UNITED STATES REPORTS

VOLUME 471

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1984

MARCH 27 THROUGH JUNE 3, 1985

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1988

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
REX E. LEE, SOLICITOR GENERAL.[1]
CHARLES FRIED, ACTING SOLICITOR GENERAL.[2]
ALEXANDER L. STEVAS, CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.[3]
PENELOPE A. HAZELTON, ACTING LIBRARIAN.[4]

---

*For notes, see p. IV.

NOTES

[1] Mr. Lee resigned as Solicitor General effective June 1, 1985.

[2] Mr. Fried became Acting Solicitor General effective June 1, 1985.

[3] Mr. Jacobs resigned as Librarian effective March 27, 1985.

[4] Mrs. Hazelton was appointed Acting Librarian effective March 28, 1985.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

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

October 12, 1982.

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

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

	Page
Abbott *v.* Melson	1105
Abdi *v.* Georgia	1006
Abrams *v.* McCray	1097
Abramson; Japan Air Lines Co. *v.*	1112
Accibal *v.* Office of Personnel Management	1127
Ackerman *v.* Giles	1053
Action Automotive, Inc.; National Labor Relations Bd. *v.*	1049
Adams *v.* Fulcomer	1013
Adams Construction Co. *v.* Georgia Power Co.	1075
Adcock *v.* United States	1102
Adkins *v.* United States	1053
Adkinson *v.* Adkinson	1125
Aetna Life Ins. Co. *v.* Lavoie	1134
Afflerbach *v.* United States	1063
Aguilar *v.* Los Angeles County	1125
Ahnapee & Western R. Co.; Consolidated Rail Corporation *v.*	1069
A. Illum Hansen, Inc.; DeMarco *v.*	1138
Air Line Pilots; Taca International Airlines, S.A. *v.*	1100
Air Products & Chemicals, Inc.; Cohodas *v.*	1139
Airwork Service Division *v.* Director, Div. of Taxation of N. J.	1127
Akootchook *v.* United States	1116
Akron; Hybud Equipment Corp. *v.*	1004
Alabama; Baker *v.*	1020
Alabama; Bean Dredging Corp. *v.*	1112
Alabama; Daniel *v.*	1009
Alabama; Lanton *v.*	1095
Alabama; McKinnis *v.*	1105
Alabama; Phillips *v.*	1019
Alabama; Waldrop *v.*	1030

Page
Alabama; Washington *v.* 1101
Alabama; Weeks *v.* 1030
A. L. Adams Construction Co. *v.* Georgia Power Co. 1075
Alaska; Roop *v.* 1016
Albanese *v.* Illinois 1044
Alberton *v.* State Bar of Cal. 1056
Alcorn *v.* Smith 1096
Alderman; Lee *v.* 1019
Alexander *v.* Illinois 1019
Ali *v.* Ford Motor Co. 1056
All Alexander L. Kielland Litigants *v.* Phillips Petro. Co. Norway 1055
Allen *v.* Georgia 1098
Allis-Chalmers Corp. *v.* Lueck 202
Allison *v.* United States 1117
Allnutt *v.* Maryland 1050
Alpha Portland Industries, Inc. *v.* Anderson 1102
Aluminum Accessories; Feuling *v.* 1137
Alyeska Pipeline Service Co.; Smith *v.* 1066
American Academy of Orthopaedic Surgeons; Marrese *v.* 1062
American Airlines, Inc.; Bonin *v.* 1005
American College of Obstetricians & Gynecologists; Thornburgh *v.* 1014
American Horse Shows Assn. *v.* Eighth Jud. Dist. Court of Nev. . 1135
American National Bank & Trust Co.; Chicago Investment Corp. *v.* 1100
American National Bank & Trust Co. *v.* Haroco, Inc. 1013,1064
American Optical Co.; Keller *v.* 1096
American Telephone & Telegraph Co.; David *v.* 1121
American Telephone & Telegraph Co.; Holocard *v.* 1125
American Telephone & Telegraph Co.; Mack *v.* 1010
AM International, Inc.; National Business Systems, Inc. *v.* 1110
Amis *v.* Steele 1016,1117
Amoco Chemicals Corp.; Day *v.* 1056,1095,1132
Amoco Oil Co.; Davis *v.* 1063
Anderson, *In re* 1049
Anderson; Alpha Portland Industries, Inc. *v.* 1102
Anderson *v.* Liberty Lobby, Inc. 1134
Anderson *v.* Vose 1118
Andino *v.* Procunier 1119
Andrews *v.* Louisiana 1068
Andrews *v.* United States 1021
Andrist; Harvey *v.* 1126
Anglo-Iranian Oil Co.; Rafter *v.* 1137
Antidefamation League; Lotz Realty Co. *v.* 1054
Antonelli, *In re* 1013
Antonelli *v.* Illinois 1006

Page
Antonelli *v.* U. S. Parole Comm'n 1006
Arango *v.* Florida 1010,1145
Arizona; Carriger *v.* 1111
Arizona; Henderson *v.* 1143
Arizona; Nash *v.* 1143
Arizona; Roscoe *v.* 1094
Arizona; Smith *v.* 1006
Arizona Distributing Co.; Buckingham Corp. *v.* 1002
Arkansas *v.* Baird 1004
Arkansas; Fairchild *v.* 1111
Arkansas *v.* Mississippi 377
Arkansas-Best Freight System, Inc. *v.* Barrentine 1054
Ash *v.* Swanson 1020
Association. For labor union, see name of trade.
Atnip *v.* United States 1103
Attorney General; Mitchell *v.* 1021,1132
Attorney General *v.* Segar 1115
Attorney General of Cal.; Carder *v.* 1102
Attorney General of Ill.; B. R. MacKay & Sons, Inc. *v.* 1066
Attorney General of Ill.; Perkins *v.* 1056
Attorney General of N. Y. *v.* McCray 1097
Attorney General of N. C. *v.* Gingles 1064
Attorney General of N. C.; P. I. A. Asheville, Inc. *v.* 1003
Attorney General of Wash. *v.* Standard Oil Co. of California 1100
Attwell *v.* U. S. Postal Service 1011,1062
Austin *v.* Brown 1138
Austin *v.* Brown Local School Dist. 1054
Austin *v.* Young 1146
Automated Medical Laboratories, Inc.; Hillsborough County *v.* .. 707,1012
Automobile Workers; Johnson *v.* 1139
Averhart *v.* Indiana 1030
Baer; Freeze *v.* 1106
Bailey, *In re* 1006
Bailey; Berry *v.* 1101
Bailey *v.* Illinois 1057
Baird; Arkansas *v.* 1004
Baker *v.* Alabama 1020
Baker *v.* Baker 1100
Baker; New Mexico *v.* 1065
Baker *v.* Seaboard System Railroad, Inc. 1055
Baker *v.* United States 1139
Baker *v.* U. S. District Court 1014
Baldonado *v.* United States 1126
Baldrige; Scott *v.* 1018

Page
Baldwin-United Corp. *v.* Eubanks 1111
Balkcom; Jarrell *v.* 1103
Bandemer; Davis *v.* 1052,1114
Bannister *v.* Missouri 1009
Barkheimer; Park Avenue Investment & Development, Inc. *v.* ... 1108
Barnes; Bosley *v.* 1017
Barney *v.* Disciplinary Bd. of Wash. State Bar Assn. 1136
Barngrover *v.* California 1018
Barrentine; Arkansas-Best Freight System, Inc. *v.* 1054
Bartholomew *v.* United States 1018
Bass Aviation, Inc. *v.* Hernandez 1136
Bateman Eichler, Hill Richards, Inc. *v.* Berner 1002
Batson *v.* Kentucky 1052
Baylies *v.* Prince George's County 1138
Beachum, *In re* 1064
Bean Dredging Corp. *v.* Alabama 1112
Becton, Dickinson & Co.; Ferrara *v.* 1064
Bedat *v.* McLean Trucking Co. 1101
Beech Aircraft Corp. *v.* Elsworth 1110
Beery *v.* United States 1066
Behagen; Federation Internationale de Basketball Amateur *v.* 1010
Bejjani *v.* United States 1127
Bell *v.* New Jersey 1049
Bellevue; Fire Fighters *v.* 1015
Benchimol; United States *v.* 453
Bender *v.* Williamsport Area School Dist. 1123
Benitez *v.* United States 1137
Berghahn *v.* Texas 1056
Berkeley; Fisher *v.* 1114,1124
Berkson *v.* Del Monte Corp. 1095
Berner; Bateman Eichler, Hill Richards, Inc. *v.* 1002
Bernstein, *In re* 1098
Berry *v.* Bailey 1101
Bertulfo *v.* Office of Personnel Management 1112
Betka *v.* Heckler 1112
Betson; Cohen *v.* 1061
Bewley *v.* Oklahoma 1051
Bibbero *v.* United States 1103
Bills Auto Repair & Towing; Grace *v.* 1004
Birden *v.* Gousha 1067
Bisco Industries, Inc.; Quansah *v.* 1005
Black, *In re* 1096
Black; Harrod *v.* 1006
Black *v.* Romano 606

Page
Black *v.* United States 1007
Blackburn; Sockwell *v.* 1020
Blackburn; Strahan *v.* 1138
Blackburn; Williams *v.* 1126
Blackfeet Tribe; Montana *v.* 759
Bladel; Michigan *v.* 1124
Blair *v.* Boulger 1095
Blanton; Mobil Oil Corp. *v.* 1007,1120
Blinder, Robinson & Co. *v.* Securities and Exchange Comm'n 1125
Block; Sharyland Water Supply Corp. *v.* 1137
Blue Shield of Massachusetts, Inc.; Kartell *v.* 1029
Blue Shield of Massachusetts, Inc.; Rodkey *v.* 1029
Blyther *v.* District of Columbia 1107
Board of Bar Overseers of Mass.; Doe *v.* 1057
Board of Comm'rs of Forest Preserve Dist. of Cook Cty.; Raske *v.* 1017
Board of Ed. of Chicago *v.* United States 1116
Board of Governors, FRS *v.* Dimension Financial Corp. 1064
Board of Supervisors of Franklin County; Hutcherson *v.* 1050
Board of Trustees of Scarsdale *v.* McCreary 83
Board of Trustees of Western Conference of Teamsters Pension Trust Fund; Thompson Building Materials Inc. *v.* 1054
Board of Water Supply, City and County of Honolulu *v.* Nakata .. 1014
Boca Raton; Densmore *v.* 1124
BoCook *v.* Tate 1118
Bodley; Singer *v.* 1062
Bolar Pharmaceutical Co. *v.* Ciba-Geigy Corp. 1137
Bolden *v.* Tarrant County Dept. of Human Resources 1065
Bonin *v.* American Airlines, Inc. 1005
Booker; Bowring *v.* 1018
Booker; Drumheller *v.* 1105
Borden, Inc.; Maxwell *v.* 1057
Borough. See name of borough.
Bosley *v.* Barnes 1017
Boston Chapter, NAACP, Inc.; Firefighters *v.* 1075
Bothke *v.* Racca 1065
Bough *v.* Ramirez 1025
Boulger; Blair *v.* 1095
Bowring *v.* Booker 1018
Boyd; Gee *v.* 1058
Boyd *v.* North Carolina 1030
Brae Corp.; Interstate Commerce Comm'n *v.* 1069
Bragg *v.* Cave 1020,1145
Brainard *v.* United States 1099
Brandt; Forrester *v.* 1106

Page
Branford Zoning Bd. of Appeals; Johnson *v.* 1066
Brault, *In re* 1114
Braunstein; Zarrilli *v.* 1020
Brewer *v.* Clayhatchee 1005,1111
Briggs; Malley *v.* 1124
Brister *v.* Jefferson Parish 1101
Britt *v.* United States 1118
B. R. MacKay & Sons, Inc. *v.* Attorney General of Ill. 1066
Brock; Grim Hotel Co. *v.* 1124
Brock; Town Pump, Inc. *v.* 1100
Brogdon *v.* Louisiana 1111
Brotherhood. For labor union, see name of trade.
Brown, *In re* 1013
Brown; Austin *v.* 1138
Brown; District of Columbia *v.* 1073
Brown; KFC National Management Co. *v.* 1004
Brown *v.* Paulus 1066
Brown *v.* Schweitzer 1105
Brown *v.* United States 1049,1119
Brown & Co. *v.* Northwest Sign Co. 1113
Browne & Co.; Bryn Mar, Ltd. *v.* 1005
Brown Local School Dist.; Austin *v.* 1054
Bruce; Clark *v.* 1138
Bryn Mar, Ltd. *v.* Carlton Browne & Co. 1005
Buchanon; Mintzes *v.* 154
Buckingham Corp. *v.* Arizona Distributing Co. 1002
Buckingham Corp. *v.* Odom Corp. 1002
Buckner; Gribble *v.* 1111
Buena Vista Distribution Co.; Patterson *v.* 1056
Buena Vista Distribution Co.; Screen Advertising Film Fund *v.* .. 1056
Buhajla *v.* United States 1106
Bullock; Cabana *v.* 1052
Burbank *v.* Cinevision Corp. 1054
Burbine; Moran *v.* 1098
Burger King Corp. *v.* Rudzewicz 462
Burlington Northern R. Co. *v.* Cosby 1110
Burnett County; Soderbeck *v.* 1117
Burns *v.* United States 1057
Burroughs *v.* Pierce 1099
Busto *v.* Martin Marietta 1017
Byrne *v.* Mass Transit Administration 1016
Cabana *v.* Bullock 1052
Cabana; Stewart *v.* 1105
Cabinet for Human Resources of Ky.; Fosso *v.* 1105

Page
Cain *v.* Virginia 1135
Caldwell; Howkins *v.* 1117
Caldwell *v.* United States 1007
Caledonian Hospital; Davidson *v.* 1125
California; Barngrover *v.* 1018
California *v.* Carney 386
California *v.* Ciraolo 1134
California; Dewberry *v.* 1116
California; Ming Shen Wong *v.* 1126
California *v.* Ramos 1119
California *v.* Texas 1050,1051
Calise *v.* United States 1100
Calvente *v.* United States 1021
Calvert *v.* Sharp 1132
Cameo Convalescent Center, Inc. *v.* Willkom 1116
Campbell *v.* Illinois 1136
Campbell; Meldrum *v.* 1056
Campbell *v.* Washington 1094
Campoy; Magee *v.* 1106
Cannon; Davidson *v.* 1134
Capital Telephone Co. *v.* New York Telephone Co. 1101
Carbone *v.* United States 1137
Carchman *v.* Nash 1013
Carder *v.* Van de Kamp 1102
Carlton; Michigan *v.* 1004
Carlton Browne & Co.; Bryn Mar, Ltd. *v.* 1005
Carney; California *v.* 386
Carpenter *v.* Pasco 1054
Carpenters; Riceland Foods, Inc. *v.* 1102
Carpenters *v.* Stevens 1015
Carr *v.* United States 1004
Carriger *v.* Arizona 1111
Carson-Truckee Water Cons. Dist.; Pyramid Lake Paiute Tribe *v.* 1065
Carstens *v.* Nuclear Regulatory Comm'n 1136
Carter, *In re* 1115
Carter; Stroom *v.* 1050
Cartwright; Day *v.* 1056,1145
Castleberry; Oklahoma *v.* 146
Castro; Police Patrolmen *v.* 1075
Catawba Indian Tribe, Inc.; South Carolina *v.* 1134
Catlett *v.* United States 1074
Cave; Bragg *v.* 1020,1145
CED's, Inc. *v.* Environmental Protection Agency 1015
Central Intelligence Agency; Neely *v.* 1022

Page
Central Intelligence Agency *v.* Sims 159
Central Intelligence Agency; Sims *v.* 159
Central Iowa Refuse Systems *v.* Des Moines Solid Waste Agency 1003
Centran Corp.; Marx *v.* 1125
Cerasani *v.* United States 1137
Cervi *v.* Kemp 1131
Chaffee *v.* South Carolina 1009,1120
Chambers *v.* Henderson 1102
Chance *v.* Zimmerman 1020
Chapman *v.* Thomas 1004
Charles; Diamond *v.* 1115
Charter Financial Group, Inc.; Patterson *v.* 1056
Chemical Bank; Haberman *v.* 1065
Chemical Bank *v.* Public Utility Dist. No. 1 of Benton County.... 1075
Chen *v.* United States 1139
Cherek *v.* United States 1014
Chesler *v.* Stadler Associates, Inc. 1066
Chevron U. S. A., Inc. *v.* Sheffield 1140
Chicago; Pudlo *v.* 1066
Chicago Bar Assn.; Matchett *v.* 1054
Chicago Investment Corp. *v.* American National Bank & Trust Co. 1100
Ciba-Geigy Corp.; Bolar Pharmaceutical Co. *v.* 1137
Cinevision Corp.; Burbank *v.* 1054
Ciraolo; California *v.* 1134
Ciro *v.* United States 1018
Citizens Home Savings Co.; Smith *v.* 1105
City. See name of city.
City Council of Chicago *v.* Ketchum 1135
Claiborne County Beer Bd.; Welch *v.* 1010
Clark *v.* Bruce 1138
Clark *v.* Walters 1066
Class; New York *v.* 1003
Clay; Irving *v.* 1108
Clayhatchee; Brewer *v.* 1005,1111
Cleburne *v.* Cleburne Living Center, Inc. 1002
Cleburne Living Center, Inc.; Cleburne *v.* 1002
Cleveland *v.* Maryland 1118
Coal Exporters Assn. of United States, Inc.; ICC *v.* 1072
Coal Exporters Assn. of United States, Inc.; Norfolk & W. R. Co. *v.* 1072
Cobb *v.* Owens 1055
Cohen *v.* Betson 1061
Cohodas *v.* Air Products & Chemicals, Inc. 1139
Cole; Howell *v.* 1138
Colino Escobar *v.* United States 1139

Page
Collier, *In re* 1096
Colorado Supreme Court; Razatos *v.* 1016
Columbia Broadcasting System, Inc.; Renard *v.* 1116
Columbus; Savage *v.* 1118
Commissioner; Denison *v.* 1069
Commissioner; Ecclesiastical Order of ISM of AM, Inc. *v.* 1015
Commissioner; Ficalora *v.* 1005
Commissioner; Furman *v.* 1011
Commissioner; Jones *v.* 1068
Commissioner; Knoblauch *v.* 1114
Commissioner; Miller *v.* 1116
Commissioner; Odend'hal *v.* 1143
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Labor & Industry of Mont.; Miller-Wohl Co. *v.* .. 1114
Commissioner of Patents and Trademarks; Kremm's Estate *v.* ... 1015
Commissioner of Transportation of N. Y. *v.* United States 1015
Commodity Futures Trading Comm'n *v.* Weintraub 343
Commonwealth. See name of Commonwealth.
Communications Satellite Corp. *v.* Franchise Tax Bd. 1049
Concerned Neighbors in Action; Stringfellow *v.* 1095
Conerly; Mississippi Power & Light Co. *v.* 1113
Confederated Tribes; Public Utility Dist. No. 1 of Chelan Cty. *v.* . 1116
Connecticut Dept. of Income Maintenance *v.* Heckler 524
Connolly; Hopfmann *v.* 459
Connor *v.* Haugh 1105
Consolidated Freightways Corp. *v.* Gerling Global Gen. Ins. Co. . 1116
Consolidated Rail Corporation *v.* Ahnapee & Western R. Co. 1069
Continental Casualty Co.; Mangrum *v.* 1018
Cooper *v.* Society National Bank 1118
Cooper *v.* United States 1130
Cooper *v.* U. S. Postal Service 1022
Copeland *v.* Florida 1030
Coquillian *v.* Jones 1105
Cornes *v.* Kellum 1062
Corrections Commissioner. See name of commissioner.
Cory *v.* Western Oil & Gas Assn. 81,1112
Cosby; Burlington Northern R. Co. *v.* 1110
Cosman *v.* United States 1102
Cospito *v.* Heckler 1131
County. See name of county.
County Bd. of Ed. of Dyer County; Webb *v.* 234
Cox *v.* United States 1119
Crain; Martin *v.* 1077
Crea *v.* New York 1011,1145

Page
Crist *v.* Lane 1068
Crow Tribe; National Farmers Union Ins. Cos. *v.* 845,1012,1301
Cummiskey *v.* United States 1005
Cupp; Howard *v.* 1021
Cupp; Owens *v.* 1118
Cupp; Ventura *v.* 1104
Cuyler; Glasshofer *v.* 1118
D. *v.* Department of Ed. of Haw. 1117
D.; Evans *v.* 1098
Dabdoub; Magee *v.* 1126
Daniel *v.* Alabama 1009
Daniel International Corp.; Lucas *v.* 1137
Dano *v.* Szombathy 1132
David *v.* American Telephone & Telegraph Co. 1121
Davidson *v.* Caledonian Hospital 1125
Davidson *v.* Cannon 1134
Davis *v.* Amoco Oil Co. 1063
Davis *v.* Bandemer 1052,1114
Davis; Faison *v.* 1050
Davis *v.* Kemp 1143
Davis; Kemp *v.* 1143
Davis *v.* Procunier 1106
Davis *v.* Stokes 1107
Day *v.* Amoco Chemicals Corp. 1056,1095,1132
Day *v.* Cartwright 1056,1145
Day *v.* DeAnda 1050
DeAnda; Day *v.* 1050
DeBerry; News Publishing Co. *v.* 1053
DeBerry; Rome News Tribune *v.* 1053
De La Rosa *v.* Procunier 1112
Delk, *In re* 1133
Del Monte Corp.; Berkson *v.* 1095
Delta Airlines; Dugger *v.* 1103
Delta Air Lines, Inc. *v.* Jacobson 1062
DeMarco *v.* A. Illum Hansen, Inc. 1138
Demarest *v.* Mahwah 1136
Denison *v.* Commissioner 1069
Densmore *v.* Boca Raton 1124
Departmental Disciplinary Comm. for First Jud. Dept.; Nuey *v.* 1050
Department of Agriculture; Minnis *v.* 1053
Department of Defense; Gala *v.* 1119
Department of Ed. of Haw.; Katherine D. *v.* 1117
Department of Ed. of Mass.; School Committee of Burlington *v.* 359
Department of Energy; Exxon Corp. *v.* 1099

Page
Department of Energy; Texaco Inc. *v.* 1099
Department of HUD; Walber *v.* 1095,1132
Department of HUD; Walber Construction Co. *v.* 1095,1132
Department of Justice *v.* Falkowski 1001
DePerte *v.* Tribune Co. 1096
Desai *v.* Tompkins County Trust Co. 1125
DeSantis; Farwest Steel Corp. *v.* 1018
DeSeyn *v.* Muskingum Watershed Conservancy Dist. 1101
Des Moines Area Solid Waste Agency; Central Iowa Refuse Sys. *v.* 1003
Deur; Sheriff of Newaygo County *v.* 1136
DeVelasco *v.* United States 1106
Devier *v.* Georgia 1009
DeVyver *v.* Smith 1022
Dewberry *v.* California 1116
Diamond *v.* Charles 1115
Diaz; San Jose Unified School Dist. *v.* 1065
Dicker, *In re* 1133
Diggs *v.* Lyons 1078
Dillon; Duckworth *v.* 1108
DiMartino; FitzPatrick *v.* 1050
Dimension Financial Corp.; Board of Governors, FRS *v.* 1064
Dingle *v.* Simpkins 1062
DiNoia *v.* New York 1022
Director, Div. of Taxation of N. J.; Airwork Service Division *v.* .. 1127
Director, Div. of Taxation of N. J.; S. G. Frantz Co. *v.* 1136
Director of penal or correctional institution. See name or title of director.
Disciplinary Bd. of Wash. State Bar Assn.; Barney *v.* 1136
Disneyland; Stewart *v.* 1016
District Court. See also U. S. District Court.
District Court of 2d Judicial District's Children's Court; Pino *v.* .. 1014
District Judge. See U. S. District Judge.
District of Columbia; Blyther *v.* 1107
District of Columbia *v.* Brown 1073
Dixon *v.* Florida 1067
Dixon *v.* United States 1068
Dizzley *v.* United States 1069
Doby; South Carolina Dept. of Corrections *v.* 1107
Doe *v.* Board of Bar Overseers of Mass. 1057
Doe *v.* Michigan Dept. of Social Services 1019
Doe No. 462; United States *v.* 1001
Dole; Pinar *v.* 1016
Donovan *v.* Merola 1075
Donovan *v.* San Antonio Metropolitan Transit Authority 1049

Page
Dowling *v.* United States 1012
Drumheller *v.* Booker 1105
Duckworth *v.* Dillon 1108
Duffy *v.* Long Beach 1102
Dufour *v.* Mississippi 1010
Dugan & Meyers Constr. Co. *v.* Worthington Pump Corp. (USA) 1135
Dugger *v.* Delta Airlines 1103
Duncan; Hernandez *v.* 1068,1145
Duncan *v.* Pacific & Southern Co. 1004
Duncan *v.* WXIA–TV 1004
Duquesne Light Co. *v.* State Tax Dept. of W. Va. 1029
Durham Hosiery Mills, Inc. *v.* White 1117
Dusakto *v.* Florida 1137
Dutton *v.* Oklahoma 1111
Early; Michigan *v.* 1117
Eastern Air Lines, Inc.; Ulane *v.* 1017
Eau Claire; Hallie *v.* 34
Ecclesiastical Order of ISM of AM, Inc. *v.* Commissioner 1015
Educational Books, Inc. *v.* Virginia 1119
Edwards, *In re* 1133
Eighth Jud. Dist. Court of Nev.; American Horse Shows Assn. *v.* 1135
Eikenberry *v.* Standard Oil Co. of California 1100
Eklund *v.* United States 1003
Ellison *v.* Landon 1055
El Paso Maternity Nursing Home; Midwife *v.* 1019
Elsworth; Beech Aircraft Corp. *v.* 1110
Elvrum *v.* Williams 1015
Ely, *In re* 1052,1064
Ely *v.* Glen Ellyn Police Dept. 1068
Ely *v.* U. S. Postal Service 1106
Enriquez *v.* Procunier 1126
Envicon Equities Corp.; Salcer *v.* 1098
Environmental Protection Agency; CED's, Inc. *v.* 1015
Environmental Protection Agency; Products for Power *v.* 1015
Epperson *v.* Epperson's Estate 1017
Epperson's Estate; Epperson *v.* 1017
EEOC *v.* Mayor and City Council of Baltimore 1012
Erdlen *v.* United States 1018
Escobar *v.* United States 1139
Esparza; McClure *v.* 1052
Esquibel *v.* United States 1022
Essex Group, Inc.; Nill *v.* 1017
Estate. See name of estate.
Estes *v.* United States 1044

Page
Eubanks; Baldwin-United Corp. *v.* 1111
Eutzy *v.* Florida 1045
Evans *v.* Jeff D. 1098
Evans; Ollman *v.* 1127
Evans *v.* Virginia 1025
Exxon Corp. *v.* Department of Energy 1099
Fabian *v.* Miami 1127
Fabian *v.* Ryan 1112
Fahnbulleh *v.* United States 1139
Fairchild *v.* Arkansas 1111
Fairman; Radford *v.* 1068
Faison *v.* Davis 1050
Falkowski; Department of Justice *v.* 1001
Farwest Steel Corp. *v.* DeSantis 1018
Fauver; Hook *v.* 1006
FCX, Inc.; Smith *v.* 1103
Federation Internationale de Basketball Amateur *v.* Behagen 1010
Felker; Georgia *v.* 1102
Fenton; Miller *v.* 1003
Ferrara *v.* Becton, Dickinson & Co. 1064
Ferrell *v.* South Carolina 1009,1120
Feuling *v.* Aluminum Accessories 1137
Feuling *v.* Wood 1137
Feyers *v.* United States 1125
Fg Fleuzeugleasing GmbH *v.* United States 1126
Ficalora *v.* Commissioner 1005
Fields *v.* United States 1067
Financial Institution Employees; National Labor Relations Bd. *v.* 1098
Financial Institution Employees; Seattle-First National Bank *v.* .. 1098
Finch *v.* Hughes Aircraft Co. 1049
Findeisen; North East Independent School Dist. *v.* 1125
Finney *v.* Georgia 1112
Finney *v.* Rothgerber 1020
Fire Fighters *v.* Bellevue 1015
Firefighters *v.* Boston Chapter, NAACP, Inc. 1075
Fisher *v.* Berkeley 1114,1124
Fitzgerald *v.* Jordan 1056
Fitzgerald; Larson *v.* 1051
FitzPatrick *v.* DiMartino 1050
Fitzpatrick *v.* United States 1055
Fleet Finance *v.* Moyer 1053
Fleming *v.* United States 1021
Flores *v.* United States 1006
Florida; Arango *v.* 1010,1145

	Page
Florida; Copeland *v.*	1030
Florida; Dixon *v.*	1067
Florida; Dusakto *v.*	1137
Florida; Eutzy *v.*	1045
Florida; Groover *v.*	1009
Florida; Guerin *v.*	1004
Florida; Hardwick *v.*	1120
Florida *v.* Manee	1137
Florida; Rose *v.*	1143
Florida; Stano *v.*	1111
Florida *v.* Zafra	1119
Florida State Attorney General; Kane *v.*	1019
Flowers *v.* United States	1139
Flynt Distributing Co.; Lerman *v.*	1054
Fogel; Illinois *v.*	1053
Folding Carton Administration Comm.; G. Heileman Brewing Co. *v.*	1113
Ford; Wallace *v.*	1005
Ford Motor Co.; Ali *v.*	1056
Forrester *v.* Brandt	1106
Forro Precision, Inc. *v.* International Business Machines Corp.	1130
Fosso *v.* Cabinet for Human Resources of Ky.	1105
Foster *v.* United States	1053
Franchise Tax Bd.; Communications Satellite Corp. *v.*	1049
Francis *v.* Franklin	307
Francois *v.* Raybestos-Manhattan, Inc.	1061
Francois *v.* Wainwright	1121
Frankenberry *v.* Pennsylvania	1105
Franklin; Francis *v.*	307
Frantz Co. *v.* Director, Division of Taxation of N. J.	1136
Frazier *v.* Lopes	1057
Freeze *v.* Baer	1106
Friedman *v.* Heckler	1146
Frumkes; Sarron *v.*	1139
Fugate *v.* New Mexico	1112
Fulcomer; Adams *v.*	1013
Furman *v.* Commissioner	1011
Gacy *v.* Illinois	1062
Gage *v.* United States	1007
Gagnon; United States *v.*	1112
Gaines *v.* Illinois	1131
Gala *v.* Department of Defense	1119
Galdi; Williams *v.*	1069
Gambrell *v.* Martin	1138
Garcia; Guerra *v.*	1065

Page
Garcia *v.* Ingram 1052
Garcia *v.* San Antonio Metropolitan Transit Authority 1049
Garcia; Wilson *v.* 261
Garibaldi; Lucky Stores, Inc. *v.* 1099
Garner; Memphis Police Dept. *v.* 1
Garner; Tennessee *v.* 1
Garraghty; Graves *v.* 1138
Garrett *v.* Texas 1009
Garrett *v.* United States 773
Gaskins *v.* South Carolina 1120
Gates Learjet Corp.; Jensen *v.* 1066
Gaunce *v.* Idaho 1133
Gay Student Services; Texas A & M Univ. *v.* 1001,1120
Gaza *v.* United States 1068
Gee *v.* Boyd 1058
General Motors Corp.; Moore *v.* 1099
General Motors Corp. *v.* Thomas 1074
General Motors Corp.; Williams *v.* 1103
Genser *v.* United States 1103
Geoghegan *v.* United States 1068
George *v.* Liberty National Bank & Trust Co. of Louisville 1004
George *v.* Liberty National Bank & Trust of Louisville 1018
George *v.* United Kentucky Bank, Inc. 1018
Georgia; Abdi *v.* 1006
Georgia; Allen *v.* 1098
Georgia; Devier *v.* 1009
Georgia *v.* Felker 1102
Georgia; Finney *v.* 1112
Georgia Power Co.; A. L. Adams Construction Co. *v.* 1075
Gerling Global General Ins. Co.; Consolidated Freightways Corp. *v.* 1116
Gerzof *v.* Grievance Committee for Tenth Judicial Dist. 1049
G. Heileman Brewing Co. *v.* Folding Carton Administration Comm. 1113
Ghibaudy *v.* United States 1018
Gibas; Saginaw Mining Co. *v.* 1116
Gibbs *v.* Phelps 1021
Gilbert *v.* University of Tenn. 1050
Gilles; Ackerman *v.* 1053
Gillmor; Williamson *v.* 1054
Gingles; Thornburg *v.* 1064
Glass *v.* Louisiana 1080
Glasshofer *v.* Cuyler 1118
Glen Ellyn Police Dept.; Ely *v.* 1068
Glover *v.* South Carolina 1068
Glover *v.* United Grocers, Inc. 1115

	Page
Gochnour *v.* Marsh	1057
Godino *v.* United States	1119
Goffen, *In re*	1114
Gold, *In re*	1114
Gold Cross Ambulance Co. *v.* Kansas City	1003
Golden State Transit Corp. *v.* Los Angeles	1003
Goldmar, Ltd. *v.* Greeley	1135
Golodetz Export Corp.; S/S Lake Anja *v.*	1117
Good Hope Chemical Corp. Creditors' Comm. *v.* Koerver & Lersch	1102
Goodson *v.* United States	1063
Gould *v.* Mutual Life Ins. Co. of New York	1017
Gould *v.* Ruefenacht	701
Gould Inc.; Wis. Dept. of Industry, Labor & Human Relations *v.*	1115
Gousha; Birden *v.*	1067
Government Employees; Heath *v.*	1068
Governor of Alaska; Chevron U. S. A., Inc. *v.*	1140
Governor of Idaho *v.* Jeff D.	1098
Governor of Pa. *v.* Am. College of Obstetricians & Gynecologists	1014
Grace *v.* Bills Auto Repair & Towing	1004
Grandison *v.* Moore	1104
Graves *v.* Garraghty	1138
Graves *v.* Hester	1049
Gray *v.* United States	1021
Greeley; Goldmar, Ltd. *v.*	1135
Green *v.* Mansour	1003
Green *v.* United States	1007
Greenfield; Wainwright *v.*	1098
Greenfield *v.* Wood	1054
Green Plumbing & Heating Co. *v.* Turner Construction Co.	1102
Gregory *v.* Maryland	1103
Gribble *v.* Buckner	1111
Grievance Committee for Tenth Judicial Dist.; Gerzof *v.*	1049
Grim Hotel Co. *v.* Brock	1124
Groover *v.* Florida	1009
Guam; Guerrero *v.*	1006
Guerin *v.* Florida	1004
Guerra *v.* Garcia	1065
Guerrero *v.* Guam	1006
Gustafson *v.* Wisconsin	1056
Gustus *v.* United States	1069
Haas *v.* Nichols	1105
Haberman *v.* Chemical Bank	1065
Hailey, *In re*	1123
Hall *v.* Wainwright	1111

Page
Hall; Wainwright *v.* 1107
Hallie *v.* Eau Claire 34
Hameed *v.* Jones 1136
Hamilton; Overland Park *v.* 1052
Hampton Roads Shipping Assn. *v.* Longshoremen 1102
Hampton Roads Shipping Assn.; Longshoremen *v.* 1017
Hansen, Inc.; DeMarco *v.* 1138
Hanson *v.* Rutherford 1112
Hardwick *v.* Florida 1120
Haroco, Inc.; American National Bank & Trust Co. *v.* 1013,1064
Harp; Pallett *v.* 1067
Harper & Row, Publishers, Inc. *v.* Nation Enterprises 539
Harrington *v.* United States 1015
Harrison *v.* Meachum 1055,1145
Harrod *v.* Black 1006
Harter *v.* Shultz 1068
Hartigan; Perkins *v.* 1056
Harvey *v.* Andrist 1126
Harvey *v.* Smith 1022
Harvey *v.* Virginia 1005
Haugh; Connor *v.* 1105
Hayes, *In re* 1051
Hayes *v.* LeFevre 1127
Haywood *v.* Procunier 1022
Heaney *v.* United States 1126
Heath *v.* Government Employees 1068
Heckler; Betka *v.* 1112
Heckler; Connecticut Dept. of Income Maintenance *v.* 524
Heckler; Cospito *v.* 1131
Heckler; Friedman *v.* 1146
Heckler; NKC Hospitals, Inc. *v.* 1016
Heckler; Pastrana de Caraballo *v.* 1113
Heckler; Starnes *v.* 1017
Heckler; Watkins *v.* 1010
Heflin-Horton Ins. Agency; Herrington *v.* 1118
Heileman Brewing Co. *v.* Folding Carton Administration Comm. 1113
Heinrich *v.* Illinois 1011
Hellwarth, *In re* 1013
Helms; Independent School Dist. No. 3 of Broken Arrow *v.* 1018
Hemby *v.* United States 1068
Henderson *v.* Arizona 1143
Henderson; Chambers *v.* 1102
Henderson; Hoffman *v.* 1101
Hennepin; O'Keefe *v.* 1121

Page
Hensley; Rodman *v.* 1016
Hernandez; Bass Aviation, Inc. *v.* 1136
Hernandez *v.* Duncan 1068,1145
Herrera *v.* New Mexico 1103
Herrera *v.* Texas 1131
Herrington *v.* Heflin-Horton Ins. Agency 1118
Herrington *v.* Tomasky 1126
Hester; Graves *v.* 1049
Hill *v.* Illinois 1119
Hill *v.* Lockhart 1064
Hillery; Vasquez *v.* 1002
Hillsborough County *v.* Automated Medical Laboratories, Inc. . 707,1012
Hinkle *v.* Moss 1055
Hoffman *v.* Henderson 1101
Holderman *v.* United States 1063,1095
Holland *v.* United States 1124,1125
Holman *v.* Illinois 1050
Holocard *v.* American Telephone & Telegraph Co. 1125
Holsey *v.* U. S. District Court 1006
Holtzman, *In re* 1063
Honig *v.* Students of California School for Blind 148
Hook *v.* Fauver 1006
Hopfmann *v.* Connolly 459
Hopgood *v.* Hopgood 1006,1111
House of Sofas; Luna *v.* 1016
Howard *v.* Cupp 1021
Howard *v.* Landry 1020
Howell *v.* Cole 1138
Howell *v.* Maryland 1050
Howkins *v.* Caldwell 1117
Huber *v.* North Dakota 1106
Huffstetler *v.* North Carolina 1009
Hughes Aircraft Co.; Finch *v.* 1049
Humphrey *v.* United States 1139
Hunter, *In re* 1098
Hunter; James *v.* 1101
Hunter *v.* Underwood 222
Hutcherson *v.* Board of Supervisors of Franklin County 1050
Hutchins, *In re* 1063
Hux *v.* Murphy 1103
Hybud Equipment Corp. *v.* Akron 1004
Hyde *v.* Missouri 1056
Hyter, *In re* 1133
Idaho; Gaunce *v.* 1133

Page
Idaho; Swann *v.* 1106
Ikari; Robinson *v.* 1068
Illinois; Albanese *v.* 1044
Illinois; Alexander *v.* 1019
Illinois; Antonelli *v.* 1006
Illinois; Bailey *v.* 1057
Illinois; Campbell *v.* 1136
Illinois *v.* Fogel 1053
Illinois; Gacy *v.* 1062
Illinois; Gaines *v.* 1131
Illinois; Heinrich *v.* 1011
Illinois; Hill *v.* 1119
Illinois; Holman *v.* 1050
Illinois; Lucien *v.* 1019,1056
Illinois; Smith *v.* 1019
Illinois; Stewart *v.* 1120,1131
Illinois; Zeisler *v.* 1005
Illinois Tool Works, Inc.; Simmons Fastener Corp. *v.* 1065
Immigration and Naturalization Service; Reyes *v.* 1061
Immigration and Naturalization Service *v.* Rios-Pineda 444
Imrex Co.; Sedima, S. P. R. L. *v.* 1013
Inadi; United States *v.* 1124
I. N. C. A. S. ; Van Weelde Brothers Shipping Ltd. *v.* 1117
Independent School Dist. No. 3 of Broken Arrow *v.* Helms 1018
Indiana; Averhart *v.* 1030
Indiana; Love *v.* 1104
Indiana; Parsons *v.* 1107
Indiana; Ramirez *v.* 147,1112
Indiana; Spikes *v.* 1001
Indiana *v.* United States 1002,1123
Indiana; Van Orden *v.* 1104
Ingraham *v.* U. S. Postal Service 1021
Ingram; Garcia *v.* 1052
In re. See name of party.
Internal Revenue Service; Riggins *v.* 1067
International. For labor union, see name of trade.
International Business Machines Corp.; Forro Precision, Inc. *v.* .. 1130
Interstate Commerce Comm'n *v.* Brae Corp. 1069
Interstate Commerce Comm'n *v.* Coal Exporters Assn. of U. S. .. 1072
Irving *v.* Clay 1108
Irving *v.* Mississippi 1095
Jack H. Brown & Co. *v.* Northwest Sign Co. 1113
Jackson; Louisiana *v.* 1053
Jackson; Michigan *v.* 1124

Page
Jackson Bd. of Ed.; Wygant *v.* 1014
Jacobs *v.* United States 1099
Jacobson; Delta Air Lines, Inc. *v.* 1062
Jacqueline, The; Kopczynski *v.* 1136
Jaeggi; Presbytery of Elijah Parish Lovejoy *v.* 1117
Jago; Radford *v.* 1135
Jago; Smith *v.* 1062
James *v.* Hunter 1101
Japan Air Lines Co. *v.* Abramson 1112
Jaramillo *v.* United States 1066
Jarrell *v.* Balkcom 1103
Jeff D.; Evans *v.* 1098
Jefferson Parish; Brister *v.* 1101
Jeneski; Kizer *v.* 1136
Jenrette *v.* United States 1099
Jensen *v.* Gates Learjet Corp. 1066
Jensen *v.* Merit Systems Protection Bd. 1126
Jensen *v.* Quaring 1097,1114
Jett *v.* Jett 1054
John E. Green Plumbing & Heating Co. *v.* Turner Construction Co. 1102
Johnson *v.* Automobile Workers 1139
Johnson *v.* Branford Zoning Bd. of Appeals 1066
Johnson *v.* Mayor and City Council of Baltimore 1012
Johnson *v.* Merit Systems Protection Bd. 1102
Johnson; Swyka *v.* 1051
Johnson *v.* United States 1117,1126,1127
Jones *v.* Commissioner 1068
Jones; Coquillian *v.* 1105
Jones; Hameed *v.* 1136
Jones; Mealer *v.* 1006
Jones *v.* Procunier 1006
Jones *v.* United States 1021,1107
Joost *v.* U. S. Parole Comm'n 1126
Jordan; Fitzgerald *v.* 1056
Judd *v.* United States 1019,1111
Judge, Circuit Court for Cecil Cty.; Howell *v.* 1138
Judge, District Court of Oklahoma Cty.; Smelser *v.* 1125
Judge, General Session Court of Rutherford Cty.; Gribble *v.* 1111
Judge of District Court, Oklahoma Cty.; Chambers *v.* 1102
Judge, Superior Court, Law Div., Gloucester Cty.; FitzPatrick *v.* 1050
Kane *v.* Florida State Attorney General 1019
Kansas; Messer *v.* 1135
Kansas City; Gold Cross Ambulance Co. *v.* 1003
Kapnison *v.* United States 1015

Page
Kartell *v.* Blue Shield of Massachusetts, Inc. 1029
Kashetta *v.* Kashetta 1112
Katherine D. *v.* Department of Ed. of Haw. 1117
Kay *v.* Pennsylvania 1010
Kearns; Valway *v.* 1096
Keen *v.* Texas 1139
Keller *v.* American Optical Co. 1096
Kelley; Smelser *v.* 1125
Kellum; Cornes *v.* 1062
Keltee *v.* Kentucky 1117
Kemp; Cervi *v.* 1131
Kemp *v.* Davis 1143
Kemp; Davis *v.* 1143
Kentucky; Batson *v.* 1052
Kentucky; Keltee *v.* 1117
Kentucky; Ohio *v.* 153
Kentucky; Pepper *v.* 1107
Kenyatta; Moore *v.* 1066
Kern *v.* United States 1017
Kerrigan *v.* Luce, Forward, Hamilton & Scripps 1101
Kerr-McGee Corp. *v.* Navajo Tribe 195
Ketchum; City Council of Chicago *v.* 1135
KFC National Management Co. *v.* Brown 1004
Kilgore First Bancorp, Inc.; Martin *v.* 1125
Kimball *v.* Lewellen 1019
Kimball *v.* Mahler 1105
King; Strickland *v.* 1002,1016
Kizer *v.* Jeneski 1136
Kliebert Educational Trust; Watson Marine Services, Inc. *v.* 1050
KMA, Inc. *v.* Newport News 1100
Knoblauch *v.* Commissioner 1114
Knoll; Springfield Township School Dist. *v.* 288
Koch; Ponterio *v.* 1017
Koerver & Lersch; Good Hope Chemical Corp. Creditors' Comm. *v.* 1102
Kohn Beverage Co. *v.* Teamsters 1017
Koker *v.* Sage 1049
Koon *v.* South Carolina 1036
Kopczynski *v.* The Jacqueline 1136
Kozel, *In re* 1063
Kramer *v.* United States 1005
Kremm's Estate *v.* Commissioner of Patents and Trademarks 1015
Kroger Co.; Simon *v.* 1075
Krynicky; University of Pittsburgh *v.* 1015
Labor Union. See name of trade.

Page
Lambinus *v.* United States 1067
Landon; Ellison *v.* 1055
Landreth; Landreth Timber Co. *v.* 681
Landreth Timber Co. *v.* Landreth 681
Landry; Howard *v.* 1020
Lane; Crist *v.* 1068
Lane; Orange *v.* 1105
Lane; Smith *v.* 1104
Lanton *v.* Alabama 1095
Larson *v.* Fitzgerald 1051
Lasso; Woodmen of World Life Ins. Society *v.* 1099
Latil *v.* United States 1104
Lavoie; Aetna Life Ins. Co. *v.* 1134
Lavonte *v.* Walter 1112
Lawson *v.* North Carolina 1120
LeAmous *v.* United States 1139
Lee *v.* Alderman 1019
Lee *v.* United States 1004,1119
Leeke; Olson *v.* 1053
LeFevre; Hayes *v.* 1127
Lehman; Young *v.* 1061
Lennon *v.* United States 1100
Lepiscopo *v.* Shuman 1126
Lerman *v.* Flynt Distributing Co. 1054
Levine *v.* United States 1050
Lewellen; Kimball *v.* 1019
Lewis *v.* Procunier 1022
Lewis *v.* United States 1007,1067
Liberta *v.* New York 1020
Liberto *v.* United States 1106
Liberty Lobby, Inc.; Anderson *v.* 1134
Liberty National Bank & Trust Co. of Louisville; George *v.* 1004
Liberty National Bank & Trust of Louisville; George *v.* 1018
Ligon *v.* United States 1007
Lindsley *v.* United States 1139
Liparota *v.* United States 419
Liphete *v.* Stierheim 1114
Local. For labor union, see name of trade.
Locke; United States *v.* 84
Lockett *v.* Lockhart 1055
Lockhart; Hill *v.* 1064
Lockhart; Lockett *v.* 1055
Lockhart; Prince *v.* 1138
Logan, *In re* 1133

Page
Long Beach; Duffy *v.* 1102
Longshoremen *v.* Hampton Roads Shipping Assn. 1017
Longshoremen; Hampton Roads Shipping Assn. *v.* 1102
Longshoremen; National Labor Relations Bd. *v.* 1013
Lopes; Frazier *v.* 1057
Lopez *v.* O'Brien 1057
Lopez *v.* United States 1106
Lorick *v.* United States 1107
Los Angeles; Golden State Transit Corp. *v.* 1003
Los Angeles County; Aguilar *v.* 1125
Lotz Realty Co. *v.* Antidefamation League 1054
Loud Hawk; United States *v.* 1014,1123
Louisiana; Andrews *v.* 1068
Louisiana; Brogdon *v.* 1111
Louisiana; Glass *v.* 1080
Louisiana *v.* Jackson 1053
Louisiana; Nelson *v.* 1030
Louisiana; Wingo *v.* 1030,1145
Love *v.* Indiana 1104
Lucas *v.* Daniel International Corp. 1137
Luce, Forward, Hamilton & Scripps; Kerrigan *v.* 1101
Lucien *v.* Illinois 1019,1056
Lucien *v.* McGinnis 1020
Luck; Ohio *v.* 1095
Lucky Stores, Inc. *v.* Garibaldi 1099
Lueck; Allis-Chalmers Corp. *v.* 202
Lumber Center, Inc.; Woods *v.* 1106
Luna *v.* House of Sofas 1016
Lyons; Diggs *v.* 1078
Lyons *v.* Ohio 1101
Lyons *v.* Warden, Nev. State Prison 1004,1111
Machinists *v.* Shaw 1137
Mack *v.* American Telephone & Telegraph Co. 1011
MacKay & Sons, Inc. *v.* Attorney General of Ill. 1066
Mad River Local School Dist.; Rowland *v.* 1062
Magee, *In re* 1124
Magee *v.* Campoy 1106
Magee *v.* Dabdoub 1126
Maggio; Preston *v.* 1104
Mahler; Kimball *v.* 1105
Mahwah; Demarest *v.* 1136
Maine; United States *v.* 375
Malley *v.* Briggs 1124
Maltz; Reminick *v.* 1022

Page
Manee; Florida *v.* ... 1137
Mangrum *v.* Continental Casualty Co. ... 1018
Manhattan Coffee Co. *v.* Teamsters ... 1100
Manko *v.* United States ... 1112
Mann *v.* Speigel ... 1136
Mansour; Green *v.* ... 1003
Manzanares *v.* New Mexico ... 1057
Marrese *v.* American Academy of Orthopaedic Surgeons ... 1062
Marsh; Gochnour *v.* ... 1057
Marshall *v.* Mathews ... 1134
Martelon *v.* Temple ... 1135
Martin *v.* Crain ... 1077
Martin; Gambrell *v.* ... 1138
Martin *v.* Kilgore First Bancorp, Inc. ... 1125
Martin *v.* Pennsylvania Bd. of Law Examiners ... 1022,1120
Martin *v.* United States ... 1003
Martinez *v.* United States ... 1055
Martin Marietta; Busto *v.* ... 1017
Marx *v.* Centran Corp. ... 1125
Maryland; Allnutt *v.* ... 1050
Maryland; Cleveland *v.* ... 1118
Maryland; Gregory *v.* ... 1103
Maryland; Howell *v.* ... 1050
Maryland; White *v.* ... 1112
Maschner; Weser *v.* ... 1118
Mason *v.* Sielaff ... 1009
Massa *v.* United States ... 1115
Massachusetts; Metropolitan Life Ins. Co. *v.* ... 724
Massachusetts; Quigley *v.* ... 1115
Massachusetts; Travelers Ins. Co. *v.* ... 724
Mass Transit Administration; Byrne *v.* ... 1016
Matchett *v.* Chicago Bar Assn. ... 1054
Materia *v.* Securities and Exchange Comm'n ... 1053
Mathews; Marshall *v.* ... 1134
Matsushita Electric Industrial Co. *v.* Zenith Radio Corp. ... 1002
Maxwell *v.* Borden, Inc. ... 1057
Mayor and City Council of Baltimore; EEOC *v.* ... 1012
Mayor and City Council of Baltimore; Johnson *v.* ... 1012
Mayor of New York City; Ponterio *v.* ... 1017
McCall *v.* Tovey ... 1020
McClure *v.* Esparza ... 1052
McCray; Abrams *v.* ... 1097
McCreary; Board of Trustees of Scarsdale *v.* ... 83
McCullough; Texas *v.* ... 1052

Page
McCurry; Tesch *v.* ... 1049
McDaniel *v.* Texas ... 1139
McDonald, *In re* ... 1062
McDonald *v.* Missouri ... 1009
McDonald *v.* United Air Lines, Inc. ... 1065
McElveen *v.* United States ... 1107
McGarry, *In re* ... 1096
McGinnis; Lucien *v.* ... 1020
McGinnis *v.* Robinson ... 1116
McGlasson, *In re* ... 1002
McGoff; White *v.* ... 1011
McGuire *v.* United States ... 1004
McKinnis *v.* Alabama ... 1105
McLean Trucking Co.; Bedat *v.* ... 1101
McNeair *v.* Suburban Hospital Assn., Inc. ... 1112
McQueen *v.* Parole and Probation Comm'n ... 1018
Meachum; Harrison *v.* ... 1055,1145
Mealer *v.* Jones ... 1006
Medical Assn. of Pennsylvania; Pennsylvania Dental Assn. *v.* ... 1016
Meese; Mitchell *v.* ... 1021,1132
Meese *v.* Segar ... 1115
Meldrum *v.* Campbell ... 1056
Melia *v.* United States ... 1135
Melson; Abbott *v.* ... 1105
Melton; Peterson *v.* ... 1126
Memphis Police Dept. *v.* Garner ... 1
Merit Systems Protection Bd.; Jensen *v.* ... 1126
Merit Systems Protection Bd.; Johnson *v.* ... 1102
Merit Systems Protection Bd.; Stallings *v.* ... 1067
Merola; Donovan *v.* ... 1075
Merritt *v.* United States ... 1021
Messer *v.* Kansas ... 1135
Metropolitan Development Comm'n of Marion Cty.; Villages, Inc. *v.* 1010
Metropolitan Life Ins. Co. *v.* Massachusetts ... 724
Metropolitan Life Ins. Co. *v.* Ward ... 1120
M. Golodetz Export Corp.; S/S Lake Anja *v.* ... 1117
Miami; Fabian *v.* ... 1127
Michigan *v.* Bladel ... 1124
Michigan *v.* Carlton ... 1004
Michigan *v.* Early ... 1117
Michigan *v.* Jackson ... 1124
Michigan Dept. of Social Services; Doe *v.* ... 1019
Midlantic Nat. Bank *v.* N. J. Dept. of Environmental Protection 1052,1097
Midwife *v.* El Paso Maternity Nursing Home ... 1019

Page
Miller, *In re* 1012
Miller *v.* Commissioner 1116
Miller *v.* Fenton 1003
Miller; United States *v.* 130
Miller-Wohl Co. *v.* Commissioner of Labor & Industry of Mont. .. 1114
Milton *v.* Procunier 1030,1132
Ming Shen Wong *v.* California 1126
Minnis *v.* Department of Agriculture 1053
Mintzes *v.* Buchanon 154
Mintzes; Moore *v.* 1067
Miriti *v.* Schade 1022
Mismash; Murray City *v.* 1052
Mississippi; Arkansas *v.* 377
Mississippi; Dufour *v.* 1010
Mississippi; Irving *v.* 1095
Mississippi Power & Light Co. *v.* Conerly 1113
Missouri; Bannister *v.* 1009
Missouri; Hyde *v.* 1056
Missouri; McDonald *v.* 1009
Missouri; Smith *v.* 1019
Mitchell *v.* Meese 1021,1132
Mobil Oil Corp. *v.* Blanton 1007,1120
Montana *v.* Blackfeet Tribe 759
Montgomery *v.* National Multiple Sclerosis Society 1050
Montgomery City-County Personnel Bd. *v.* Williams 1005
Moon *v.* Secretary of Labor 1055
Moore, *In re* 1133
Moore *v.* General Motors Corp. 1099
Moore; Grandison *v.* 1104
Moore *v.* Kenyatta 1066
Moore *v.* Mintzes 1067
Moore *v.* Virginia 1010
Moran *v.* Burbine 1098
Morel de Letelier *v.* Republic of Chile 1125
Moret *v.* Newsome 1006
Morgan; United States *v.* 1061
Morris; Ryder *v.* 1126
Morrissey *v.* William Morrow & Co. 1061
Morrow & Co.; Morrissey *v.* 1061
Moss; Hinkle *v.* 1055
Moss *v.* United States 1107
Mountain States Tel. & Tel. Co. *v.* Pueblo of Santa Ana 1051,1097
Moyer; Fleet Finance *v.* 1053
Moyer; Southern Discount *v.* 1053

Page
Muhammad *v.* United States 1119
Mullins *v.* Ohio 1062
Murphy; Hux *v.* 1103
Murphy *v.* Pennsylvania Human Relations Comm'n 1132
Murphy *v.* United States 1106
Murr *v.* Tennessee Bd. of Law Examiners 1063
Murray City *v.* Mismash 1052
Muskingum Watershed Conservancy Dist.; DeSeyn *v.* 1101
Mutual Life Ins. Co. of New York; Gould *v.* 1017
Nakata; Board of Water Supply, City and County of Honolulu *v.* . 1014
Nash *v.* Arizona 1143
Nash; Carchman *v.* 1013
Nash; New Jersey Dept. of Corrections *v.* 1013
National Business Systems, Inc. *v.* AM International, Inc. 1110
National Farmers Union Ins. Cos. *v.* Crow Tribe 845,1012,1301
National Labor Relations Bd. *v.* Action Automotive, Inc. 1049
National Labor Relations Bd. *v.* Financial Institution Employees 1098
National Labor Relations Bd. *v.* Longshoremen 1013
National Labor Relations Bd.; Sumco Mfg. Co. *v.* 1100
National Multiple Sclerosis Society; Montgomery *v.* 1050
Nation Enterprises; Harper & Row, Publishers, Inc. *v.* 539
Navajo Tribe; Kerr-McGee Corp. *v.* 195
Nebraska; Simpson-Wood *v.* 1138
Neely *v.* Central Intelligence Agency 1022
Nelson *v.* Louisiana 1030
Nelson *v.* Piedmont Aviation, Inc. 1116
Nevada *v.* Oliver 1116
Nevada; Papandrea *v.* 1118
New Jersey; Bell *v.* 1049
New Jersey; Wes Outdoor Advertising Co. *v.* 1049
New Jersey; Williams *v.* 1021
New Jersey Dept. of Corrections *v.* Nash 1013
New Jersey Dept. of Env. Protection; Midlantic Nat. Bank *v.* . 1052,1097
New Jersey Dept. of Env. Protection; O'Neill *v.* 1052,1097
New Mexico *v.* Baker 1065
New Mexico; Fugate *v.* 1112
New Mexico; Herrera *v.* 1103
New Mexico; Manzanares *v.* 1057
New Mexico; Roybal *v.* 1118
Newport News; KMA, Inc. *v.* 1100
Newsome; Moret *v.* 1006
News Publishing Co. *v.* DeBerry 1053
New York *v.* Class 1003
New York; Crea *v.* 1011,1145

Page
New York; DiNoia *v.* 1022
New York; Liberta *v.* 1020
New York *v.* Smith 1049
New York City; O'Neill *v.* 1052,1097
New York Telephone Co.; Capital Telephone Co. *v.* 1101
Nichols; Haas *v.* 1105
Nill *v.* Essex Group, Inc. 1017
Nix *v.* Whiteside 1014,1097
Nix; Williams *v.* 1138
NKC Hospitals, Inc. *v.* Heckler 1016
Noland *v.* North Carolina 1050
Norfolk & Western R. Co. *v.* Coal Exporters Assn. of U. S., Inc. 1072
Norman *v.* Oregon 1020,1139
Norris *v.* United States 1065
North Carolina; Boyd *v.* 1030
North Carolina; Huffstetler *v.* 1009
North Carolina; Lawson *v.* 1120
North Carolina; Noland *v.* 1050
North Carolina; Vereen *v.* 1094
North Carolina *ex rel.* Thornburg; P. I. A. Asheville, Inc. *v.* 1003
North Dakota; Huber *v.* 1106
North East Independent School Dist. *v.* Findeisen 1125
Northwest Commercial Fishermen's Fed. Recovery Assn. *v.* U. S. 1135
Northwest Sign Co.; Jack H. Brown & Co. *v.* 1113
Nothstein, *In re* 1001
Nuckols *v.* Oklahoma 1030
Nuclear Regulatory Comm'n; Carstens *v.* 1136
Nuey *v.* Departmental Disciplinary Comm. for First Jud. Dept. .. 1050
O'Brien; Lopez *v.* 1057
O'Brocta *v.* United States 1099
O'Connor *v.* O'Connor 1020
Odend'hal *v.* Commissioner 1143
Odom Corp.; Buckingham Corp. *v.* 1002
Office of Disciplinary Counsel of Sup. Court of Ohio; Zauderer *v.* . 626
Office of Personnel Management; Accibal *v.* 1127
Office of Personnel Management; Bertulfo *v.* 1112
Ohio *v.* Kentucky 153
Ohio *v.* Luck 1095
Ohio; Lyons *v.* 1101
Ohio; Mullins *v.* 1062
Ohio-Sealy Mattress Mfg. Co.; Sealy, Inc. *v.* 1125
O'Keefe *v.* Hennepin 1121
Oklahoma; Bewley *v.* 1051
Oklahoma *v.* Castleberry 146

Page
Oklahoma; Dutton *v.* 1111
Oklahoma; Nuckols *v.* 1030
Oklahoma; Shabazz *v.* 1138
Oklahoma; Ward *v.* 1019
Oklahoma; Webber *v.* 1012
Oklahoma City *v.* Tuttle 808
Oldham; Robinson *v.* 1127
Oliphant *v.* United States 1015
Oliver; Nevada *v.* 1116
Ollman *v.* Evans 1127
Olson *v.* Leeke 1053
Oneida County *v.* Oneida Indian Nation 1062
Oneida Indian Nation; Oneida County *v.* 1062
O'Neill *v.* New Jersey Dept. of Environmental Protection 1052,1097
O'Neill *v.* New York City 1052,1097
Orange *v.* Lane 1105
Oregon; Norman *v.* 1020,1139
Ospina *v.* United States 1126
Otalora *v.* United States 1067
Otto *v.* United States 1050
Overland Park *v.* Hamilton 1052
Owens; Cobb *v.* 1055
Owens *v.* Cupp 1118
Owens *v.* United States 1104
Pacific Gas & Electric Co. *v.* Public Utilities Comm'n of Cal. 1123
Pacific & Southern Co.; Duncan *v.* 1004
Pacific & Southern Co.; TV News Clips *v.* 1004
Padell, *In re* 1012
Palacios *v.* United States 1118
Pallett *v.* Harp 1067
Palmer *v.* Palmer 1135
Palmer *v.* Tucker 1101
Pan American World Airways, Inc., *In re* 1115
Papandrea *v.* Nevada 1118
Parfett; Wenturine *v.* 1065
Parish. See name of parish.
Park Avenue Investment & Development, Inc. *v.* Barkheimer 1108
Parke; Wright *v.* 1124
Parole and Probation Comm'n; McQueen *v.* 1018
Parsons *v.* Indiana 1107
Pasco; Carpenter *v.* 1054
Pastrana de Caraballo *v.* Heckler 1113
Patterson *v.* Buena Vista Distribution Co. 1056
Patterson *v.* Charter Financial Group, Inc. 1056

Page
Patterson *v.* South Carolina 1036
Patton *v.* Thomson 1005
Paulus; Brown *v.* 1066
Pecoraro, *In re* 1097
Pennsylvania; Frankenberry *v.* 1105
Pennsylvania; Kay *v.* 1010
Pennsylvania; Petrino *v.* 1069
Pennsylvania; Waters *v.* 1137
Pennsylvania Blue Shield; Pennsylvania Dental Assn. *v.* 1016
Pennsylvania Bd. of Law Examiners; Martin *v.* 1022,1120
Pennsylvania Dental Assn. *v.* Medical Assn. of Pennsylvania 1016
Pennsylvania Dental Assn. *v.* Pennsylvania Blue Shield 1016
Pennsylvania Human Relations Comm'n; Murphy *v.* 1132
Peoples *v.* United States 1067
Pepper *v.* Kentucky 1107
Peralta Shipping Corp. *v.* Smith & Johnson (Shipping) Corp. 1112
Perkins *v.* Hartigan 1056
Perkins *v.* Rice 1106
Perkins *v.* Stephenson 1067
Perkins *v.* United States 1015
Peterson *v.* Melton 1126
Petrino *v.* Pennsylvania 1069
Petrov *v.* United States 1025
Phelps; Gibbs *v.* 1021
Phelps *v.* United States 1018
Phillips, *In re* 1011
Phillips *v.* Alabama 1019
Phillips Petroleum Co. Norway; All Alex. L. Kielland Litigants *v.* 1055
P. I. A. Asheville, Inc. *v.* North Carolina *ex rel.* Thornburg 1003
Pichon *v.* Texas 1137
Piedmont Aviation, Inc.; Nelson *v.* 1116
Pierce; Burroughs *v.* 1099
Pierrot *v.* United States 1104
Pinar *v.* Dole 1016
Piney Woods Country Life School; Shell Oil Co. *v.* 1005
Pino *v.* District Court of 2d Judicial District's Children's Court ... 1014
Piquette *v.* United States 1119
Pizarro *v.* United States 1139
Playtime Theatres, Inc.; Renton *v.* 1013
Pogo Producing Co.; Wilson *v.* 1054
Police Patrolmen *v.* Castro 1075
Ponte *v.* Real 491
Ponterio *v.* Koch 1017
Port Terminal Railroad Assn. *v.* Sims 1016

Page
Presbytery of Elijah Parish Lovejoy *v.* Jaeggi 1117
Preston *v.* Maggio 1104
Pride *v.* United States 1021,1057
Primbs *v.* United States 1068,1145
Primiano *v.* United States 1018
Prince *v.* Lockhart 1138
Prince George's County; Baylies *v.* 1138
Procunier; Andino *v.* 1119
Procunier; Davis *v.* 1106
Procunier; De La Rosa *v.* 1112
Procunier; Enriquez *v.* 1126
Procunier; Haywood *v.* 1022
Procunier; Jones *v.* 1006
Procunier; Lewis *v.* 1022
Procunier; Milton *v.* 1030,1131
Procunier; Tinghitella *v.* 1127
Procunier; Walker *v.* 1107
Products for Power *v.* Environmental Protection Agency 1015
Providence Builders *v.* Zoning Hearing Bd. of Lower Providence . 1101
Przybyla *v.* United States 1099
Public Utilities Comm'n of Cal.; Pacific Gas & Electric Co. *v.* 1123
Public Utility Dist. No. 1 of Benton Cty.; Chemical Bank *v.* 1075
Public Utility Dist. No. 1 of Chelan Cty. *v.* Confederated Tribes . 1116
Pudlo *v.* Chicago 1066
Pueblo of Santa Ana; Mountain States Tel. & Tel. Co. *v.* 1051,1097
Pyramid Lake Paiute Tribe *v.* Carson-Truckee Water Cons. Dist. 1065
Quaker City Gear Works, Inc. *v.* Skil Corp. 1136
Quansah *v.* Bisco Industries, Inc. 1005
Quaring; Jensen *v.* 1097,1114
Quigley *v.* Massachusetts 1115
Quiroz *v.* Wawrzaszek 1055
Rabb *v.* United States 1019
Racca; Bothke *v.* 1065
Radford *v.* Fairman 1068
Radford *v.* Jago 1135
Rafter *v.* Anglo-Iranian Oil Co. 1137
Ramirez; Bough *v.* 1025
Ramirez *v.* Indiana 147,1112
Ramirez de Arellano; Weinberger *v.* 1113
Ramos; California *v.* 1119
Ramos *v.* Ramos 1017
Raske *v.* Board of Comm'rs of Forest Preserve Dist. of Cook Cty. 1017
Raybestos-Manhattan, Inc.; Francois *v.* 1061
Razatos *v.* Colorado Supreme Court 1016

	Page
Real; Ponte *v.*	491
Reed *v.* United States	1135
Reivitz; Thompson *v.*	1103
Reminick *v.* Maltz	1022
Renard *v.* Columbia Broadcasting System, Inc.	1116
Renner *v.* United States	1005
Renton *v.* Playtime Theatres, Inc.	1013
Republic of Chile; Morel de Letelier *v.*	1125
Reyes *v.* Immigration and Naturalization Service	1061
Reynosa *v.* United States	1104
Rhea *v.* United States	1103
Rhode Island; Tavone *v.*	1010
Rhode Island and New York Boundary Case	375
Rice; Perkins *v.*	1106
Rice; Small *v.*	1118
Riceland Foods, Inc. *v.* Carpenters	1102
Riggins *v.* Internal Revenue Service	1067
Rios-Pineda; Immigration and Naturalization Service *v.*	444
Robinson *v.* Ikari	1068
Robinson; McGinnis *v.*	1116
Robinson *v.* Oldham	1127
Robson, *In re*	1120
Rockefeller; Wells *v.*	1107
Rodkey *v.* Blue Shield of Massachusetts, Inc.	1029
Rodman *v.* Hensley	1016
Rodriguez *v.* United States	1119
Rojas-Contreras; United States *v.*	1013
Romano; Black *v.*	606
Rome News Tribune *v.* DeBerry	1053
Ronwin *v.* Supreme Court of Iowa	1101
Roop *v.* Alaska	1016
Roscoe *v.* Arizona	1094
Rose *v.* Florida	1143
Ross, *In re*	1013
Rothgerber; Finney *v.*	1020
Rouse, *In re*	1012
Rowland *v.* Mad River Local School Dist.	1062
Roybal *v.* New Mexico	1118
Rudzewicz; Burger King Corp. *v.*	462
Ruefenacht; Gould *v.*	701
Ruggiero *v.* United States	1127
Rush *v.* United States	1120
Russell *v.* United States	858
Rutherford; Hanson *v.*	1112

Page
Ryan; Fabian *v.* ... 1112
Ryder *v.* Morris ... 1126
Sage; Koker *v.* ... 1049
Saginaw Mining Co. *v.* Gibas ... 1116
Sailors *v.* Secretary of Labor ... 1004
Salcer *v.* Envicon Equities Corp. ... 1098
Saldana *v.* Wyoming ... 1103
Salman *v.* United States ... 1139
Sams *v.* United States ... 1103
San Antonio Metropolitan Transit Authority; Donovan *v.* ... 1049
San Antonio Metropolitan Transit Authority; Garcia *v.* ... 1049
San Jose Unified School Dist. *v.* Diaz ... 1065
Sarron *v.* Frumkes ... 1139
Sasway *v.* United States ... 1003
Satterfield *v.* United States ... 1117
Savage *v.* Columbus ... 1118
Sayan *v.* Wainwright ... 1138
Scag; Trecker *v.* ... 1066
Schade; Miriti *v.* ... 1022
Schmitt *v.* United States ... 1104
Schmucker; United States *v.* ... 1001
School Committee of Burlington *v.* Department of Ed. of Mass. ... 359
Schweitzer; Brown *v.* ... 1105
Scott *v.* Baldrige ... 1018
Scott *v.* Sioux City ... 1003
Screen Advertising Film Fund *v.* Buena Vista Distribution Co. ... 1056
Seaboard System Railroad, Inc.; Baker *v.* ... 1055
Seals *v.* United States ... 1140
Sealy, Inc. *v.* Ohio-Sealy Mattress Mfg. Co. ... 1125
Sears; Transportation Union *v.* ... 1099
Seattle-First National Bank *v.* Financial Institution Employees ... 1098
Secretary of Agriculture; Sharyland Water Supply Corp. *v.* ... 1137
Secretary of Army; Gouchnour *v.* ... 1057
Secretary of Commerce; Scott *v.* ... 1018
Secretary of Defense *v.* Ramirez de Arellano ... 1113
Secretary of HHS; Betka *v.* ... 1112
Secretary of HHS; Connecticut Dept. of Income Maintenance *v.* ... 524
Secretary of HHS; Cospito *v.* ... 1131
Secretary of HHS; Friedman *v.* ... 1146
Secretary of HHS; NKC Hospitals, Inc. *v.* ... 1016
Secretary of HHS; Pastrana de Caraballo *v.* ... 1113
Secretary of HHS; Starnes *v.* ... 1017
Secretary of HHS; Watkins *v.* ... 1010
Secretary of Housing and Urban Development; Burroughs *v.* ... 1099

Page
Secretary of Labor; Grim Hotel Co. *v.* 1124
Secretary of Labor; Moon *v.* 1055
Secretary of Labor; Sailors *v.* 1004
Secretary of Labor *v.* San Antonio Metropolitan Transit Authority 1049
Secretary of Labor; Tony and Susan Alamo Foundation *v.* 290
Secretary of Labor; Town Pump, Inc. *v.* 1100
Secretary of Navy; Young *v.* 1061
Secretary of State; Harter *v.* 1068
Secretary of Transportation; Pinar *v.* 1016
Secretary of Treasury; New Mexico *v.* 1065
Securities and Exchange Comm'n; Blinder, Robinson & Co. *v.* ... 1125
Securities and Exchange Comm'n; Materia *v.* 1053
Sedima, S. P. R. L. *v.* Imrex Co. 1013
Segar; Meese *v.* 1115
Segrera *v.* United States 1102
Segura *v.* United States 1104
Seiter; Wilson *v.* 1118
Sellars *v.* Social Security Administration 1104
Servotech International Establishment *v.* United States 1055
Session *v.* Texas 1009
S. G. Frantz Co. *v.* Director, Division of Taxation of N. J. 1136
Shabazz *v.* Oklahoma 1138
Sharp; Calvert *v.* 1132
Sharyland Water Supply Corp. *v.* Block 1137
Shaw; Machinists *v.* 1137
Sheffield; Chevron U. S. A., Inc. *v.* 1140
Shell Oil Co. *v.* Piney Woods Country Life School 1005
Shen Wong *v.* California 1126
Sheriff of Newaygo County *v.* Deur 1136
Shultz; Harter *v.* 1068
Shuman; Lepiscopo *v.* 1126
Sielaff; Mason *v.* 1009
Sielaff; Turner *v.* 1098,1134
Simmons Fastener Corp. *v.* Illinois Tool Works, Inc. 1065
Simon *v.* Kroger Co. 1075
Simpkins; Dingle *v.* 1062
Simpson-Wood *v.* Nebraska 1138
Sims *v.* Central Intelligence Agency 159
Sims; Central Intelligence Agency *v.* 159
Sims; Port Terminal Railroad Assn. *v.* 1016
Singer *v.* Bodley 1062
Singleton *v.* South Carolina 1111
Sioux City; Scott *v.* 1003
Skil Corp.; Quaker City Gear Works, Inc. *v.* 1136

Page
Skinner *v.* United States 1115
Sloan, *In re* 1134
Sloan *v.* United States 1057,1106
Small *v.* Rice 1118
Smelser *v.* Kelley 1125
Smith; Alcorn *v.* 1096
Smith *v.* Alyeska Pipeline Service Co. 1066
Smith *v.* Arizona 1006
Smith *v.* Citizens Home Savings Co. 1105
Smith; DeVyver *v.* 1022
Smith *v.* FCX, Inc. 1103
Smith; Harvey *v.* 1022
Smith *v.* Illinois 1019
Smith *v.* Jago 1062
Smith *v.* Lane 1104
Smith *v.* Missouri 1019
Smith; New York *v.* 1049
Smith *v.* Sorensen 1054
Smith *v.* Texas 1061
Smith *v.* United States 1057,1137
Smith; Wilson *v.* 1022
Smith & Johnson (Shipping) Corp.; Peralta Shipping Corp. *v.* 1112
Snyder, *In re* 1012,1051
Social Security Administration; Sellars *v.* 1104
Society National Bank; Cooper *v.* 1118
Sockwell *v.* Blackburn 1020
Soderbeck *v.* Burnett County 1117
Solem; Stumes *v.* 1067
Sorensen; Smith *v.* 1054
Soteras *v.* United States 1055
South Carolina *v.* Catawba Indian Tribe, Inc. 1134
South Carolina; Chaffee *v.* 1009,1120
South Carolina; Ferrell *v.* 1009,1120
South Carolina; Gaskins *v.* 1120
South Carolina; Glover *v.* 1068
South Carolina; Koon *v.* 1036
South Carolina; Patterson *v.* 1036
South Carolina; Singleton *v.* 1111
South Carolina; Truesdale *v.* 1009,1120
South Carolina; Tyson *v.* 1006
South Carolina Dept. of Corrections *v.* Doby 1107
South Carolina Tax Comm'n; Spencer *v.* 82,1112
Southern Discount *v.* Moyer 1053
Southern Motor Carriers Rate Conference, Inc. *v.* United States 48

Page
Speedy *v.* Wyrick 1019
Speigel *v.* Zimmerman 1105
Spencer *v.* South Carolina Tax Comm'n 82,1112
Spiegel; Mann *v.* 1136
Spikes *v.* Indiana 1001
Spoon *v.* Wyoming 1020
Spradley *v.* United States 1100
Springfield Township School Dist. *v.* Knoll 288
Squillacote; United States *v.* 1016
S/S Lake Anja *v.* M. Golodetz Export Corp. 1117
Stadler Associates, Inc.; Chesler *v.* 1066
Stallings *v.* Merit Systems Protection Bd. 1067
Standard Oil Co. of California; Eikenberry *v.* 1100
Stano *v.* Florida 1111
Starnes *v.* Heckler 1017
State. See name of State.
State Bar of Cal.; Alberton *v.* 1056
State Bar of Wis.; Wisconsin's Environmental Decade, Inc. *v.* 1100
State Tax Dept. of W. Va.; Duquesne Light Co. *v.* 1029
Steele; Amis *v.* 1016,1117
Steirheim; Liphete *v.* 1114
Stephenson; Perkins *v.* 1067
Stepping Stones Associates *v.* White Plains 1066
Sterling *v.* United States 1099
Stern *v.* Weiss 1011
Stevens; Carpenters *v.* 1015
Stewart *v.* Cabana 1105
Stewart *v.* Disneyland 1016
Stewart *v.* Illinois 1120,1131
Stokes; Davis *v.* 1107
Stonehill *v.* United States 1066
Stop H–3 Assn.; Yamasaki *v.* 1108
Strahan *v.* Blackburn 1138
Street; Tennessee *v.* 409
Strickland *v.* King 1002,1016
Stringfellow *v.* Concerned Neighbors in Action 1095
Stroom *v.* Carter 1050
Stubbs *v.* United States 1053
Students of California School for Blind; Honig *v.* 148
Stull *v.* United States 1112
Stumes *v.* Solem 1067
Suburban Hospital Assn., Inc.; McNeair *v.* 1112
Sumco Mfg. Co. *v.* National Labor Relations Bd. 1100
Superintendent of penal or correctional institution. See name or title of superintendent.

Page
Supreme Court of Iowa; Ronwin *v.* 1101
Surdut, *In re* 1114
Surgent, *In re* 1097
Suter *v.* United States 1103
Swann *v.* Idaho 1106
Swanson; Ash *v.* 1020
Swyka *v.* Johnson 1051
Szombathy; Dano *v.* 1132
Tabman, *In re* 1123
Taca International Airlines, S.A. *v.* Air Line Pilots 1100
Tarrant County Dept. of Human Resources; Bolden *v.* 1065
Tate; BoCook *v.* 1118
Tavone *v.* Rhode Island 1010
Teamsters; Kohn Beverage Co. *v.* 1017
Teamsters; Manhattan Coffee Co. *v.* 1100
Temple; Martelon *v.* 1135
Tennessee *v.* Garner 1
Tennessee *v.* Street 409
Tennessee Bd. of Law Examiners; Murr *v.* 1063
Territory. See name of Territory.
Tesch *v.* McCurry 1049
Texaco Inc. *v.* Department of Energy 1099
Texas; Berghahn *v.* 1056
Texas; California *v.* 1050,1051
Texas; Garrett *v.* 1009
Texas; Herrera *v.* 1131
Texas; Keen *v.* 1139
Texas *v.* McCullough 1052
Texas; McDaniel *v.* 1139
Texas; Pichon *v.* 1137
Texas; Session *v.* 1009
Texas; Smith *v.* 1061
Texas A & M Univ. *v.* Gay Student Services 1001,1120
Thai Airways International, Ltd.; Yugoexport, Inc. *v.* 1101
Thetford *v.* United States 1010
Thomas; Chapman *v.* 1004
Thomas; General Motors Corp. *v.* 1074
Thomas *v.* United States 1021,1102,1104
Thompson *v.* Reivitz 1103
Thompson *v.* United States 1104,1107
Thompson Building Materials Inc. *v.* Board of Trustees of Western Conference of Teamsters Pension Trust Fund 1054
Thomson; Patton *v.* 1005
Thornburg *v.* Gingles 1064
Thornburg; P. I. A. Asheville, Inc. *v.* 1003

Page
Thornburgh *v.* American College of Obstetricians and Gynecologists 1014
Timlick *v.* United States 1119
Tinghitella *v.* Procunier 1127
Tomasky; Herrington *v.* 1126
Tompkins County Trust Co.; Desai *v.* 1125
Tony and Susan Alamo Foundation *v.* Secretary of Labor 290
Tooker *v.* United States 1021
Toomey *v.* Washington 1067
Torres *v.* United States 1055
Tovey; McCall *v.* 1020
Town. See name of town.
Town Pump, Inc. *v.* Brock 1100
Transportation Union *v.* Sears 1099
Travelers Ins. Co. *v.* Massachusetts 724
Trecker *v.* Scag 1066
Tribble *v.* United States 1127
Tribune Co.; DePerte *v.* 1096
Truesdale *v.* South Carolina 1009,1120
Tucker; Palmer *v.* 1101
Tuggle *v.* Virginia 1096
Turner *v.* Seilaff 1098,1134
Turner Construction Co.; John E. Green Plumbing & Heating Co. *v.* 1102
Tuttle; Oklahoma City *v.* 808
TV News Clips *v.* Pacific & Southern Co. 1004
TV News Clips *v.* WXIA–TV 1004
Tyson *v.* South Carolina 1006
Ulane *v.* Eastern Air Lines, Inc. 1017
Underwood; Hunter *v.* 222
Union. For labor union, see name of trade.
United. For labor union, see name of trade.
United Air Lines, Inc.; McDonald *v.* 1065
United Grocers, Inc.; Glover *v.* 1115
United Kentucky Bank, Inc.; George *v.* 1018
United States. See name of other party.
U. S. District Court; Baker *v.* 1014
U. S. District Court; Holsey *v.* 1006
U. S. District Judge; Day *v.* 1050
U. S. Parole Comm'n; Antonelli *v.* 1006
U. S. Parole Comm'n; Joost *v.* 1126
U. S. Postal Service; Attwell *v.* 1011,1062
U. S. Postal Service; Cooper *v.* 1022
U. S. Postal Service; Ely *v.* 1106
U. S. Postal Service; Ingraham *v.* 1021
University of Pittsburgh *v.* Krynicky 1015

Page
University of Tenn.; Gilbert *v.* 1050
Valles *v.* United States 1057
Valway *v.* Kearns 1096
Van de Kamp; Carder *v.* 1102
Van Orden *v.* Indiana 1104
Van Weelde Brothers Shipping Ltd. *v.* I. N. C. A. S. 1117
Vasquez *v.* Hillery 1002
Ventura *v.* Cupp 1104
Vereen *v.* North Carolina 1094
Village. See name of village.
Villages, Inc. *v.* Metropolitan Development Comm'n of Marion Cty. 1010
Virginia; Cain *v.* 1135
Virginia; Educational Books, Inc. *v.* 1119
Virginia; Evans *v.* 1025
Virginia; Harvey *v.* 1005
Virginia; Moore *v.* 1010
Virginia; Tuggle *v.* 1096
Virginia; Washington *v.* 1111
Von Neumann; United States *v.* 1064
Vose; Anderson *v.* 1118
Vossbrinck *v.* Vossbrinck 1020
Wainwright; Francois *v.* 1121
Wainwright *v.* Greenfield 1098
Wainwright *v.* Hall 1107
Wainwright; Hall *v.* 1111
Wainwright; Sayan *v.* 1138
Walber *v.* Department of HUD 1095,1132
Walber *v.* United States 1132
Walber Construction Co. *v.* Department of HUD 1095,1132
Walber Construction Co. *v.* United States 1132
Waldrop *v.* Alabama 1030
Walker *v.* Procunier 1107
Wallace *v.* Ford 1005
Walter; Lavonte *v.* 1112
Walters; Clark *v.* 1066
Ward; Metropolitan Life Ins. Co. *v.* 1120
Ward *v.* Oklahoma 1019
Warden. See also name of warden.
Warden, Nev. State Prison; Lyons *v.* 1004,1111
Washington *v.* Alabama 1101
Washington; Campbell *v.* 1094
Washington; Toomey *v.* 1067
Washington *v.* Virginia 1111
Washington Dept. of Services for Blind; Witters *v.* 1002

Page
Waterman *v.* United States 1065
Waters *v.* Pennsylvania 1137
Watkins *v.* Heckler 1010
Watson Marine Services, Inc. *v.* Kliebert Educational Trust 1050
Wawrzaszek; Quiroz *v.* 1055
Webb *v.* County Bd. of Ed. of Dyer County 234
Webber *v.* Oklahoma 1012
Webster *v.* United States 1106
Weeks *v.* Alabama 1030
Weinberger *v.* Ramirez de Arellano 1113
Weintraub; Commodity Futures Trading Comm'n *v.* 343
Weiss; Stern *v.* 1011
Welch *v.* Claiborne County Beer Bd. 1010
Welden *v.* United States 1117
Wells *v.* Rockefeller 1107
Wenturine *v.* Parfett 1065
Weser *v.* Maschner 1118
Wesley *v.* United States 1130
Wes Outdoor Advertising Co. *v.* New Jersey 1049
West *v.* United States 1053
Western Oil & Gas Assn.; Cory *v.* 81,1112
White; Durham Hosiery Mills, Inc. *v.* 1117
White *v.* Maryland 1112
White *v.* McGoff 1011
White *v.* United States 1015
White Plains; Stepping Stones Associates *v.* 1066
Whiteside; Nix *v.* 1014,1097
Wiley; Wilson *v.* 1138
Wilks *v.* Wisconsin 1067
William Morrow & Co.; Morrissey *v.* 1061
Williams *v.* Blackburn 1126
Williams; Elvrum *v.* 1015
Williams *v.* Galdi 1069
Williams *v.* General Motors Corp. 1103
Williams; Montgomery City-County Personnel Bd. *v.* 1005
Williams *v.* New Jersey 1021
Williams *v.* Nix 1138
Williams *v.* United States 1103,1127
Williamson *v.* Gillmor 1054
Williamsport Area School Dist.; Bender *v.* 1123
Willkom; Cameo Convalescent Center, Inc. *v.* 1116
Wilson *v.* Garcia 261
Wilson *v.* Pogo Producing Co. 1054
Wilson *v.* Seiter 1118

Page
Wilson *v.* Smith 1022
Wilson *v.* Wiley 1138
Wingo *v.* Louisiana 1030,1145
Winterhalder *v.* United States 1057
Wisconsin; Gustafson *v.* 1056
Wisconsin; Wilks *v.* 1067
Wisconsin Dept. of Industry, Labor & Human Rel. *v.* Gould Inc. . 1115
Wisconsin's Environmental Decade, Inc. *v.* State Bar of Wis. 1100
Wise *v.* United States 1022
Witters *v.* Washington Dept. of Services for Blind 1092
Wolff, *In re* 1096
Wollrab, *In re* 1133
Wong *v.* California 1126
Wood; Feuling *v.* 1137
Wood; Greenfield *v.* 1054
Woodmen of World Life Ins. Society *v.* Lasso 1099
Woods *v.* Lumber Center, Inc. 1106
Worthington Pump Corp. (USA); Dugan & Meyers Constr. Co. *v.* 1135
Wright *v.* Parke 1124
WXIA–TX; Duncan *v.* 1004
WXIA–TX; TV News Clips *v.* 1004
Wygant *v.* Jackson Bd. of Ed. 1014
Wyoming; Saldana *v.* 1103
Wyoming; Spoon *v.* 1020
Wyrick; Speedy *v.* 1019
Yamanis *v.* United States 1100
Yamasaki *v.* Stop H–3 Assn. 1108
Yates *v.* United States 1022
Yocum *v.* United States 1021
Young; Austin *v.* 1146
Young *v.* Lehman 1061
Young *v.* United States 1104
Yugoexport, Inc. *v.* Thai Airways International, Ltd. 1101
Zafra; Florida *v.* 1119
Zarrilli *v.* Braunstein 1020
Zauderer *v.* Office of Disciplinary Counsel of Sup. Ct. of Ohio 626
Zeisler *v.* Illinois 1005
Zenith Radio Corp.; Matsushita Electric Industrial Co. *v.* 1002
Zimmerman; Chance *v.* 1020
Zimmerman; Speigel *v.* 1105
Zoning Hearing Bd. of Lower Providence; Providence Builders *v.* 1101

TABLE OF CASES CITED

Page

Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1 68
Accardi v. Shaughnessy, 347 U.S. 260 622
Adams v. Woods, 2 Cranch 336 271
Affiliated Capital Corp. v. City of Houston, 735 F. 2d 1555 67
Agrashell, Inc. v. Hammons Products Co., 479 F. 2d 269 1009
Agustin v. INS, 700 F. 2d 564 450
Alaska Pacific Fisheries v. United States, 248 U.S. 78 768
Albernaz v. United States, 450 U.S. 333 779, 793
Albrecht v. United States, 273 U.S. 1 778, 779
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 739, 753
Alexander v. Gardner-Denver Co., 415 U.S. 36 213, 755
Algoma Plywood Co. v. Wisconsin Bd., 336 U.S. 301 752
Allen v. City of Decatur, 23 Ill. 332 836
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 748, 755
Allstate Ins. Co. v. Hague, 449 U.S. 302 477
Almond v. Kent, 459 F. 2d 200 278
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 245
American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 532
American Progressive Life and Health Ins. Co. v. Corcoran, 715 F. 2d 784 742

Page

American Tobacco Co. v. Patterson, 456 U.S. 63 96
American Tobacco Co. v. Werckmeister, 207 U.S. 284 551
American Trucking Assns., Inc. v. Frisco Transportation Co., 358 U.S. 133 655
American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257 851
AMF Inc. v. Jewett, 711 F. 2d 1096 116
Anderson v. Bessemer City, 470 U.S. 564 485, 721
Anderson v. Continental Ins. Co., 85 Wis. 2d 675 217, 218
Anderson v. United States, 417 U.S. 211 414
Anderson National Bank v. Luckett, 321 U.S. 233 108
Arkansas v. Sanders, 442 U.S. 753 401, 402
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 225, 227, 232, 233
Armstrong v. United States, 364 U.S. 40 106
Arquette v. Hancock, 656 S. W. 2d 627 282
Ashe v. Swenson, 397 U.S. 436 798
Ashwander v. TVA, 297 U.S. 288 92, 120
Associated General Contractors v. Carpenters, 459 U.S. 519 838
Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 622
Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 267, 270, 281, 284
Avco Corp. v. Aero Lodge 735, 390 U.S. 557 220

Page

Bachellar v. Maryland, 397 U.S. 564 323
Baggett v. Bullitt, 377 U.S. 360 666
Bain, Ex parte, 121 U.S. 1 135, 140–144
Baker v. McCollan, 443 U.S. 137 30, 816
Balani v. INS, 669 F. 2d 1157 450
Baldrige v. Shapiro, 455 U.S. 345 166, 169, 176
Barefoot v. Estelle, 463 U.S. 880 1037, 1042, 1047, 1048
Barragan-Sanchez v. Rosenberg, 471 F. 2d 758 449
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 302, 755
Bartholomew v. Watson, 665 F. 2d 910 239, 248, 249
Bates v. State Bar of Ariz., 433 U.S. 350 63, 629, 634–636, 638–641, 643, 645, 651, 658, 659, 661, 669, 670, 673, 677
Baxter v. Palmigiano, 425 U.S. 308 495–497, 506, 510, 514
Bay State Gas Co. v. Commissioner, 689 F. 2d 1 116
Beard v. Stephens, 372 F. 2d 685 271, 274
Bearden v. Georgia, 461 U.S. 660 610, 611, 614, 615, 620, 621, 623
Belknap, Inc. v. Hale, 463 U.S. 491 748, 749, 753
Bell v. Morrison, 1 Pet. 351 282, 285
Bell v. United States, 349 U.S. 81 427
Bell v. Wolfish, 441 U.S. 520 31
Beloff v. Pressdram Ltd., [1973] All E. R. 241 551
Belushi v. Woodward, 598 F. Supp. 36 555
Bennett v. City of Slidell, 728 F. 2d 762 820
Bennett v. New Jersey, 470 U.S. 632 700
Berger v. United States, 295 U.S. 78 135, 136, 138

Page

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263 1007
Berry v. Hamman, 203 Va. 596 16
Best v. Humboldt Placer Mining Co., 371 U.S. 334 86, 104
Bishop v. Wood, 426 U.S. 341 273
Bithoney, In re, 486 F. 2d 319 666
Black v. Romano, 471 U.S. 606 512
Blake v. Katter, 693 F. 2d 677 282, 285
Blockburger v. United States, 284 U.S. 299 778, 779, 794
Blouin v. Dembitz, 480 F. 2d 488 248
Blow v. Lascaris, 668 F. 2d 670 239
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 685, 695
Blum v. Bacon, 457 U.S. 132 532
Blum v. Stenson, 465 U.S. 886 239, 258
Board of Regents v. Roth, 408 U.S. 564 517, 669
Board of Regents v. Tomanio, 446 U.S. 478 266, 268–270, 275, 281, 282, 285
Boileau, In re, 736 F. 2d 503 347
Bolanos-Hernandez v. INS, 749 F. 2d 1316 1061
Boles v. Onton Dock, Inc., 659 F. 2d 74 1059
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 637, 638
Bond v. Stanton, 630 F. 2d 1231 248
Bonner v. City of Prichard, 661 F. 2d 1206 1059
Booker v. State, 397 So. 2d 910 1081
Bouie v. City of Columbia, 378 U.S. 347 621
Bowen v. U. S. Postal Service, 459 U.S. 212 211
Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 671
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 442, 443

Page

Boyd v. North Carolina, 471 U.S. 1030 1033, 1046
Boyd v. United States, 271 U.S. 104 336
Brandon v. Holt, 469 U.S. 464 831
Branti v. Finkel, 445 U.S. 507 299
Bremen, The v. Zapata Off-Shore Co., 407 U.S. 1 472, 478, 486
Briscoe v. LaHue, 460 U.S. 325 276, 277, 838
British-American Oil Producing Co. v. Board of Equalization of Mont., 299 U.S. 159 765, 768, 770, 771
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 302
Brooks v. Commonwealth, 61 Pa. 352 12
Brown v. Allen, 344 U.S. 443 503
Brown v. Bathke, 588 F. 2d 634 239, 251
Brown v. Herald Co., 464 U.S. 928 1115
Brown v. Hotel and Restaurant Employees, 468 U.S. 491 208, 214, 749
Brown v. Ohio, 432 U.S. 161 775, 778, 787, 789, 790, 795–798, 803, 806, 807
Brown v. United States, 239 U.S. App. D. C. 345 282
Browy, In re, 527 F. 2d 799 354
Bruton v. United States, 391 U.S. 123 325, 413–415, 417
Bryan v. Itasca County, 426 U.S. 373 765, 766
Buckley v. Valeo, 424 U.S. 1 666
Bullock v. Lucas, 743 F. 2d 244 1122
Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 713
Burlington Truck Lines v. United States, 371 U.S. 156 509
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 819
Burnett v. Grattan, 468 U.S. 42 241, 250, 267, 269, 273
Burnett v. New York Central R. Co., 380 U.S. 424 282

Page

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 547
Butner v. United States, 440 U.S. 48 351
Cady v. Dombrowski, 413 U.S. 433 390–392
Calder v. Jones, 465 U.S. 783 470, 471, 473, 476, 477, 479
Caldwell v. State, 41 Tex. 86 12
California v. Carney, 471 U.S. 386 522, 523
California v. Ramos, 463 U.S. 992 397, 398, 503, 1037, 1042, 1047, 1048
California Automobile Assn. Inter-Insurance Bureau v. Maloney, 341 U.S. 105 728, 742
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 39, 46, 53, 54, 57–63, 66, 73, 74
Camara v. Municipal Court, 387 U.S. 523 8
Cameron v. United States, 252 U.S. 450 105
Campbell v. Haverhill, 155 U.S. 610 267, 280, 281, 283, 286
Campbell v. United States, 365 U.S. 85 499
Canavan v. Beneficial Finance Corp., 553 F. 2d 860 1024
Cannon v. University of Chicago, 441 U.S. 677 837
Cantor v. Detroit Edison Co., 428 U.S. 579 45, 56, 57, 59, 64, 72, 74
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 713
Cardwell v. Lewis, 417 U.S. 583 391, 404, 407
Carey v. Population Services International, 431 U.S. 678 648
Carpenter v. Shaw, 280 U.S. 363 765
Carroll v. Lessee of Carroll, 16 How. 275 843
Carroll v. United States, 267 U.S. 132 13, 14, 26, 390, 392, 393, 401, 403
Cassesso v. Commissioner of Correction, 390 Mass. 419 501

Page

Catlett v. United States, 471 U.S. 1074 443
Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y., 447 U.S. 557 637, 638, 644, 647, 651, 652, 657–659, 661, 664, 668, 675
Chambers v. Maroney, 399 U.S. 42 390, 391
Chambers v. Mississippi, 410 U.S. 284 509
Chambers v. Omaha Public School Dist., 536 F. 2d 222 274
Chaney v. Heckler, 231 U.S. App. D. C. 136 1094
Chapman v. California, 386 U.S. 18 1035, 1041
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 278
Chardon v. Fumero Soto, 462 U.S. 650 266, 269, 270
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 209
Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 267
Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 752
Chemical Bank v. Arthur Andersen & Co., 726 F. 2d 930 698
Chevron U.S.A., Inc. v. Hammond, 726 F. 2d 483 1141
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 530, 714
Choate v. Trapp, 224 U.S. 665 766
Chrapliwy v. Uniroyal, Inc., 670 F. 2d 760 251
Ciechon v. City of Chicago, 686 F. 2d 511 239, 251
Cincinnati Bar Assn. v. Fennell, 63 Ohio St. 2d 113 672
Citibank, N. A. v. Andros, 666 F. 2d 1192 347, 349
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 508
City. See name of city.

Page

Clark v. Musick, 623 F. 2d 89 271, 275
Clark v. United States, 289 U.S. 1 354
Clark v. Ziedonis, 368 F. Supp. 544 16
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 103, 822, 832
Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 273, 623
Cohens v. Virginia, 6 Wheat. 264 843
Coker v. Georgia, 433 U.S. 584 14, 1084
Cole v. Arkansas, 333 U.S. 196 673
Colorado v. Nunez, 465 U.S. 324 157
Committee on Professional Ethics and Conduct of Ohio State Bar Assn. v. Humphrey, 355 N. W. 2d 565 679
Commonwealth. See also name of Commonwealth.
Commonwealth v. Klein, 372 Mass. 823 17
Community Communications Co. v. Boulder, 455 U.S. 40 37, 40, 43, 45, 46, 65
Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 664
Connally v. General Construction Co., 269 U.S. 385 665
Connecticut v. Johnson, 460 U.S. 73 325, 326, 1144, 1145
Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 508, 510, 617, 619, 622
Consolidated Rail Corp. v. Ahnapee & W. R. Co., 471 U.S. 1069 1072
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 96
Consumers Union of United States, Inc. v. General Signal Corp., 724 F. 2d 1044 556
Continental Co. v. Union Carbide, 370 U.S. 690 71, 72
Coolidge v. New Hampshire, 403 U.S. 443 397, 403

Page

Cooper v. California, 386 U.S. 58 390
Copeland v. Marshall, 205 U.S. App. D. C. 390 253
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 1008
Corn v. Zant, 708 F. 2d 549 324
Cottle v. Wainwright, 493 F. 2d 397 623
County. See name of county.
Cowles v. Mercer County, 7 Wall. 118 835
Crain v. United States, 162 U.S. 625 136
Cramp v. Board of Public Instruction, 368 U.S. 278 666
Cunningham v. Ellington, 323 F. Supp. 1072 30
Cupp v. Murphy, 412 U.S. 291 8
Cupp v. Naughten, 414 U.S. 141 315, 319, 328, 332, 336, 337, 341, 342
Czajka v. Hickman, 703 F. 2d 317 1079
Daily v. Morgan, 701 F. 2d 496 692, 693
Davis v. Mississippi, 394 U.S. 721 8
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 756
Dealy v. United States, 152 U.S. 539 136
De Canas v. Bica, 424 U.S. 351 717, 756
Delaney Corp. v. Bonne Bell, Inc., 525 F. 2d 296 1009
DeLaurentiis v. Haig, 686 F. 2d 192 168
Delaware v. Prouse, 440 U.S. 648 8, 10
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 119
DelCostello v. Teamsters, 462 U.S. 151 125, 270, 1076, 1077
Der-Rong Chour v. INS, 578 F. 2d 464 450
DeVargas v. New Mexico, 97 N. M. 563 263–266, 271

Page

Diaz v. United States, 223 U.S. 442 791, 792, 796, 798
Dickey v. Florida, 398 U.S. 30 1029
Discipline of Appert & Pyle, In re, 315 N. W. 2d 204 668
Diversified Industries, Inc. v. Meredith, 572 F. 2d 596 349
Dix v. Newsome, 584 F. Supp. 1052 1081
Dodge v. Ford Motor Co., 204 Mich. 459 349
Doe v. Anrig, 561 F. Supp. 121 365, 366
Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 303
Doran v. Salem Inn, Inc., 422 U.S. 922 712
Dorszynski v. United States, 418 U.S. 424 508, 617, 619
Douglas v. Alabama, 380 U.S. 415 414, 418
Douglas v. Buder, 412 U.S. 430 614, 621
Dove v. United States, 423 U.S. 325 156–158
Dowd Box Co. v. Courtney, 368 U.S. 502 209
Ducker, In re, 134 F. 43 355
Duke Power Co. v. Greenwood County, 299 U.S. 259 155
Duncan v. Louisiana, 391 U.S. 145 278
Durham v. United States, 401 U.S. 481 157, 158
Dutton v. Evans, 400 U.S. 74 413, 415
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 53, 55, 80
Eddings v. Oklahoma, 455 U.S. 104 1031, 1033–1037, 1040, 1045, 1046, 1048, 1049, 1086
Eddmonds v. Illinois, 469 U.S. 894 1044
Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F. 2d 105 1008
E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F. 2d 296 1009

Page

Electrical Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 756
Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 270
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 105
Engle v. Koehler, 707 F. 2d 241 1144
Enmund v. Florida, 458 U.S. 782 14, 1121–1123
EPA v. Mink, 410 U.S. 73 167, 189
Erie R. Co. v. Thompkins, 304 U.S. 64 850
Ernst & Ernst v. Hochfelder, 425 U.S. 185 695
Escambia County v. McMillan, 466 U.S. 48 120
Escondido Mut. Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765 851
Estate. See name of estate.
Estelle v. Gamble, 429 U.S. 97 273, 1083, 1085
Estes v. Tuscaloosa County, 696 F. 2d 898 239
Euclid v. Ambler Realty Co., 272 U.S. 365 104
Eutzy v. Florida, 471 U.S. 1045 1031, 1038
Eversole v. Metropolitan Life Ins. Co., 500 F. Supp. 1162 742
Ex parte. See name of party.
Farmer v. Carpenters, 430 U.S. 290 206, 207
Federal Crop Ins. Corporation v. Merrill, 332 U.S. 380 122
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 96, 103
FEC v. National Conservative Political Action Committee, 470 U.S. 480 582
FPC v. Tuscarora Indian Nation, 362 U.S. 99 175
FTC v. Colgate-Palmolive Co., 380 U.S. 374 649, 653, 659
Fendler v. Morosco, 253 N. Y. 281 552

Page

Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141 713
First National Bank of Chicago v. Richardson, 484 F. 2d 1369 1060
Fisher v. United States, 425 U.S. 391 348
Fitzgibbon v. CIA, 578 F. Supp. 704 176
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 273
FLM Collision Parts, Inc. v. Ford Motor Co., 543 F. 2d 1019 1008
Florida v. Meyers, 466 U.S. 380 458
Florida v. Rodriguez, 469 U.S. 1 396, 458
Florida v. Royer, 460 U.S. 491 8
Florida Bar v. Schreiber, 420 So. 2d 599 677
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 713
Florida Power & Light Co. v. Lorion, 470 U.S. 729 187
Folsom v. Marsh, 9 F. Cas. 342 550
Ford v. United States, 273 U.S. 593 136–139, 141, 144, 145
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 284
Fornaris v. Ridge Tool Co., 400 U.S. 41 471
Fort v. Brinkley, 87 Ark. 400 226
Foundation for North American Wild Sheep v. United States Dept. of Agriculture, 681 F. 2d 1172 1059, 1060
Francis v. Franklin, 471 U.S. 307 1122, 1144
Francis v. Resweber, 329 U.S. 459 1084, 1085, 1091, 1093
Franklin v. State, 245 Ga. 141 312
Frazier v. Cupp, 394 U.S. 731 415
Frederiksen v. Poloway, 637 F. 2d 1147 705

Page

Friedman v. Rogers, 440 U.S. 1 638, 664, 677
Fuentes v. Shevin, 407 U.S. 67 486
Fulton v. Loew's, Inc., 114 F. Supp. 676 270
Furman v. Georgia, 408 U.S. 238 1080, 1084, 1086
Furtado v. Bishop, 604 F. 2d 80 1079
Gagnon v. Scarpelli, 411 U.S. 778 511, 512, 611–615, 617–619
Gannaway, Ex parte, 448 So. 2d 413 396
Garcia v. United States, 469 U.S. 70 167, 700
Gardels v. CIA, 223 U.S. App. D. C. 88 168, 179
Gardiner v. A. H. Robins Co., 747 F. 2d 1180 640
Garmon v. Foust, 668 F. 2d 400 275
Garner v. Stephens, 460 F. 2d 1144 274
Garner v. Teamsters, 346 U.S. 485 208, 751
Garner v. Wolfinbarger, 430 F. 2d 1093 354
Garrison v. Louisiana, 379 U.S. 64 582, 605
Gashgai v. Leibowitz, 703 F. 2d 10 282
Gault, In re, 387 U.S. 1 671
Gemsco, Inc. v. Walling, 324 U.S. 244 302
George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547 1009
Georgia v. Pennsylvania R. Co., 324 U.S. 439 55, 56, 68–70, 79, 80
Gernstein v. Pugh, 420 U.S. 103 13
Gertz v. Robert Welch, Inc., 418 U.S. 323 561, 1128–1130
Giant Food, Inc. v. Scherry, 51 Md. App. 586 18
Gibbons v. Ogden, 9 Wheat. 1 208, 712
Giglio v. United States, 405 U.S. 150 1029

Page

Gillette Co. v. Miner, 459 U.S. 86 157
Gilmere v. City of Atlanta, 737 F. 2d 894 820
Godfrey v. Francis, 251 Ga. 652 1081
Godfrey v. Georgia, 446 U.S. 420 1044
Goldberg v. Kelly, 397 U.S. 254 508, 512, 617
Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 293, 296, 301
Golden v. Garafalo, 678 F. 2d 1139 692, 697, 705
Goldfarb v. Virginia State Bar, 421 U.S. 773 45, 53, 58, 60, 61, 63, 64, 67, 71–73, 676
Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 552
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 470
Goto v. Lane, 265 U.S. 393 138
Gough v. Rossmoor Corp., 585 F. 2d 381 1008
Gould v. Ruefenacht, 471 U.S. 701 695, 696
Graham v. West Virginia, 224 U.S. 616 793
Grand Jury Investigation, In re, 599 F. 2d 1224 349
Grayned v. City of Rockford, 408 U.S. 104 665
Grazing Fields Farm v. Goldschmidt, 626 F. 2d 1068 1059
Green v. United States, 355 U.S. 184 795
Greene v. McElroy, 360 U.S. 474 672
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 508, 613, 617, 619
Gregg v. Georgia, 428 U.S. 153 1009, 1026, 1030, 1031, 1037, 1044, 1046, 1061, 1080, 1081, 1083, 1084, 1093, 1094, 1111, 1113, 1120, 1121, 1132, 1143, 1144
Griffin v. Breckenridge, 403 U.S. 88 272

Page

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 93
Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 55, 68, 743, 744
Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566 217
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 477
Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1 1109, 1110
Haig v. Agee, 453 U.S. 280 175
Halkin v. Helms, 194 U.S. App. D. C. 82 178
Hall v. United States, 168 U.S. 632 136, 138
Hallie v. City of Chippewa Falls, 105 Wis. 2d 533 44
Hallie v. Eau Claire, 471 U.S. 34 57, 62, 64, 67
Halperin v. CIA, 203 U.S. App. D. C. 110 168
Hamilton v. City of Overland Park, 730 F. 2d 613 265, 286
Hamling v. United States, 418 U.S. 87 442
Hanly v. Kleindienst, 471 F. 2d 823 1059, 1060
Hanson v. Denckla, 357 U.S. 235 474, 475, 480–482, 486
Harlow v. Fitzgerald, 457 U.S. 800 812
Harris v. McRae, 448 U.S. 297 529
Harris v. Rivera, 454 U.S. 339 510, 613, 617, 619
Harrison v. NAACP, 360 U.S. 167 248
Hawkins v. Barney's Lessee, 5 Pet. 457 106, 107
Hawks v. Charlemont, 107 Mass. 414 837
Hayes v. Florida, 470 U.S. 811 8
Hayes v. Thompson, 637 F. 2d 483 495, 511
Hebert v. Louisiana, 272 U.S. 312 278
Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 90, 111, 112

Page

Heckler v. Mathews, 465 U.S. 728 92
Heiney v. Florida, 469 U.S. 920 1045
Heitland v. INS, 551 F. 2d 495 449
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 472, 473, 475
Hemingway's Estate v. Random House, Inc., 23 N. Y. 2d 341 559
Hemingway's Estate v. Random House, Inc., 53 Misc. 2d 462 596
Henderson's Tobacco, 11 Wall. 652 765
Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 368, 373
Hensley v. Eckerhart, 461 U.S. 424 238–242, 244, 250, 253, 254, 258, 259
Hernandez Jimenez v. Calero Toledo, 604 F. 2d 99 1025
Hess v. Reynolds, 113 U.S. 73 765
Hewitt v. Helms, 459 U.S. 460 508, 517, 617–619
Hibbert v. INS, 554 F. 2d 17 450
Hickel v. Oil Shale Corp., 400 U.S. 48 100–102, 126, 127
Hicks v. Miranda, 422 U.S. 332 459, 460
Hilker v. Western Automobile Ins. Co., 204 Wis. 1 216
Hill v. United States, 368 U.S. 424 457
Hines v. Board of Ed. of Covington, 667 F. 2d 564 274
Hines v. Davidowitz, 312 U.S. 52 713, 719, 756
Hobson v. Wilson, 237 U.S. App. D. C. 219 1076
Hoehling v. Universal City Studios, Inc., 618 F. 2d 972 548, 582, 583
Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 668

Page

Holloway v. Moser, 193 N. C. 185 12, 14, 15
Hoopeston Canning Co. v. Cullen, 318 U.S. 313 476, 478, 742
Horacek v. Thone, 710 F. 2d 496 239
Howard v. Lockheed-Georgia Co., 742 F. 2d 612 1077
Huffman v. Pursue, Ltd., 420 U.S. 592 247
Hughes v. Rowe, 449 U.S. 5 495
Hughes v. United States, 701 F. 2d 56 1024
Hynes v. Mayor of Oradell, 425 U.S. 610 665
Illinois v. City of Milwaukee, 406 U.S. 91 850
Illinois v. Gates, 462 U.S. 213 401
Illinois v. Somerville, 410 U.S. 458 796
Imbler v. Pachtman, 424 U.S. 409 834, 838
INS v. Bagamasbad, 429 U.S. 24 449
INS v. Jong Ha Wang, 450 U.S. 139 446, 449, 451, 452
INS v. Phinpathya, 464 U.S. 183 449, 452
Ingraham v. Wright, 430 U.S. 651 273
Ingram v. Kumar, 585 F. 2d 566 1024
In re. See name of party or proceeding.
Insurance Comm'r v. Metropolitan Life Ins. Co., 296 Md. 334 742
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 472
Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921 742
International News Service v. Associated Press, 248 U.S. 215 556, 581, 605
International Shoe Co. v. Washington, 326 U.S. 310 464, 472, 474–476, 478, 479
ICC v. American Trucking Assns., Inc., 467 U.S. 354 77

Page

ICC v. Brae Corp., 471 U.S. 1069 1072, 1073
ICC v. Coal Exporters Assn. of United States, Inc., 471 U.S. 1072 1071
Iowa State Univ. Research Foundation, Inc. v. American Broadcasting Cos., 621 F. 2d 57 550, 558, 568
Itel Capital Corp. v. Cups Coal Co., 707 F. 2d 1253 1025
Jackson v. City of Bloomfield, 731 F. 2d 652 266
Jackson v. Denno, 378 U.S. 368 325
Jackson v. Lamphire, 3 Pet. 280 116
Jamison v. State, 455 So. 2d 1112 396
Jay v. Boyd, 351 U.S. 345 446
Jeffers v. United States, 432 U.S. 137 777, 794, 796–798, 803, 804, 807
Jenkins v. McKeithen, 395 U.S. 411 143
Johnson v. Municipality No. One, 5 La. Ann. 100 837
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 268, 269, 271, 281
Johnson v. Robison, 415 U.S. 361 92
Johnson v. State, 173 Tenn. 134 5, 24
Jones v. Marshall, 528 F. 2d 132 28
Jones v. Rath Packing Co., 430 U.S. 519 713, 715, 717, 740
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 668
Juidice v. Vail, 430 U.S. 327 856
Julian v. Randazzo, 380 Mass. 391 17
Jurek v. Texas, 428 U.S. 262 1036, 1037, 1042, 1047
Kansas Indians, The, 5 Wall. 737 764
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 715
Katz v. United States, 389 U.S. 347 401

Page

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 470, 472, 473, 475–477, 480, 482, 483, 486
Kemmler, In re, 136 U.S. 436 1081–1084, 1086, 1093
Kennerly v. District Court of Mont., 400 U.S. 423 855
Kent v. United States, 383 U.S. 541 512
Ker v. California, 374 U.S. 23 8
Kilgore v. City of Mansfield, 679 F. 2d 632 282
King v. Winkler, 673 F. 2d 342 705
Kirk v. Cronvich, 629 F. 2d 404 1024
Kleppe v. New Mexico, 426 U.S. 529 104
Kolender v. Lawson, 461 U.S. 352 666
Kortum v. Alkire, 69 Cal. App. 3d 325 16
Kosikowski v. Bourne, 659 F. 2d 105 271
Kotteakos v. United States, 328 U.S. 750 135, 138
Kranzush v. Badger State Mut. Casualty Co., 103 Wis. 2d 56 217
Kulko v. California Superior Court, 436 U.S. 84 471, 473, 475, 482, 486
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 38–40, 42, 44–46, 57, 59, 60, 64
Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 445 U.S. 907 478
Lakewood Pipe of Texas, Inc. v. Rubaii, 379 So. 2d 475 471
Lamb v. Jernigan, 683 F. 2d 1332 320, 341
Lamoureux v. Superintendent, Massachusetts Correctional Institution, Walpole, 390 Mass. 409 501
Landreth Timber Co. v. Landreth, 471 U.S. 681 704, 705

Page

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F. 2d 485 586
Langone v. Connolly, 460 U.S. 1057 460, 461
Languirand v. Hayden, 717 F. 2d 220 814, 820
Latino Project, Inc. v. City of Camden, 701 F. 2d 262 239
Leary v. United States, 395 U.S. 6 323
Leblanc v. INS, 715 F. 2d 685 450
Lee v. Runge, 404 U.S. 887 582
Leese v. Doe, 182 N. J. Super. 318 283
Lemon v. Kurtzman, 403 U.S. 602 305
Lessig v. Tidewater Oil Co., 327 F. 2d 459 1007, 1008
Limpus v. London General Omnibus Co., 1 Hurl. & C. 526 836
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 659, 670
Lockett v. Ohio, 438 U.S. 586 1031, 1033–1037, 1040, 1045, 1046, 1048, 1049
Long Beach Police Officers Assn. v. Long Beach, 61 Cal. App. 3d 364 16
Los Angeles v. Lyons, 461 U.S. 95 31
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 1084, 1085, 1091, 1093
Louisville, C. & C. R. Co. v. Letson, 2 How. 497 835
Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F. 2d 732 1059
Lugar v. Edmonson Oil Co., 457 U.S. 922 273
Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 212, 749–753
Maine v. Thiboutot, 448 U.S. 1 278
Malone v. White Motor Corp., 435 U.S. 497 208, 209, 212, 213, 747, 748, 757
Mandel v. Bradley, 432 U.S. 173 460

Page

Marbury v. Madison, 1 Cranch 137 843
Marine Bank v. Weaver, 455 U.S. 551 686, 688–690, 696, 698
Marks v. Prattco, Inc., 607 F. 2d 1153 1025
Marshall v. Elks Club of Huntington, Inc., 444 F. Supp. 957 297
Marshall v. Lonberger, 459 U.S. 422 415
Marshall v. Woods Hole Oceanographic Institution, 458 F. Supp. 709 297
Martin v. Commonwealth, 221 Va. 436 1081
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 461
Massachusetts v. Upton, 466 U.S. 727 458, 503
Mathews v. Eldridge, 424 U.S. 319 512, 618
Mattis v. Schnarr, 547 F. 2d 1007 18, 19
Mazer v. Stein, 347 U.S. 201 558
McCausland v. Mason County Bd. of Ed., 649 F. 2d 278 278
McClaine v. Rankin, 197 U.S. 154 267
McClam v. Barry, 225 U.S. App. D. C. 124 282
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 766
McCorquodale v. Balkcom, 525 F. Supp. 408 1081
McCray v. Illinois, 386 U.S. 300 515
McDonald v. Williams, 174 U.S. 397 357
McElvaine v. Brush, 142 U.S. 155 1082
McGautha v. California, 402 U.S. 183 1033
McGee v. International Life Ins. Co., 355 U.S. 220 473–479, 483, 484, 486
McGhee v. Ogburn, 707 F. 2d 1312 274
McGrath v. Zenith Radio Corp., 651 F. 2d 458 706
McInerney v. Berman, 621 F. 2d 20 341

Page

McKay v. Hammock, 730 F. 2d 1367 266, 286
McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 862
McLucas v. DeChamplain, 421 U.S. 21 92
M'Cluny v. Silliman, 3 Pet. 270 280
McMann v. Richardson, 397 U.S. 759 155
McMann v. Ross, 396 U.S. 118 155, 158
McNeese v. Board of Ed., 373 U.S. 668 272, 279
McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc., 698 F. 2d 676 270
Meek v. Pittenger, 421 U.S. 349 305
Meeropol v. Nizer, 560 F. 2d 1061 566, 568
Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686 562
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 198, 200, 851, 856
Mescalero Apache Tribe v. Jones, 411 U.S. 145 765, 852
Metromedia, Inc. v. San Diego, 453 U.S. 490 659
Metropolitan Life Ins. Co. v. Whaland, 119 N. H. 894 742
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 650, 651, 657
Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 231, 232
Michigan v. Long, 463 U.S. 1032 389, 397, 398, 502, 522, 700
Michigan v. Summers, 452 U.S. 692 8
Michigan United Food & Commercial Workers Union v. Baerwaldt, 572 F. Supp. 943 742
Middlesex County Ethics Committee v. Garden State Bar Assn., 457 U.S. 423 639

Page

Miller v. California, 418 U.S. 915 460
Miller v. Casey, 235 U.S. App. D. C. 11 168
Miller v. City of Overland Park, 231 Kan. 557 282, 286
Miller v. Pate, 386 U.S. 1 1028
Miller v. Schoene, 276 U.S. 272 107
Miller v. Universal City Studios, Inc., 650 F. 2d 1365 587
Miller v. Vitek, 437 F. Supp. 569 511
Mills v. Board of Ed. of District of Columbia, 348 F. Supp. 866 373
Mills Music, Inc. v. Snyder, 469 U.S. 153 552
Milnarik v. M–S Commodities, Inc., 457 F. 2d 274 697
Mine Workers v. Pennington, 381 U.S. 657 53, 55, 80
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 700
Minnesota v. Heckler, 718 F. 2d 852 528
Mismash v. Murray City, 730 F. 2d 1366 265, 286
Missouri v. Hunter, 459 U.S. 359 779, 793
Mitchell v. Hopper, 538 F. Supp. 77 1081
Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 296
Mitchell v. Pilgrim Holiness Church Corp., 210 F. 2d 879 297
Mitchum v. Foster, 407 U.S. 225 272, 279
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 95
Moe v. Salish & Kootenai Tribes, 425 U.S. 463 761, 765
Monell v. New York City Dept. of Social Services, 436 U.S. 658 5, 6, 22, 810, 812, 817–825, 827–833, 835, 839, 841–844
Monroe v. Pape, 365 U.S. 167 272, 277, 279, 818, 819, 834, 835, 838, 840, 842
Montana v. United States, 450 U.S. 544 851

Page

Moore v. Illinois, 408 U.S. 786 1029
Moore v. McComsey, 313 Pa. Super. 264 282
Moore v. Stamps, 507 S. W. 2d 939 615
Moore Ice Cream Co. v. Rose, 289 U.S. 373 96
Morgan Walton Properties, Inc. v. International City Bank & Trust Co., 404 So. 2d 1059 1110
Morissette v. United States, 342 U.S. 246 313, 423, 425, 426, 432, 439, 443
Morrissey v. Brewer, 408 U.S. 471 512, 611–615, 617, 619, 621
Morton v. Mancari, 417 U.S. 535 766, 856
Motor Coach Employees v. Lockridge, 403 U.S. 274 208, 757
Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 622
Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 225, 228, 232
Mourning v. Family Publications Service, Inc., 411 U.S. 356 110
Moviecolor Limited v. Eastman Kodak Co., 288 F. 2d 80 270
Mullaney v. Wilbur, 421 U.S. 684 313, 314, 317–319, 327, 333
Munilla v. Perez-Cobo, 335 So. 2d 584 1110
Myers v. Mail & Express Co., 36 Copyright Off. Bull. 478 587
Napue v. Illinois, 360 U.S. 264 1027, 1028
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 303
National Comm'n on Egg Nutrition v. FTC, 570 F. 2d 157 645, 676
National Comm'n on Law Enforcement and Social Justice v. CIA, 576 F. 2d 1373 168, 178, 179
National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 472, 486

Page

National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378 67
NLRB v. Amax Coal Co., 453 U.S. 322 98
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 298, 305
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 208
NLRB v. Nash-Finch Co., 404 U.S. 138 750
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 166
National Railroad Passenger Corporation v. Atchison, T. & S. F. R. Co., 470 U.S. 451 105
Natural Resources Defense Council, Inc. v. EPA, 703 F. 2d 700 251
Neal v. Brim, 506 F. 2d 6 248
Nelson v. Commissioner of Correction, 390 Mass. 379 501
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 200, 856
New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 42, 63
New Orleans v. Dukes, 427 U.S. 297 712
Newport v. Fact Concerts, Inc., 453 U.S. 247 277, 825, 838, 843
New York Dept. of Social Services v. Dublino, 413 U.S. 405 717
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 240, 246, 248, 249, 252
New York Indians, The, 5 Wall. 761 764
New York Life Ins. Co. v. Hardison, 199 Mass. 190 728
New York Telephone Co. v. New York Labor Dept., 440 U.S. 519 212, 749–753
New York Times Co. v. Sullivan, 376 U.S. 254 582, 1128
New York Times Co. v. United States, 403 U.S. 713 556, 581, 591
Nichols v. Universal Pictures Corp., 45 F. 2d 119 583

Page

North Carolina v. Pearce, 395 U.S. 711 512, 777
Northcross v. Board of Ed., 611 F. 2d 624 248
Northern Securities Co. v. United States, 193 U.S. 197 72
North Laramie Land Co. v. Hoffman, 268 U.S. 276 108
Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 95
November v. Time, Inc., 13 N. Y. 2d 175 1129
Nucleus of Chicago Homeowners Assn. v. Lynn, 524 F. 2d 225 1059
NYSA–ILA Vacation & Holiday Fund v. Waterfront Comm'n of N. Y. Harbor, 732 F. 2d 292 116
Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 269
Ohio v. Johnson, 467 U.S. 493 795
Ohralik v. Ohio State Bar Assn., 436 U.S. 447 629, 635, 637, 638, 641, 642, 644, 664, 670, 674, 676–679
Oklahoma v. Castleberry, 471 U.S. 146 396
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 853–855
Oliver, In re, 333 U.S. 257 509, 671
Oneida County v. Oneida Indian Nation, 470 U.S. 226 766, 850
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 764
On Lee v. United States, 343 U.S. 747 816
O. P. M. Leasing Services, Inc., In re, 670 F. 2d 383 347, 349
O. P. M. Leasing Services, Inc., In re, 13 B. R. 54 350
Oregon v. Hass, 420 U.S. 714 522
Osborn v. University Society, Inc., 378 So. 2d 873 471
O'Stricker v. Jim Walter Corp., 4 Ohio St. 3d 84 641
O'Sullivan v. Felix, 233 U.S. 318 266, 280
Owen v. City of Independence, 445 U.S. 622 7, 819, 825, 828, 831–833, 843

Page

Owens v. Haas, 601 F. 2d 1242 814
Oyler v. Boles, 368 U.S. 448 793
Pacific & Southern Co. v. Duncan, 744 F. 2d 1490 560, 569
Palmer v. Thompson, 403 U.S. 217 225, 231, 232
Papachristou v. City of Jacksonville, 405 U.S. 156 666
Parker v. Brown, 317 U.S. 341 36, 38, 39, 44, 50, 53–58, 60, 61–64, 66, 71–73, 75
Parker v. Matthews, 411 F. Supp. 1059 247
Parker v. Randolph, 442 U.S. 62 324, 415
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 740
Patsy v. Florida Bd. of Regents, 457 U.S 496 247, 252, 279
Patterson v. Commonwealth, 222 Va. 653 1026, 1027, 1029
Patterson v. New York, 432 U.S. 197 313, 314, 317, 318
Patterson v. South Carolina, 471 U.S. 1036 1031, 1046, 1048
Patterson v. State, 239 Ga. 409 315, 320
Pauk v. Board of Trustees of City Univ. of N. Y., 654 F. 2d 856 271, 275
Paul v. Davis, 424 U.S. 693 669
Payne v. Virginia, 468 U.S. 1062 457
Payton v. New York, 445 U.S. 573 13, 29, 32, 395, 408
Peabody Coal Co. v. Lowis, 708 F. 2d 266 116
Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 373
Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717 105
People v. Ceballos, 12 Cal. 3d 470 16
People v. Chestnut, 151 Cal. App. 3d 721 406
People v. Corr, 682 P. 2d 20 396
People v. Darden, 34 N. Y. 2d 177 515

Page

People v. Gordon, 156 Cal. App. 3d 74 406
People v. Morrongiello, 145 Cal. App. 3d 1 404
Perez v. United States, 402 U.S. 146 862
Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 473
Photovest Corp. v. Fotomat Corp., 606 F. 2d 704 1008
Pierson v. Ray, 386 U.S. 547 277, 838
Pinkerton v. United States, 328 U.S. 640 778
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 96
Pippin v. State, 197 Ala. 613 226
Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 638, 645
Pokorny v. Costle, 464 F. Supp. 1273 1059
Polish National Alliance v. NLRB, 322 U.S. 643 752
Polite v. Diehl, 507 F. 2d 119 274, 282
Polk County v. Dodson, 454 U.S. 312 820, 831
Ponte v. Real, 471 U.S. 491 617–619
Posadas v. National City Bank, 296 U.S. 497 75
Powell v. Alabama, 287 U.S. 45 278
Powell v. United States Cartridge Co., 339 U.S. 497 296
Prellwitz v. Berg, 578 F. 2d 190 622
Press Publishing Co. v. Monroe, 73 F. 196 552
Primus, In re, 436 U.S. 412 629, 669
Procunier v. Navarette, 434 U.S. 555 844
Providence Road Community Assn. v. EPA, 683 F. 2d 80 1058, 1060
Public Service Comm'n v. Batesville Telephone Co., 284 U.S. 6 471

Page

Pullman-Standard v. Swint, 456 U.S. 273 229
Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165 852
Quinto v. Legal Times of Washington, Inc., 506 F. Supp. 554 558
Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 249
Rakas v. Illinois, 439 U.S. 128 393
Ray v. Atlantic Richfield Co., 435 U.S. 151 1141–1143
Redd v. Lambert, 674 F. 2d 1032 239
Reiter v. Sonotone Corp., 442 U.S. 330 530
Reneau v. State, 70 Tenn. 720 12
Republic Steel Corp. v. Maddox, 379 U.S. 650 205, 220, 221
Retail Clerks v. Schermerhorn, 375 U.S. 96 208, 747
Revere v. Massachusetts General Hospital, 463 U.S. 239 502
Rewis v. United States, 401 U.S. 808 427
Rice v. Rehner, 463 U.S. 713 771, 851
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 713, 715, 719
Richards v. United States, 369 U.S. 1 95
Richardson v. Ramirez, 418 U.S. 24 233
Richmond Co. v. United States, 275 U.S. 331 1077
Ringrose v. Engelberg Huller Co., 692 F. 2d 403 1024
R. M. J., In re, 455 U.S. 191 629, 634–641, 644, 651, 657–660, 664, 667, 669, 675, 677
Roberts v. State, 14 Mo. 138 12
Robertson v. Wegmann, 436 U.S. 584 281, 284, 285
Robinson v. California, 370 U.S. 660 1083
Rogers v. Lodge, 458 U.S. 613 228
Rogers v. United States, 367 F. 2d 998 1074

Page

Rogers v. United States, 575 F. Supp. 4 92
Rokeach v. Avco Embassy Pictures Corp., 197 USPQ 155 581, 586
Romero v. International Terminal Operating Co., 358 U.S. 354 850
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 856
Rose v. State, 431 N. E. 2d 521 16
Rosemont Enterprises, Inc. v. Random House, Inc., 366 F. 2d 303 581, 587
Rosen v. United States, 161 U.S. 29 442
Ross v. Kemp, 756 F. 2d 1483 1123
Roviaro v. United States, 353 U.S. 53 523
Royce v. Commissioner of Correction, 390 Mass. 425 501
Roy Export Co. Establishment v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137 558, 562, 565, 568
Ruffalo, In re, 390 U.S. 544 653, 655, 666, 672
Ruiz v. State, 265 Ark. 875 1081
Runyon v. McCrary, 427 U.S. 160 267, 278
Russell v. United States, 369 U.S. 749 135, 140, 143
Rutherford Food Corp. v. McComb, 331 U.S. 722 294
Salinger v. United States, 272 U.S. 542 136–138, 141, 144, 145
Salisbury v. United States, 223 U.S. App. D. C. 243 181
Sampson v. Murray, 415 U.S. 61 856
Sanders v. John Nuveen & Co., 463 F. 2d 1075 699
San Diego Building Trades Council v. Garmon, 359 U.S. 236 207, 213, 214, 748, 749
Sandstrom v. Montana, 442 U.S. 510 309, 312–319, 323–327, 329, 332, 333, 338, 342, 1122, 1144, 1145
Santa Clara Pueblo v. Martinez, 436 U.S. 49 200, 849, 851

Page

Sauls v. Hutto, 304 F. Supp. 124 17
Save Our Ten Acres v. Kreger, 472 F. 2d 463 1050, 1060
Scarborough v. United States, 431 U.S. 563 859
Schieber v. INS, 171 U.S. App. D. C. 312 450
Schmerber v. California, 384 U.S. 757 8
Schnapper v. Foley, 215 U.S. App. D. C. 59 560
Schroeder v. William Morrow & Co., 566 F. 2d 3 547
Schumann v. McGinn, 307 Minn. 446 11, 14
Schware v. Board of Bar Examiners of N. M., 353 U.S. 232 677
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 62
Schweiker v. Wilson, 450 U.S. 221 536
Scordilis v. Drobnicki, 443 So. 2d 411 471
Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 668
SEC v. Chenery Corp., 332 U.S. 194 518
SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 686, 688, 689, 691, 694
SEC v. National Securities, Inc., 393 U.S. 453 744
SEC v. W. J. Howey Co., 328 U.S. 293 684, 685, 687, 689–693
Securities Industry Assn. v. Board of Governors, FRS, 468 U.S. 137 694
Segura-Viachi v. INS, 538 F. 2d 91 449
Sena School Bus Co. v. Santa Fe Bd. of Ed., 677 P. 2d 639 282
Shaffer v. Heitner, 433 U.S. 186 472, 474, 482
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 732, 737–739, 745, 746
Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 567
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49 565

Page

Shelley v. Kraemer, 334 U.S. 1 839
Sherman v. Field Clinic, 74 Ill. App. 3d 21 1109
Shows v. M/V Red Eagle, 695 F. 2d 114 1079
Sierra Club v. Peterson, 230 U.S. App. D. C. 352 1059
Silver v. New York Stock Exchange, 373 U.S. 341 57, 74
Singleton v. Commissioner, 439 U.S. 940 1140
Skrine v. State, 244 Ga. 520 315
Slaughter-House Cases, 16 Wall. 36 756
Smith v. California, 361 U.S. 147 666
Smith v. Cremins, 308 F. 2d 187 275
Smith v. Evening News Assn., 371 U.S. 195 211
Smith v. General Motors Corp., 747 F. 2d 372 1077
Smith v. Illinois, 469 U.S. 91 457
Smith v. Robinson, 468 U.S. 992 240, 247, 249
Smith v. United States, 360 U.S. 1 143
Snepp v. United States, 444 U.S. 507 175–177
Solem v. Helm, 463 U.S. 277 21, 26, 27
Songer v. Wainwright, 469 U.S. 1133 1035
Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 546, 549, 550, 552, 562, 568, 580, 588, 591, 592, 594, 596, 597, 600
South Carolina v. Katzenbach, 383 U.S. 301 500
South Dakota v. Neville, 459 U.S. 553 503
South Dakota v. Opperman, 428 U.S. 364 391, 392
Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 39, 46
Southland Royalty Co. v. Navajo Tribe of Indians, 715 F. 2d 486 197

Page

Spaziano v. Florida, 468 U.S. 447 28, 1045
Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F. 2d 256 1008
Speiser v. Randall, 357 U.S. 513 313
Spevack v. Klein, 385 U.S. 511 671
Spinkellink v. Wainwright, 578 F. 2d 582 1081
Springfield Township School Dist. v. Knoll, 471 U.S. 288 286
Standard Oil Co. v. United States, 221 U.S. 1 98
Stanley v. Columbia Broadcasting System, Inc., 35 Cal. 2d 653 552
State. See also name of State.
State v. Bryant, 65 N. C. 327 12
State v. Burkholder, 12 Ohio St. 3d 205 396
State v. Caponi, 12 Ohio St. 3d 302 396
State v. Foster, 60 Ohio Misc. 46 16
State v. Koon, 278 S. C. 528 1038–1041
State v. Lepley, 343 N. W. 2d 41 398
State v. Million, 120 Ariz. 10 397
State v. Mower, 407 A. 2d 729 398
State v. Patterson, 278 S. C. 319 1038
State v. Sardo, 112 Ariz. 509 398
State v. Shaw, 273 S. C. 194 1081
State v. Smith, 127 Iowa 534 12, 15
State v. Von Bulow, 475 A. 2d 995 396
Steadman v. SEC, 450 U.S. 91 169
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 219
Stevens v. Morse, 185 Wis. 500 1129
Stevens Linen Associates, Inc. v. Mastercraft Corp., 656 F. 2d 11 567

Page

Stirone v. United States, 361 U.S. 212 135, 138–140, 143
Stoner v. California, 376 U.S. 483 408
Storey v. State, 71 Ala. 329 12
Stromberg v. California, 283 U.S. 359 323, 822, 833, 1122
Stuckett v. U. S. Postal Service, 469 U.S. 898 1024
Suid v. Newsweek Magazine, 503 F. Supp. 146 581, 586
Sullivan v. Dugger, 721 F. 2d 719 1081
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 269
Summit Valley Industries, Inc. v. Carpenters, 456 U.S. 717 245
Sumner v. Mata, 455 U.S. 591 624
Sunal v. Large, 332 U.S. 174 457
Sung Ja Oum v. INS, 613 F. 2d 51 450
Sutter v. Groen, 687 F. 2d 197 697, 700, 705
Sweeney & Sons, Inc. v. Texaco, Inc., 637 F. 2d 105 1008
Swift & Co. v. United States, 196 U.S. 375 1007
Taggart v. Weinacker's, Inc., 397 U.S. 223 757
Talamini v. Allstate Ins. Co., 470 U.S. 1067 1110
Tcherepnin v. Knight, 389 U.S. 332 689, 690, 692
Teamsters v. Daniel, 439 U.S. 551 685, 691
Teamsters v. Lucas Flour Co., 369 U.S. 95 209–212, 219, 220
Teamsters v. Morton, 377 U.S. 252 212, 750, 752
Teamsters v. Oliver, 358 U.S. 283 753
Tedder v. State, 322 So. 2d 908 1045, 1046
Tennessee v. Garner, 471 U.S. 1 817
Terminal Railroad Assn. v. Railroad Trainmen, 318 U.S. 1 758
Terry v. Anderson, 95 U.S. 628 104, 107, 117
Terry v. Ohio, 392 U.S. 1 8, 20, 26

Page

Texaco, Inc. v. Short, 454 U.S. 516 103, 104, 106–109, 115, 116
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 850
Textile Workers v. Lincoln Mills, 353 U.S. 448 209
Thayer v. Boston, 36 Mass. 511 819, 837
Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707 303
Thompson v. Louisiana, 469 U.S. 17 457
Thompson v. Norfolk & W. R. Co., 116 W. Va. 705 16
Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140 756
Tibbs v. Florida, 457 U.S. 31 796
Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130 562, 593
Town. See name of town.
Townsend v. Sain, 372 U.S. 293 615
Trace X Chemical, Inc. v. Gulf Oil Chemical Co., 724 F. 2d 68 1024
Trainor v. Hernandez, 431 U.S. 434 247
Trammel v. United States, 445 U.S. 40 348
Travelers Health Assn. v. Virginia, 339 U.S. 643 473, 476, 480
Trop v. Dulles, 356 U.S. 86 1083, 1085, 1093, 1094
Turner v. New York, 168 U.S. 90 104
Turner v. Unification Church, 473 F. Supp. 367 302
Turner v. United States, 248 U.S. 354 851
Turner v. United States, 396 U.S. 398 136
Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 546, 558
Ulster County Court v. Allen, 442 U.S. 140 314–316
Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143 532

Page

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 743
Union Pacific R. Co. v. Mason City & Fort Dodge R. Co., 199 U.S. 160 1077
Union Pacific R. Co. v. United States, 313 U.S. 450 72
United Housing Foundation, Inc. v. Forman, 421 U.S. 837 684–695, 698, 704
United States v. Agurs, 427 U.S. 97 1028
United States v. Alexander, 559 F. 2d 1339 515
United States v. Anderson, 509 F. 2d 724 515, 516
United States v. Arambasich, 597 F. 2d 609 433
United States v. Bailey, 444 U.S. 394 423, 424
United States v. Balint, 258 U.S. 250 433, 440
United States v. Ballard, 322 U.S. 78 135, 143, 145
United States v. Bass, 404 U.S. 336 427
United States v. Borden Co., 308 U.S. 188 75, 766
United States v. Boyle, 469 U.S. 241 94, 95, 101
United States v. Brandt, 717 F. 2d 955 1074
United States v. Brignoni-Ponce, 422 U.S. 873 7
United States v. Brown, 500 F. 2d 375 456
United States v. Cadena, 588 F. 2d 100 397
United States v. Chadwick, 433 U.S. 1 404, 405
United States v. Chagra, 653 F. 2d 26 804
United States v. Chandler, 753 F. 2d 360 1074
United States v. Clark, 445 U.S. 23 92, 93, 120
United States v. Clark, 559 F. 2d 420 397
United States v. Congress of Industrial Organizations, 335 U.S. 106 92

Page

United States v. Cusanelli, 472 F. 2d 1204 397
United States v. Delahoussaye, 573 F. 2d 910 1074, 1075
United States v. DiFrancesco, 449 U.S. 117 795
United States v. Dotterweich, 320 U.S. 277 433, 437
United States v. Fabrizio, 385 U.S. 263 143
United States v. Faltico, 687 F. 2d 273 423
United States v. Freed, 401 U.S. 601 424, 425, 433, 439, 442, 443
United States v. Gagnon, 470 U.S. 522 458
United States v. Grandinetti, 564 F. 2d 723 456
United States v. Hernandez, 730 F. 2d 895 1131
United States v. Hudson, 7 Cranch 32 424
United States v. Hurse, 453 F. 2d 128 515
United States v. International Minerals & Chemical Corp., 402 U.S. 558 433, 441, 443
United States v. Jackson, 384 F. 2d 825 515
United States v. Jarman, 491 F. 2d 764 1074
United States v. Johns, 469 U.S. 478 392, 396
United States v. Karo, 468 U.S. 705 408
United States v. Kubrick, 444 U.S. 111 282
United States v. Lee, 455 U.S. 252 303, 305
United States v. Leon, 468 U.S. 897 401
United States v. Little Lake Misere Land Co., 412 U.S. 580 850
United States v. Lovenguth, 514 F. 2d 96 397
United States v. Marchetti, 466 F. 2d 1309 178
United States v. Martinez-Fuerte, 428 U.S. 543 8

Page

United States v. Marvin, 687 F. 2d 1221 423
United States v. Mastelotto, 717 F. 2d 1238 135
United States v. Mazurie, 419 U.S. 544 851
United States v. McKesson & Robbins, Inc., 351 U.S. 305 67, 78
United States v. Mendenhall, 446 U.S. 544 7
United States v. Miller, 460 F. 2d 582 397
United States v. Mitchell, 538 F. 2d 1230 404
United States v. Montgomery, 620 F. 2d 753 397
United States v. Moore, 522 F. 2d 1068 515
United States v. Morrison, 449 U.S. 361 1028
United States v. Munsingwear, Inc., 340 U.S. 36 155
United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694 67, 74
United States v. New York, N. H. & H. R. Co., 355 U.S. 253 499
United States v. Norris, 281 U.S. 619 143
United States v. O'Brien, 391 U.S. 367 228
United States v. O'Brien, 686 F. 2d 850 423
United States v. Ortiz, 422 U.S. 891 8
United States v. Paramount Pictures, Inc., 334 U.S. 131 67
United States v. Philadelphia National Bank, 374 U.S. 321 68, 75
United States v. Place, 462 U.S. 696 8, 26
United States v. Pollard, 724 F. 2d 1438 423
United States v. Price, 383 U.S. 787 272
United States v. Raines, 362 U.S. 17 92
United States v. Reed, 573 F. 2d 1020 622

Page

United States v. Resenwasser, 323 U.S. 360 295, 296, 300
United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 92
United States v. Rodgers, 442 F. 2d 902 397
United States v. Rollins, 699 F. 2d 530 393
United States v. Ross, 456 U.S. 798 391, 392, 394, 395, 399, 401, 403
United States v. Rumely, 345 U.S. 41 486
United States v. Scott, 437 U.S. 82 796, 798
United States v. Sharpe, 470 U.S. 675 396
United States v. Shimer, 367 U.S. 374 713
United States v. Silk, 331 U.S. 704 294, 296, 300
United States v. Sinito, 723 F. 2d 1250 804
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 67
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 55, 68, 70, 80
United States v. Southern Motor Carriers Rate Conference, Inc., 672 F. 2d 469 53
United States v. Sterling, 742 F. 2d 521 804
United States v. Tateo, 377 U.S. 463 796
United States v. Timmreck, 441 U.S. 780 457
United States v. Trans-Missouri Freight Assn., 166 U.S. 290 69, 78
United States v. Turkette, 452 U.S. 576 439
United States v. United States Gypsum Co., 333 U.S. 364 484
United States v. United States Gypsum Co., 438 U.S. 422 424, 426, 427
United States v. Universal C. I. T. Credit Corp., 344 U.S. 218 427

Page

United States v. Valenzuela-Bernal, 458 U.S. 858 509
United States v. Villamonte-Marquez, 462 U.S. 579 26
United States v. Watson, 423 U.S. 441 7, 13, 16, 26
United States v. Weber Aircraft Corp., 465 U.S. 792 168, 170
United States v. Wheeler, 435 U.S. 313 851, 852
United States v. Wiga, 662 F. 2d 1325 397
United States v. Williams, 630 F. 2d 1322 397
United States v. Woodward, 469 U.S. 105 458
United States v. Yermian, 468 U.S. 63 431, 432, 435, 441
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 622
United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 93, 94
University of Texas v. Camenisch, 451 U.S. 390 149, 150
Upjohn Co. v. United States, 449 U.S. 383 348
Uraneck v. Lima, 359 Mass. 749 17
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 104, 105, 109, 116
Vaca v. Sipes, 386 U.S. 171 205
Vance v. Vance, 108 U.S. 514 104
Van Schaick v. Church of Scientology, 535 F. Supp. 1125 302
Village. See name of village.
Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 629, 651, 658, 659, 664, 670, 674, 677
Vitek v. Jones, 445 U.S. 480 511, 618, 622
Vlandis v. Kline, 412 U.S. 441 103, 110
Von Wiegen, In re, 101 App. Div. 2d 627 678
Wadsworth v. Whaland, 562 F. 2d 70 740, 742

Page

Wainwright v. Witt, 469 U.S. 412 324
Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F. 2d 91 548, 557, 563, 583, 586, 597
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 1007
Walling v. Portland Terminal Co., 330 U.S. 148 295, 299–301
Walls v. Midland Carbon Co., 254 U.S. 300 105
Walton Properties, Inc. v. International City Bank & Trust Co., 404 So. 2d 1059 1110
Walz v. Tax Comm'n, 397 U.S. 664 305
Warden v. Palermo, 431 U.S. 911 154–158
Warner-Lambert Co. v. FTC, 183 U.S. App. D. C. 230 645, 676
Washington v. Chrisman, 455 U.S. 1 503
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 199, 852, 856
Washington v. Texas, 388 U.S. 14 509
Washington Group, Inc., In re, 476 F. Supp. 246 352, 355
Watson v. Uni-press, Inc., 733 F. 2d 1386 1024
Watt v. Alaska, 451 U.S. 259 397, 502, 503
Watt v. Western Nuclear, Inc., 462 U.S. 36 397
Wayne Chemical, Inc. v. Columbus Agency Service Corp., 567 F. 2d 692 742
Wayne Chemical, Inc. v. Columbus Agency Service Corp., 426 F. Supp. 316 730
Webb v. Gorsuch, 699 F. 2d 157 1058
Weems v. United States, 217 U.S. 349 1083
Weinberger v. Salfi, 422 U.S. 749 110, 857

Page

Wellington v. Daniels, 717 F. 2d 932 814
Welsh v. Wisconsin, 466 U.S. 740 14
Werner v. Hartfelder, 113 Mich. App. 747 16
Western Mining Council v. Watt, 643 F. 2d 618 100
Westinghouse Electric Corp. v. Vaughn, 466 U.S. 521 157
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 650, 651
Whalen v. United States, 445 U.S. 684 779, 793
Whatley v. Department of Ed., 673 F. 2d 873 274
Wheaton v. Peters, 8 Pet. 591 551
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 200
White v. United Parcel Service, 692 F. 2d 1 282
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 851, 852, 856
Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547 1009
Wiley v. Memphis Police Dept., 548 F. 2d 1247 28
Wilkerson v. Utah, 99 U.S. 130 1084, 1085
Williams v. E. I. du Pont de Nemours Co., 581 F. Supp. 791 1077
Williams v. Illinois, 399 U.S. 235 623
Williams v. Lee, 358 U.S. 217 199, 855, 856
Williams v. Rhoden, 629 F. 2d 1099 274
Williams v. Walsh, 558 F. 2d 667 271
Wilson v. Garcia, 471 U.S. 261 289
Wilson v. Iseminger, 185 U.S. 55 117
Winnebago Tribe of Nebraska v. Ray, 621 F. 2d 269 1059
Winship, In re, 397 U.S. 358 309, 313, 314, 326, 331, 342
Winston v. Lee, 470 U.S. 753 8

Page

Wisconsin v. Constantineau, 400 U.S. 433 669
Wolf v. Weinstein, 372 U.S. 633 355
Wolff v. McDonnell, 418 U.S. 539 492, 494–499, 501, 502, 506–508, 510, 513, 514, 516–518, 521–523, 618, 624
Wolf Sales Co. v. Rudolf Wurlitzer Co., 105 F. Supp. 506 270
Wood v. Georgia, 450 U.S. 261 622
Woods v. Marks, 742 F. 2d 770 518
Woodson v. North Carolina, 428 U.S. 280 1036
Wooley v. Maynard, 430 U.S. 705 559, 650, 651
Wooten v. Sanders, 572 F. 2d 500 274
Worcester v. Georgia, 6 Pet. 515 764

Page

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 472–475, 477, 478, 480, 483, 486
Worsham v. A. H. Robins Co., 734 F. 2d 676 640
Wyoming Outdoor Coordinating Council v. Butz, 484 F. 2d 1244 1059, 1060
Wyrick v. Fields, 459 U.S. 42 458
Youakim v. Miller, 425 U.S. 231 92
Younger v. Harris, 401 U.S. 37 639
Zablocki v. Redhail, 434 U.S. 374 652
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 557, 582
Zant v. Stephens, 462 U.S. 862 1044, 1086
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 94, 1024
Zschernig v. Miller, 389 U.S. 429 719

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1984

TENNESSEE *v.* GARNER ET AL.

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

No. 83–1035. Argued October 30, 1984—Decided March 27, 1985*

A Tennessee statute provides that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son as, after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was 17 or 18 years old and of slight build. The father subsequently brought an action in Federal District Court, seeking damages under 42 U. S. C. § 1983 for asserted violations of his son's constitutional rights. The District Court held that the statute and the officer's actions were constitutional. The Court of Appeals reversed.

Held: The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Pp. 7–22.

---

*Together with No. 83–1070, *Memphis Police Department et al.* v. *Garner et al.*, on certiorari to the same court.

(a) Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Pp. 7–12.

(b) The Fourth Amendment, for purposes of this case, should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. Changes in the legal and technological context mean that that rule is distorted almost beyond recognition when literally applied. Whereas felonies were formerly capital crimes, few are now, or can be, and many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Also, the common-law rule developed at a time when weapons were rudimentary. And, in light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute. There is no indication that holding a police practice such as that authorized by the statute unreasonable will severely hamper effective law enforcement. Pp. 12–20.

(c) While burglary is a serious crime, the officer in this case could not reasonably have believed that the suspect—young, slight, and unarmed—posed any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous. Pp. 20–22.

710 F. 2d 240, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 22.

Henry L. Klein argued the cause for petitioners in No. 83–1070. With him on the briefs were *Clifford D. Pierce, Jr.*, *Charles V. Holmes*, and *Paul F. Goodman*. *W. J. Michael Cody*, Attorney General of Tennessee, argued the cause for appellant in No. 83–1035. With him on the briefs were *William M. Leech, Jr.*, former Attorney General, and *Jerry L. Smith*, Assistant Attorney General.

Steven L. Winter argued the cause for appellee-respondent Garner. With him on the brief was *Walter L. Bailey, Jr.*†

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house.[1] She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and

---

†Briefs of *amici curiae* urging affirmance were filed for the Florida Chapter of the National Bar Association by *Deitra Micks;* and for the Police Foundation et al. by *William Josephson, Robert Kasanof, Philip Lacovara,* and *Margaret Bush Wilson.*

[1]The owner of the house testified that no lights were on in the house, but that a back door light was on. Record 160. Officer Hymon, though uncertain, stated in his deposition that there were lights on in the house. *Id.,* at 209.

about 5′ 5″ or 5′ 7″ tall.[2] While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture,[3] Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.[4]

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann.

---

[2] In fact, Garner, an eighth-grader, was 15. He was 5′ 4″ tall and weighed somewhere around 100 or 110 pounds. App. to Pet. for Cert. A5.

[3] When asked at trial why he fired, Hymon stated:

"Well, first of all it was apparent to me from the little bit that I knew about the area at the time that he was going to get away because, number 1, I couldn't get to him. My partner then couldn't find where he was because, you know, he was late coming around. He didn't know where I was talking about. I couldn't get to him because of the fence here, I couldn't have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him." App. 52.

He also stated that the area beyond the fence was dark, that he could not have gotten over the fence easily because he was carrying a lot of equipment and wearing heavy boots, and that Garner, being younger and more energetic, could have outrun him. *Id.*, at 53–54.

[4] Garner had rummaged through one room in the house, in which, in the words of the owner, "[a]ll the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." *Id.*, at 34. The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered. *Id.*, at 34–35.

§ 40–7–108 (1982).[5] The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140–144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. *Id.*, at 57.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U. S. C. § 1983 for asserted violations of Garner's constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good-faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity. 600 F. 2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), which had come down after the District Court's decision. The District Court was

---

[5] Although the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. See *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

directed to consider whether a city enjoyed a qualified immunity, whether the use of deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a "policy or custom" as required for liability under *Monell*. 600 F. 2d, at 54–55.

The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon's actions, were constitutional. Given this conclusion, it declined to consider the "policy or custom" question. App. to Pet. for Cert. A37–A39.

The Court of Appeals reversed and remanded. 710 F. 2d 240 (1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment,[6] and is therefore constitutional only if "reasonable." The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—"the facts, as found, did not justify the use of deadly force under the Fourth Amendment." *Id.*, at 246. Officers cannot resort to deadly force unless they "have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large." *Ibid.*[7]

---

[6] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U. S. Const., Amdt. 4.

[7] The Court of Appeals concluded that the rule set out in the Model Penal Code "accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons." 710 F. 2d, at 247. The relevant portion of the Model Penal Code provides:

"The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes

The State of Tennessee, which had intervened to defend the statute, see 28 U. S. C. § 2403(b), appealed to this Court. The city filed a petition for certiorari. We noted probable jurisdiction in the appeal and granted the petition. 465 U. S. 1098 (1984).

II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States* v. *Mendenhall*, 446 U. S. 544 (1980), there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E. g.*, *United States* v. *Watson*, 423 U. S. 411 (1976). Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of

---

that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

The court also found that "[a]n analysis of the facts of this case under the Due Process Clause" required the same result, because the statute was not narrowly drawn to further a compelling state interest. 710 F. 2d, at 246–247. The court considered the generalized interest in effective law enforcement sufficiently compelling only when the the suspect is dangerous. Finally, the court held, relying on *Owen* v. *City of Independence*, 445 U. S. 622 (1980), that the city was not immune.

the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e 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." *United States* v. *Place*, 462 U. S. 696, 703 (1983); see *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981). See also *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Terry* v. *Ohio*, 392 U. S. 1, 28–29 (1968).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States* v. *Place*, *supra*, an airport seizure not "carefully tailored to its underlying justification," *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston* v. *Lee*, 470 U. S. 753 (1985), or detention for fingerprinting without probable cause, *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Hayes* v. *Florida*, 470 U. S. 811 (1985). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp* v. *Murphy*, 412 U. S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker* v. *California*, 374 U. S. 23 (1963), administrative housing inspections without probable cause to believe that a code violation will be found, *Camara* v. *Municipal Court*, *supra*, and a blood test of a drunken-driving suspect, *Schmerber* v. *California*, 384 U. S. 757 (1966). In each of these cases, the question was whether

the totality of the circumstances justified a particular sort of search or seizure.

B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement.[8] It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly

---

[8] The dissent emphasizes that subsequent investigation cannot replace immediate apprehension. We recognize that this is so, see n. 13, *infra;* indeed, that is the reason why there is any dispute. If subsequent arrest were assured, no one would argue that use of deadly force was justified. Thus, we proceed on the assumption that subsequent arrest is not likely. Nonetheless, it should be remembered that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught.

In lamenting the inadequacy of later investigation, the dissent relies on the report of the President's Commission on Law Enforcement and Administration of Justice. It is worth noting that, notwithstanding its awareness of this problem, the Commission itself proposed a policy for use of deadly force arguably even more stringent than the formulation we adopt today. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189 (1967). The Commission proposed that deadly force be used only to apprehend "perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed." In addition, the officer would have "to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible." *Ibid.*

force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware* v. *Prouse*, *supra*, at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts,[9] the presently available evidence does not support this thesis.[10] The fact is that a majority of police de-

[9] We note that the usual manner of deterring illegal conduct—through punishment—has been largely ignored in connection with flight from arrest. Arkansas, for example, specifically excepts flight from arrest from the offense of "obstruction of governmental operations." The commentary notes that this "reflects the basic policy judgment that, absent the use of force or violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense." Ark. Stat. Ann. § 41–2802(3)(a) (1977) and commentary. In the few States that do outlaw flight from an arresting officer, the crime is only a misdemeanor. See, *e. g.*, Ind. Code § 35–44–3–3 (1982). Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. *E. g.*, Ill. Rev. Stat., ch. 38, ¶ 31–1 (1984); Mont. Code Ann. § 45–7–301 (1984); N. H. Rev. Stat. Ann. § 642:2 (Supp. 1983); Ore. Rev. Stat. § 162.315 (1983).

This lenient approach does avoid the anomaly of automatically transforming every fleeing misdemeanant into a fleeing felon—subject, under the common-law rule, to apprehension by deadly force—solely by virtue of his flight. However, it is in real tension with the harsh consequences of flight in cases where deadly force is employed. For example, Tennessee does not outlaw fleeing from arrest. The Memphis City Code does, § 22–34.1 (Supp. 17, 1971), subjecting the offender to a maximum fine of $50, § 1–8 (1967). Thus, Garner's attempted escape subjected him to (a) a $50 fine, and (b) being shot.

[10] See Sherman, Reducing Police Gun Use, in Control in the Police Organization 98, 120–123 (M. Punch ed. 1983); Fyfe, Observations on Police

partments in this country have forbidden the use of deadly force against nonviolent suspects. See *infra*, at 18–19. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann* v. *McGinn*, 307 Minn. 446, 472, 240 N. W. 2d 525, 540 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where

---

Deadly Force, 27 Crime & Delinquency 376, 378–381 (1981); W. Geller & K. Karales, Split-Second Decisions 67 (1981); App. 84 (affidavit of William Bracey, Chief of Patrol, New York City Police Department). See generally Brief for Police Foundation et al. as *Amici Curiae*.

feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

III

A

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant. As stated in Hale's posthumously published Pleas of the Crown:

> "[I]f persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, Historia Placitorum Coronae 85 (1736).

See also 4 W. Blackstone, Commentaries *289. Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon. *E. g.*, *Holloway* v. *Moser*, 193 N. C. 185, 136 S. E. 375 (1927); *State* v. *Smith*, 127 Iowa 534, 535, 103 N. W. 944, 945 (1905); *Reneau* v. *State*, 70 Tenn. 720 (1879); *Brooks* v. *Commonwealth*, 61 Pa. 352 (1869); *Roberts* v. *State*, 14 Mo. 138 (1851); see generally R. Perkins & R. Boyce, Criminal Law 1098–1102 (3d ed. 1982); Day, Shooting the Fleeing Felon: State of the Law, 14 Crim. L. Bull. 285, 286–287 (1978); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 807–816 (1924). But see *Storey* v. *State*, 71 Ala. 329 (1882); *State* v. *Bryant*, 65 N. C. 327, 328 (1871); *Caldwell* v. *State*, 41 Tex. 86 (1874).

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 418–419 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980). Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

B

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death.[11] "Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or

[11] The roots of the concept of a "felony" lie not in capital punishment but in forfeiture. 2 F. Pollock & F. Maitland, The History of English Law 465 (2d ed. 1909) (hereinafter Pollock & Maitland). Not all felonies were always punishable by death. See *id.*, at 466–467, n. 3. Nonetheless, the link was profound. Blackstone was able to write: "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that is shall be punished with death, *viz.* by hanging, as well as with forfeiture . . . ." 4 W. Blackstone, Commentaries *98. See also R. Perkins & R. Boyce, Criminal Law 14–15 (3d ed. 1982); 2 Pollock & Maitland 511.

fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." American Law Institute, Model Penal Code § 3.07, Comment 3, p. 56 (Tentative Draft No. 8, 1958) (hereinafter Model Penal Code Comment). Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons. See, *e. g.*, *Schumann* v. *McGinn*, 307 Minn., at 458, 240 N. W. 2d, at 533; *Holloway* v. *Moser*, *supra*, at 187, 136 S. E., at 376 (1927).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. See, *e. g.*, *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977). And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock & Maitland 467, n. 3; *Carroll* v. *United States*, *supra*, at 158, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich. L. Rev., at 572–573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.[12]

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety

---

[12] White-collar crime, for example, poses a less significant physical threat than, say, drunken driving. See *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984); *id.*, at 755 (BLACKMUN, J., concurring). See Model Penal Code Comment, at 57.

of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, The Gun in America 150–151 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries. See Wechsler & Michael, A Rationale for the Law of Homicide: I, 37 Colum. L. Rev. 701, 741 (1937).[13]

One other aspect of the common-law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. See *Holloway* v. *Moser*, 193 N. C., at 187, 136 S. E., at 376; *State* v. *Smith*, 127 Iowa, at 535, 103 N. W., at 945. See generally Annot., 83 A. L. R. 3d 238 (1978).

In short, though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

C

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to pre-

---

[13] It has been argued that sophisticated techniques of apprehension and increased communication between the police in different jurisdictions have made it more likely that an escapee will be caught than was once the case, and that this change has also reduced the "reasonableness" of the use of deadly force to prevent escape. *E. g.*, Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71, 76 (1980). We are unaware of any data that would permit sensible evaluation of this claim. Current arrest rates are sufficiently low, however, that we have some doubt whether in past centuries the failure to arrest at the scene meant that the police had missed their only chance in a way that is not presently the case. In 1983, 21% of the offenses in the Federal Bureau of Investigation crime index were cleared by arrest. Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 159 (1984). The clearance rate for burglary was 15%. *Ibid.*

vailing rules in individual jurisdictions. See, *e. g.*, *United States* v. *Watson*, 423 U. S., at 421–422. The rules in the States are varied. See generally Comment, 18 Ga. L. Rev. 137, 140–144 (1983). Some 19 States have codified the common-law rule,[14] though in two of these the courts have significantly limited the statute.[15] Four States, though without a relevant statute, apparently retain the common-law rule.[16] Two States have adopted the Model Penal Code's

---

[14] Ala. Code § 13A–3–27 (1982); Ark. Stat. Ann. § 41–510 (1977); Cal. Penal Code Ann. § 196 (West 1970); Conn. Gen. Stat. § 53a–22 (1972); Fla. Stat. § 776.05 (1983); Idaho Code § 19–610 (1979); Ind. Code § 35–41–3–3 (1982); Kan. Stat. Ann. § 21–3215 (1981); Miss. Code Ann. § 97–3–15(d) (Supp. 1984); Mo. Rev. Stat. § 563.046 (1979); Nev. Rev. Stat. § 200.140 (1983); N. M. Stat. Ann. § 30–2–6 (1984); Okla. Stat., Tit. 21, § 732 (1981); R. I. Gen. Laws § 12–7–9 (1981); S. D. Codified Laws §§ 22–16–32, 22–16–33 (1979); Tenn. Code Ann. § 40–7–108 (1982); Wash. Rev. Code § 9A.16.040(3) (1977). Oregon limits use of deadly force to violent felons, but also allows its use against any felon if "necessary." Ore. Rev. Stat. § 161.239 (1983). Wisconsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (1981–1982) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest"). But see *Clark* v. *Ziedonis*, 368 F. Supp. 544 (ED Wis. 1973), aff'd on other grounds, 513 F. 2d 79 (CA7 1975).

[15] In California, the police may use deadly force to arrest only if the crime for which the arrest is sought was "a forcible and atrocious one which threatens death or serious bodily harm," or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed. *Kortum* v. *Alkire*, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30–31 (1977). See also *People* v. *Ceballos*, 12 Cal. 3d 470, 476–484, 526 P. 2d 241, 245–250 (1974); *Long Beach Police Officers Assn.* v. *Long Beach*, 61 Cal. App. 3d 364, 373–374, 132 Cal. Rptr. 348, 353–354 (1976). In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape. *Rose* v. *State*, 431 N. E. 2d 521 (Ind. App. 1982).

[16] These are Michigan, Ohio, Virginia, and West Virginia. *Werner* v. *Hartfelder*, 113 Mich. App. 747, 318 N. W. 2d 825 (1982); *State* v. *Foster*, 60 Ohio Misc. 46, 59–66, 396 N. E. 2d 246, 255–258 (Com. Pl. 1979) (citing cases); *Berry* v. *Hamman*, 203 Va. 596, 125 S. E. 2d 851 (1962); *Thompson* v. *Norfolk & W. R. Co.*, 116 W. Va. 705, 711–712, 182 S. E. 880, 883–884 (1935).

provision verbatim.[17] Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.[18] Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies.[19] The remaining States either have no relevant statute or case law, or have positions that are unclear.[20]

---

[17] Haw. Rev. Stat. § 703–307 (1976); Neb. Rev. Stat. § 28–1412 (1979). Massachusetts probably belongs in this category. Though it once rejected distinctions between felonies, *Uraneck* v. *Lima*, 359 Mass. 749, 750, 269 N. E. 2d 670, 671 (1971), it has since adopted the Model Penal Code limitations with regard to private citizens, *Commonwealth* v. *Klein*, 372 Mass. 823, 363 N. E. 2d 1313 (1977), and seems to have extended that decision to police officers, *Julian* v. *Randazzo*, 380 Mass. 391, 403 N. E. 2d 931 (1980).

[18] Alaska Stat. Ann. § 11.81.370(a) (1983); Ariz. Rev. Stat. Ann. § 13–410 (1978); Colo. Rev. Stat. § 18–1–707 (1978); Del. Code Ann., Tit. 11, § 467 (1979) (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); Ga. Code § 16–3–21(a) (1984); Ill. Rev. Stat., ch. 38, ¶ 7–5 (1984); Iowa Code § 804.8 (1983) (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); Ky. Rev. Stat. § 503.090 (1984) (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); Me. Rev. Stat. Ann., Tit. 17–A, § 107 (1983) (commentary notes that deadly force may be used only "where the person to be arrested poses a threat to human life"); Minn. Stat. § 609.066 (1984); N. H. Rev. Stat. Ann. § 627:5(II) (Supp. 1983); N. J. Stat. Ann. § 2C–3–7 (West 1982); N. Y. Penal Law § 35.30 (McKinney Supp. 1984–1985); N. C. Gen. Stat. § 15A–401 (1983); N. D. Cent. Code § 12.1–05–07.2.d (1976); 18 Pa. Cons. Stat. § 508 (1982); Tex. Penal Code Ann. § 9.51(c) (1974); Utah Code Ann. § 76–2–404 (1978).

[19] See La. Rev. Stat. Ann. § 14:20(2) (West 1974); Vt. Stat. Ann., Tit. 13, § 2305 (1974 and Supp. 1984). A Federal District Court has interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where "life itself is endangered or great bodily harm is threatened." *Sauls* v. *Hutto*, 304 F. Supp. 124, 132 (ED La. 1969).

[20] These are Maryland, Montana, South Carolina, and Wyoming. A Maryland appellate court has indicated, however, that deadly force may not be used against a felon who "was in the process of fleeing and, at the

It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common-law rule.[21] Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. C. Milton, J. Halleck, J. Lardner, & G. Abrecht, Police Use of Deadly Force 45–46 (1977). The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. *Id.*, at 40–41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury." Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1–2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a

---

time, presented no immediate danger to . . . anyone . . . ." *Giant Food, Inc.* v. *Scherry*, 51 Md. App. 586, 589, 596, 444 A. 2d 483, 486, 489 (1982).

[21] In adopting its current statute in 1979, for example, Alabama expressly chose the common-law rule over more restrictive provisions. Ala. Code § 13A–3–27, Commentary, pp. 67–€3 (1982). Missouri likewise considered but rejected a proposal akin to the Model Penal Code rule. See *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1022 (CA8 1976) (Gibson, C. J., dissenting), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 431 U. S. 171 (1977). Idaho, whose current statute codifies the common-law rule, adopted the Model Penal Code in 1971, but abandoned it in 1972.

felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, The Use of Deadly Force by Boston Police Personnel (1974), cited in *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1016, n. 19 (CA8 1976), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 431 U. S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 161 (1982) (table). See also Record 1108–1368 (written policies of 44 departments). See generally W. Geller & K. Karales, Split-Second Decisions 33–42 (1981); Brief for Police Foundation et al. as *Amici Curiae*. In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute now before us.

D

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *Amici* note that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." *Id.*, at 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See *supra*, at 10–11, and n. 10.

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see nn. 15, 17–19, *supra*, the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions. Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

IV

The District Court concluded that Hymon was justified in shooting Garner because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9–A11, A38. This conclusion made a determination of Garner's apparent dangerousness unnecessary. The court did find, however, that Garner appeared to be unarmed, though Hymon could not be certain that was the case. *Id.*, at A4, A23. See also App. 41, 56; Record 219. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

In reversing, the Court of Appeals accepted the District Court's factual conclusions and held that "the facts, as found, did not justify the use of deadly force." 710 F. 2d, at 246.

We agree. Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that "[t]he facts of this case did not indicate to Officer Hymon that Garner was 'non-dangerous.'" App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that Garner had broken into a house at night. However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. *Post*, at 29, 32. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).[22] Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem* v. *Helm*, 463 U. S. 277, 296–297, and nn. 22–23 (1983). In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973–1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, House-

[22] In a recent report, the Department of Corrections of the District of Columbia also noted that "there is nothing inherently dangerous or violent about the offense," which is a crime against property. D. C. Department of Corrections, Prisoner Screening Project 2 (1985).

hold Burglary 4 (1985).[23] See also T. Reppetto, Residential Crime 17, 105 (1974); Conklin & Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1973).

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U. S. C. § 2403(b) and is not subject to liability. The possible liability of the remaining defendants—the Police Department and the city of Memphis—hinges on *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

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

So ordered.

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

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to

---

[23] The dissent points out that three-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home assaults are committed by burglars. *Post*, at 26–27. These figures mean only that if one knows that a suspect committed a rape in the home, there is a good chance that the suspect is also a burglar. That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, or might commit, a violent crime.

The dissent also points out that this 3.8% adds up to 2.8 million violent crimes over a 10-year period, as if to imply that today's holding will let loose 2.8 million violent burglars. The relevant universe is, of course, far smaller. At issue is only that tiny fraction of cases where violence has

apprehend a criminal suspect who refuses to halt when fleeing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 8. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 14, 16–17, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive both to the history of the Fourth Amendment and to the general implications of the Court's reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that "they" were breaking into the house next door. App. in No. 81–5605 (CA6), p. 207. The officers found the residence had been forcibly entered through a window and saw lights

---

taken place and an officer who has no other means of apprehending the suspect is unaware of its occurrence.

on inside the house. Officer Hymon testified that when he saw the broken window he realized "that something was wrong inside," *id.*, at 656, but that he could not determine whether anyone—either a burglar or a member of the household—was within the residence. *Id.*, at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene Garner run away from the house through the dark and cluttered backyard. Garner crouched next to a 6-foot-high fence. Officer Hymon thought Garner was an adult and was unsure whether Garner was armed because Hymon "had no idea what was in the hand [that he could not see] or what he might have had on his person." *Id.*, at 658–659. In fact, Garner was 15 years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.*, at 657. The officer identified himself as a police officer and ordered Garner to halt. Garner paused briefly and then sprang to the top of the fence. Believing that Garner would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Appellee-respondent, the deceased's father, filed a 42 U. S. C. § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of Garner's constitutional rights. The District Court for the Western District of Tennessee held that Officer Hymon's actions were justified by a Tennessee statute that authorizes a police officer to "use all the necessary means to effect the arrest," if "after notice of the intention to arrest the defendant, he either flee or forcibly resist." Tenn. Code Ann. § 40–7–108 (1982). As construed by the Tennessee courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than such force will prevent the escape. See, *e. g.*, *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819

(1938). The District Court held that the Tennessee statute is constitutional and that Hymon's actions as authorized by that statute did not violate Garner's constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the Tennessee statute "authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape" violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F. 2d 240, 244 (1983).

The Court affirms on the ground that application of the Tennessee statute to authorize Officer Hymon's use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner's constitutional rights. Thus, the majority's assertion that a police officer who has probable cause to seize a suspect "may not always do so by killing him," *ante*, at 9, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Ante*, at 11. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer Hymon "seized" Garner by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful bal-

ancing of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States* v. *Place*, 462 U. S. 696, 703 (1983). In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the "rubric of police conduct . . . necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 416–421 (1976); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). Cf. *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 585 (1983) (noting "impressive historical pedigree" of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." *Solem* v. *Helm*, 463 U. S. 277, 315–316 (1983) (BURGER, C. J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home,

three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). During the period 1973–1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." *Ante*, at 21. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.'" *Solem* v. *Helm*, *supra*, at 316 (BURGER, C. J., dissenting). See also Restatement of Torts § 131, Comment *g* (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. in No. 81–5605 (CA6), p. 334. Although some law enforcement agencies may choose to assume the risk that a criminal will remain at large, the

Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. See, *e. g.*, *Wiley* v. *Memphis Police Department*, 548 F. 2d 1247, 1252–1253 (CA6), cert. denied, 434 U. S. 822 (1977); *Jones* v. *Marshall*, 528 F. 2d 132, 142 (CA2 1975).

The Court unconvincingly dismisses the general deterrence effects by stating that "the presently available evidence does not support [the] thesis" that the threat of force discourages escape and that "there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases." *Ante*, at 10, 11. There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws"). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. The

majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante*, at 9. This blithe assertion hardly provides an adequate substitute for the majority's failure to acknowledge the distinctive manner in which the suspect's interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer's use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton* v. *New York*, 445 U. S. 573, 617, n. 14 (1980) (WHITE, J., dissenting) ("[T]he policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel"). The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The

police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, appellee-respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of cruel and unusual punishment. These arguments were rejected by the District Court and, except for the due process claim, not addressed by the Court of Appeals. With respect to due process, the Court of Appeals reasoned that statutes affecting the fundamental interest in life must be "narrowly drawn to express only the legitimate state interests at stake." 710 F. 2d, at 245. The Court of Appeals concluded that a statute allowing police use of deadly force is narrowly drawn and therefore constitutional only if the use of such force is limited to situations in which the suspect poses an immediate threat to others. *Id.*, at 246–247. Whatever the validity of Tennessee's statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law." Cf. *Baker* v. *McCollan*, 443 U. S. 137, 144–145 (1979). Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his Sixth Amendment right to trial by jury. See *Cunningham* v. *Ellington*, 323 F. Supp. 1072, 1075–1076 (WD Tenn. 1971) (three-judge court). Finally, because there is no indication that the use

of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the Eighth Amendment. See *Bell* v. *Wolfish*, 441 U. S. 520, 538–539 (1979). Accordingly, I conclude that the District Court properly entered judgment against appellee-respondent, and I would reverse the decision of the Court of Appeals.

III

Even if I agreed that the Fourth Amendment was violated under the circumstances of this case, I would be unable to join the Court's opinion. The Court holds that deadly force may be used only if the suspect "threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Ante*, at 11. The Court ignores the more general implications of its reasoning. Relying on the Fourth Amendment, the majority asserts that it is constitutionally unreasonable to *use* deadly force against fleeing criminal suspects who do not appear to pose a threat of serious physical harm to others. *Ibid.* By declining to limit its holding to the use of firearms, the Court unnecessarily implies that the Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk. Cf. *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983).

Although it is unclear from the language of the opinion, I assume that the majority intends the word "use" to include only those circumstances in which the suspect is actually apprehended. Absent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect. The Court's opinion, despite its broad language, actually decides only that the

shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.

The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances. Cf. *Payton* v. *New York*, 445 U. S., at 619 (WHITE, J., dissenting). Police are given no guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force. The Court also declines to outline the additional factors necessary to provide "probable cause" for believing that a suspect "poses a significant threat of death or serious physical injury," *ante*, at 3, when the officer has probable cause to arrest and the suspect refuses to obey an order to halt. But even if it were appropriate in this case to limit the use of deadly force to that ambiguous class of suspects, I believe the class should include nighttime residential burglars who resist arrest by attempting to flee the scene of the crime. We can expect an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime. Thus, the majority opinion portends a burgeoning area of Fourth Amendment doctrine concerning the circumstances in which police officers can reasonably employ deadly force.

IV

The Court's opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons. Thus, the Court "lightly brushe[s] aside," *Payton* v. *New York*, *supra*, at 600, a longstanding police practice that predates the Fourth Amendment and continues to receive the approval of nearly half of the state legislatures. I cannot accept the majority's creation of a constitutional right to flight for burglary sus-

pects seeking to avoid capture at the scene of the crime. Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect's escape into the night. I respectfully dissent.

TOWN OF HALLIE ET AL. *v.* CITY OF EAU CLAIRE

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

No. 82–1832. Argued November 26, 1984—Decided March 27, 1985

Petitioners, unincorporated townships located in Wisconsin adjacent to respondent city, filed suit against respondent in Federal District Court, alleging that petitioners were potential competitors of respondent in the collection and transportation of sewage, and that respondent had violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provision of such services to the provision of sewage collection and transportation services. Respondent refused to supply sewage treatment services to petitioners, but supplied the services to individual landowners in petitioners' areas if a majority of the individuals in the area voted by referendum election to have their homes annexed by respondent and to use its sewage collection and transportation services. The District Court dismissed the complaint, finding, *inter alia*, that Wisconsin statutes regulating the municipal provision of sewage services expressed a clear state policy to replace competition with regulation. The court concluded that respondent's allegedly anticompetitive conduct fell within the "state action" exemption to the federal antitrust laws established by *Parker* v. *Brown*, 317 U. S. 341. The Court of Appeals affirmed.

Held: Respondent's anticompetitive activities are protected by the state action exemption to the federal antitrust laws. Pp. 38–47.

(a) Before a municipality may claim the protection of the state action exemption, it must demonstrate that it is engaging in the challenged activity pursuant to a "clearly articulated" state policy. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389. Pp. 38–40.

(b) Wisconsin statutes grant authority to cities to construct and maintain sewage systems, to describe the district to be served, and to refuse to serve unannexed areas. The statutes are not merely neutral on state policy but, instead, clearly contemplate that a city may engage in anticompetitive conduct. To pass the "clear articulation" test, the legislature need not expressly state in a statute or the legislative history that it intends for the delegated action to have anticompetitive effects. The Wisconsin statutes evidence a clearly articulated state policy to displace competition with regulation in the area of municipal provision of sewage services. Pp. 40–44.

(c) The "clear articulation" requirement of the state action test does not require that respondent show that the State "compelled" it to act. Although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy. *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, and *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, distinguished. Pp. 45–46.

(d) Active state supervision of anticompetitive conduct is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. The requirement of active state supervision serves essentially the evidentiary function of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. Where the actor is a municipality rather than a private party, there is little or no danger that it is involved in a *private* price-fixing arrangement. The danger that a municipality will seek to further purely parochial public interests at the expense of more overriding state goals is minimal, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Pp. 46–47.

700 F. 2d 376, affirmed.

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

John J. Covelli argued the cause for petitioners. With him on the briefs was *Michael P. May*.

Frederick W. Fischer argued the cause and filed a brief for respondent.*

**Ronald A. Zumbrun* and *Robert K. Best* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Rule*, *Carter G. Phillips*, *Catherine G. O'Sullivan*, and *Nancy C. Garrison;* for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Robert E. Davy*, *Thomas J. DeMay*, *Linley E. Pearson*, Attorney General of Indiana, *Frank A. Baldwin*, Deputy Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; for the Commonwealth of Virginia et al. by *Gerald L. Baliles*, Attorney General of Virginia, *Elizabeth B. Lacy*, Deputy Attorney General, *Craig Thomas Merritt*, Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Robert M. Langer*, Assistant

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a municipality's anticompetitive activities are protected by the state action exemption to the federal antitrust laws established by *Parker* v. *Brown*, 317 U. S. 341 (1943), when the activities are authorized, but not compelled, by the State, and the State does not actively supervise the anticompetitive conduct.

I

Petitioners—Town of Hallie, Town of Seymour, Town of Union, and Town of Washington (the Towns)—are four Wisconsin unincorporated townships located adjacent to respondent, the City of Eau Claire (the City). Town of Hallie is located in Chippewa County, and the other three towns are located in Eau Claire County.[1] The Towns filed suit against the City in United States District Court for the Western District of Wisconsin seeking injunctive relief and alleging that the City violated the Sherman Act, 15 U. S. C. § 1 *et seq.*, by acquiring a monopoly over the provision of sewage treatment services in Eau Claire and Chippewa Counties, and by tying

---

Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Assistant Attorney General, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Eugene F. Waye*, Deputy Attorney General, *Brian McKay*, Attorney General of Nevada, *David L. Wilkenson*, Attorney General of Utah, and *Suzanne M. Dallimore*, Assistant Attorney General; for the U. S. Conference of Mayors et al. by *Stephen Chapple*, *Frederic Lee Ruck*, and *Ross D. Davis;* for the American Public Power Association et al. by *Carlos C. Smith*, *Frederick L. Hitchcock*, *Edward D. Meyer*, *Stanley P. Hebert*, *John W. Pestle*, *John D. Maddox*, *June W. Wiener*, *Clifford D. Pierce, Jr.*, *Donald W. Jones*, *Eugene N. Collins*, and *Randall L. Nelson;* and for the National Institute of Municipal Law Officers by *Roger F. Cutler*, *Roy D. Bates*, *George Agnost*, *Benjamin L. Brown*, *J. Lamar Shelley*, *John W. Witt*, *Robert J. Alfton*, *James K. Baker*, *Clifford D. Pierce, Jr.*, *William H. Taube*, *William I. Thornton, Jr.*, *Henry W. Underhill, Jr.*, and *Charles S. Rhyne.*

David Epstein filed a brief for the American Ambulance Association et al. as *amici curiae.*

[1] The City is located in both Eau Claire and Chippewa Counties.

the provision of such services to the provision of sewage collection and transportation services.[2] Under the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.*, the City had obtained federal funds to help build a sewage treatment facility within the Eau Claire Service Area, that included the Towns; the facility is the only one in the market available to the Towns. The City has refused to supply sewage treatment services to the Towns. It does supply the services to individual landowners in areas of the Towns if a majority of the individuals in the area vote by referendum election to have their homes annexed by the City, see Wis. Stat. §§ 66.024(4), 144.07(1) (1982), and to use the City's sewage collection and transportation services.

Alleging that they are potential competitors of the City in the collection and transportation of sewage, the Towns contended in the District Court that the City used its monopoly over sewage treatment to gain an unlawful monopoly over the provision of sewage collection and transportation services, in violation of the Sherman Act. They also contended that the City's actions constituted an illegal tying arrangement and an unlawful refusal to deal with the Towns.

The District Court ruled for the City. It found that Wisconsin's statutes regulating the municipal provision of sewage service expressed a clear state policy to replace competition with regulation. The court also found that the State adequately supervised the municipality's conduct through the State's Department of Natural Resources, that was authorized to review municipal decisions concerning provision of sewage services and corresponding annexations of land. The court concluded that the City's allegedly anticompetitive conduct fell within the state action exemption to the federal antitrust laws, as set forth in *Community Communications*

---

[2] The complaint also alleged violations of the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.*, and of a common-law duty of a utility to serve. The District Court dismissed these claims, and they are not at issue in this Court.

Co. v. *Boulder*, 455 U. S. 40 (1982), and *Parker* v. *Brown*, *supra*. Accordingly, it dismissed the complaint.

The United States Court of Appeals for the Seventh Circuit affirmed. 700 F. 2d 376 (1983). It ruled that the Wisconsin statutes authorized the City to provide sewage services and to refuse to provide such services to unincorporated areas. The court therefore assumed that the State had contemplated that anticompetitive effects might result, and concluded that the City's conduct was thus taken pursuant to state authorization within the meaning of *Parker* v. *Brown*, *supra*. The court also concluded that in a case such as this involving "a local government performing a traditional municipal function," 700 F. 2d, at 384, active state supervision was unnecessary for *Parker* immunity to apply. Requiring such supervision as a prerequisite to immunity would also be unwise in this situation, the court believed, because it would erode traditional concepts of local autonomy and home rule that were clearly expressed in the State's statutes.

We granted certiorari, 467 U. S. 1240 (1984), and now affirm.

II

The starting point in any analysis involving the state action doctrine is the reasoning of *Parker* v. *Brown*. In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. 317 U. S., at 350–351. Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. *Id.*, at 351.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 412 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities

must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*, at 413.

The determination that a municipality's activities constitute state action is not a purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful. *Parker* v. *Brown*, 317 U. S., at 351. On the other hand, in proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful *Parker* defense to an antitrust suit. 435 U. S., at 415. Rather, *Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy" that was "actively supervised" by the State. 435 U. S., at 410. The plurality viewed this approach as desirable because it "preserv[ed] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.*, at 415–416.

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), a unanimous Court applied the *Lafayette* two-pronged test to a case in which the state action exemption was claimed by a private party.[3] In

[3] *Midcal* was originally brought as a mandamus action seeking an injunction against a state agency, the California Department of Alcoholic Beverage Control. The State played no role, however, in setting prices or reviewing their reasonableness, activities carried out by the private wine dealers. 445 U. S., at 100–101. The mere fact that the state agency was a named defendant was not sufficient to alter the state action analysis from that appropriate to a case involving the state regulation of private anticompetitive acts. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *post*, at 56–57.

that case, we found no antitrust immunity for California's wine-pricing system. Even though there was a clear legislative policy to permit resale liquor price maintenance, there was no state supervision of the anticompetitive activity. Thus, the private wine producers who set resale prices were not entitled to the state action exemption. When we again addressed the issue of a municipality's exemption from the antitrust laws in *Boulder*, *supra*, we declined to accept *Lafayette*'s suggestion that a municipality must show more than that a state policy to displace competition exists. We held that Colorado's Home Rule Amendment to its Constitution, conferring on municipal governments general authority to govern local affairs, did not constitute a "clear articulation" of a state policy to authorize anticompetitive conduct with respect to the regulation of cable television in the locale. Because the city could not meet this requirement of the state action test, we declined to decide whether governmental action by a municipality must also be actively supervised by the State. 455 U. S., at 51–52, n. 14.

It is therefore clear from our cases that before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy. We have never fully considered, however, how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action. Moreover, we have expressly left open the question whether action by a municipality—like action by a private party—must satisfy the "active state supervision" requirement. *Boulder*, *supra*, at 51–52, n. 14. We consider both of those issues below.

III

The City cites several provisions of the Wisconsin code to support its claim that its allegedly anticompetitive activity

constitutes state action. We therefore examine the statutory structure in some detail.

A

Wisconsin Stat. § 62.18(1) (1981–1982) grants authority to cities to construct, add to, alter, and repair sewage systems. The authority includes the power to "describe with reasonable particularity the district to be [served]." *Ibid.* This grant of authority is supplemented by Wis. Stat. § 66.069(2)(c) (1981–1982), providing that a city operating a public utility

> "may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated."

With respect to joint sewage systems, Wis. Stat. § 144.07(1) (1981–1982) provides that the State's Department of Natural Resources may require a city's sewage system to be constructed so that other cities, towns, or areas may connect to the system, and the Department may order that such connections be made. Subsection (1m) provides, however, that an order by the Department of Natural Resources for the connection of unincorporated territory to a city system shall be void if that territory refuses to become annexed to the city.[4]

B

The Towns contend that these statutory provisions do not evidence a state policy to displace competition in the provision of sewage services because they make no express men-

[4] There is no such order of the Department of Natural Resources at issue in this case.

tion of anticompetitive conduct.[5] As discussed above, the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate. See *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978) (no express intent to displace the antitrust laws, but statute provided regulatory structure that inherently "displace[d] unfettered business freedom"). Accord, 1 P. Areeda & D. Turner, Antitrust Law ¶212.3, p. 54 (Supp. 1982).

---

[5] The Towns also rely on Wis. Stat. Ann. §§ 66.076(1) and 66.30 (1965 and Supp. 1984) to argue that the State's policy on the provision of sewage services is actually procompetitive. This claim must fail because, aside from the fact that it was not raised below, the provisions relied upon do not support the contention. First, it is true that § 66.076(1) permits certain municipalities, including towns, to operate sewage systems. The provision is simply a general enabling statute, however, not a mandatory prescription. In addition, subsection (8) of § 66.076 incorporates into the enabling statute all of the limitations of § 66.069, including the power to limit the area of service. Thus, § 66.076(1) does not express a procompetitive state attitude.

Nor does § 66.30 aid the Towns. It is a general provision concerning all utilities—not just sewage systems—that permits municipalities to enter into cooperative agreements. The statute is not mandatory, but merely permissive. Moreover, even assuming two municipalities agreed pursuant to this section to cooperate in providing sewage services, the result would not necessarily be greater competition. Rather, the two combined might well be more effective than either alone in keeping other municipalities out of the market.

Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder*, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the "clear articulation" component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was.[6]

The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

---

[6] Nor does it help the Towns' claim that the statutes leave to the City the discretion whether to provide sewage services. States must always be free to delegate such authority to their political subdivisions.

Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences. Justice Stewart's dissent in *Lafayette* was concerned that the plurality's opinion would impose this kind of requirement on legislatures, with detrimental side effects upon municipalities' local autonomy and authority to govern themselves. 435 U. S., at 434–435. In fact, this Court has never required the degree of specificity that the Towns insist is necessary.[7]

In sum, we conclude that the Wisconsin statutes evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of sewage services. These statutory provisions plainly show that "'the legislature contemplated the kind of action complained of.'" *Lafayette*, *supra*, at 415 (quoting the decision of the Court of Appeals, 532 F. 2d 431, 434 (CA5 1976)).[8] This is sufficient to satisfy the "clear articulation" requirement of the state action test.

---

[7] Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. See 1 P. Areeda & D. Turner, Antitrust Law ¶ 212.3(b) (Supp. 1982).

[8] Our view of the legislature's intent is supported by *Town of Hallie* v. *City of Chippewa Falls*, 105 Wis. 2d 533, 314 N. W. 2d 321 (1982), in which the Supreme Court of Wisconsin rejected the Town of Hallie's challenge under state antitrust laws against the City of Chippewa Falls in a case quite similar to the one at bar. There, the Town of Hallie argued that the City's refusal to provide it with sewage treatment services, the requirement of annexation, and the City's conditioning of the provision of treatment services on the acceptance also of sewage collection and other city services, violated the state antitrust laws. The State Supreme Court disagreed, concluding that the legislature intended the City to undertake the challenged actions. Those actions therefore were exempt from the State's antitrust laws. Analyzing §§ 66.069(2)(c) and 144.07(1m), the court concluded that the legislature had "viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could

C

The Towns further argue that the "clear articulation" requirement of the state action test requires at least that the City show that the State "compelled" it to act. In so doing, they rely on language in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), and *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). We disagree with this contention for several reasons. *Cantor* and *Goldfarb* concerned private parties—not municipalities—claiming the state action exemption. This fact distinguishes those cases because a municipality is an arm of the State. We may presume, absent a showing to the contrary, that the municipality acts in the public interest.[9] A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.

None of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown. Both *Boulder*, 455 U. S., at 56–57, and *Lafayette*, 435 U. S., at 416–417, spoke in terms of the State's direction *or authorization* of the anticompetitive practice at issue. This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively

require before extending sewer services to the area." *Id.*, at 540–541, 314 N. W. 2d, at 325.

Although the Wisconsin Supreme Court's opinion does not, of course, decide the question presented here of the City's immunity under the *federal* antitrust laws, it is instructive on the question of the state legislature's intent in enacting the statutes relating to the municipal provision of sewage services.

[9] Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to "sunshine" laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.

expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy.

IV

Finally, the Towns argue that as there was no active state supervision, the City may not depend on the state action exemption. The Towns rely primarily on language in *Lafayette*. It is fair to say that our cases have not been entirely clear. The plurality opinion in *Lafayette* did suggest, without elaboration and without deciding the issue, that a city claiming the exemption must show that its anticompetitive conduct was actively supervised by the State. 435 U. S., at 410. In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), a unanimous Court held that supervision is required where the anticompetitive conduct is by private parties. In *Boulder*, however, the most recent relevant case, we expressly left this issue open as to municipalities. 455 U. S., at 51–52, n. 14. We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.[10]

As with respect to the compulsion argument discussed above, the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is

---

[10] In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *post*, at 62.

essentially a private price-fixing arrangement." 445 U. S., at 106. Where a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

V

We conclude that the actions of the City of Eau Claire in this case are exempt from the Sherman Act. They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation. We further hold that active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. We accordingly affirm the judgment of the Court of Appeals for the Seventh Circuit.

It is so ordered.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES

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

No. 82–1922. Argued November 26, 1984—Decided March 27, 1985

Petitioner Southern Motor Carriers Rate Conference and petitioner North Carolina Motor Carriers Association (petitioners), "rate bureaus" composed of motor common carriers operating in North Carolina, Georgia, Tennessee, and Mississippi, submit, on behalf of their members, joint rate proposals to the Public Service Commission in each State. This collective ratemaking is authorized, but not compelled, by the respective States. The United States, contending that petitioners' collective ratemaking violates the federal antitrust laws, filed an action in Federal District Court to enjoin it. Petitioners responded that their conduct was immune from the federal antitrust laws by virtue of the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341. The District Court entered a summary judgment in the Government's favor. The Court of Appeals affirmed, holding that compulsion is a threshold requirement to a finding of *Parker* immunity. The court reasoned that the two-pronged test of *California Retail Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, for determining whether state regulation of private parties is shielded from the federal antitrust laws—the challenged restraint must be one clearly articulated and affirmatively expressed as a state policy and the State must supervise actively any private anticompetitive conduct—is inapplicable to suits against private parties; that even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy" within the meaning of *Midcal*'s first prong; and that because *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773—which held that a State Bar, acting alone, could not immunize from the federal antitrust laws its anticompetitive conduct in fixing minimum fees for lawyers—was cited with approval in *Midcal*, the *Midcal* Court endorsed the continued validity of a "compulsion requirement."

Held: Petitioners' collective ratemaking activities, although not compelled by the respective States, are immune from federal antitrust liability under the state action doctrine. The *Midcal* test should be used to determine whether the private rate bureaus' collective ratemaking activities are protected under the federal antitrust laws. Moreover, the actions of a private party can be attributed to a "clearly articulated state

policy," within the meaning of the *Midcal* test's first prong, even in the absence of compulsion. The anticompetitive conduct is taken pursuant to a "clearly articulated state policy" under the first prong of the *Midcal* test. Here North Carolina, Georgia, and Tennessee statutes expressly permit collective ratemaking. Mississippi, while not expressly approving of collective ratemaking, has clearly articulated its intent to displace price competition among common carriers with a regulatory structure. Because the Government conceded that there was adequate state supervision, both prongs of the *Midcal* test are satisfied. Pp. 55–66.

702 F. 2d 532, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 66.

Allen I. Hirsch argued the cause for petitioners. With him on the brief for petitioner Southern Motor Carriers Rate Conference, Inc., was *Simon A. Miller.* *Bryce Rea, Jr.*, and *Patrick McEligot* filed briefs for petitioner North Carolina Motor Carriers Association, Inc. *William Paul Rodgers, Jr.*, filed briefs for petitioner National Association of Regulatory Utility Commissioners.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Assistant Attorney General Rule, Carter G. Phillips, Catherine G. O'Sullivan, Elliott M. Seiden,* and *Nancy C. Garrison.**

---

*Briefs of *amici curiae* urging reversal were filed for the American Movers Conference et al. by *James A. Calderwood, Edward J. Kiley,* and *Robert R. Harris;* and for the Edison Electric Institute by *S. Eason Balch* and *H. Hampton Boles.*

Briefs of *amici curiae* urging affirmance were filed for the State of Iowa et al. by *Thomas G. Miller,* Attorney General of Iowa, *John R. Perkins* and *William F. Raisch,* Assistant Attorneys General, *Charles M. Oberly III,* Attorney General of Delaware, *Dennis J. Roberts II,* Attorney General of Rhode Island, *Faith A. La Salle,* Special Assistant Attorney General, *Bronson C. La Follette,* Attorney General of Wisconsin, *Michael L. Zaleski,* Assistant Attorney General, *Linley E. Pearson,* Attorney General of Indiana, and *Frank A. Baldwin,* Deputy Attorney General; for the National Industrial Transportation League by *John F. Donelan*

JUSTICE POWELL delivered the opinion of the Court.

Southern Motor Carriers Rate Conference, Inc. (SMCRC), and North Carolina Motor Carriers Association, Inc. (NCMCA), petitioners, are "rate bureaus" composed of motor common carriers operating in four Southeastern States. The rate bureaus, on behalf of their members, submit joint rate proposals to the Public Service Commission in each State for approval or rejection. This collective ratemaking is authorized, but not compelled, by the States in which the rate bureaus operate. The United States, contending that collective ratemaking violates the federal antitrust laws, filed this action to enjoin the rate bureaus' alleged anticompetitive practices. We here consider whether the petitioners' collective ratemaking activities, though not compelled by the States, are entitled to Sherman Act immunity under the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

A

In North Carolina, Georgia, Mississippi, and Tennessee, Public Service Commissions set motor common carriers' rates for the intrastate transportation of general commodities.[1] Common carriers are required to submit proposed rates to the relevant Commission for approval.[2] A proposed

---

and *Frederic L. Wood;* and for the National Small Shipments Traffic Conference et al. by *Daniel J. Sweeney.*

[1] N. C. Gen. Stat. § 62–130(a) (1982); Ga. Code Ann. § 46–7–18 (Supp. 1984); Miss. Code Ann. § 77–7–217 (1972); Tenn. Code Ann. § 65–15–106(a) (Supp. 1984).

The Interstate Commerce Commission has the power to fix common carriers' rates for the interstate transportation of general commodities. 49 U. S. C. § 10704. The Interstate Commerce Act, however, expressly reserves to the States the regulation of common carriers' intrastate rates, even if these rates affect interstate commerce. 49 U. S. C. § 10521(b).

[2] N. C. Gen. Stat. § 62–134(a) (1982); Ga. Code Ann. § 46–2–25(a) (1982); Miss. Code Ann. §§ 77–7–211 and 77–7–215 (1972); Tenn. Code Ann. § 65–5–202 (1982).

rate becomes effective if the state agency takes no action within a specified period of time. If a hearing is scheduled, however, a rate will become effective only after affirmative agency approval.[3] The State Public Service Commissions thus have and exercise ultimate authority and control over all intrastate rates.

In all four States, common carriers are allowed to agree on rate proposals prior to their joint submission to the regulatory agency.[4] By reducing the number of proposals, collective ratemaking permits the agency to consider more carefully each submission. In fact, some Public Service Commissions have stated that without collective ratemaking they would be unable to function effectively as rate-setting bodies.[5] Nevertheless, collective ratemaking is not compelled by any of the States; every common carrier remains free to submit individual rate proposals to the Public Service Commissions.[6]

---

[3] N. C. Gen. Stat. § 62–134(b) (1982); Ga. Code Ann. § 46–2–25(b) (1982); Miss. Code Ann. §§ 77–7–217 and 77–7–219 (1972); Tenn. Code Ann. § 65–5–203(a) (Supp. 1984).

[4] N. C. Gen. Stat. § 62–152.1(b) (1982); Ga. Code Ann. § 46–7–18 (Supp. 1984), Ga. Pub. Serv. Comm'n Rule 1–3–1–.14 (1983); Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in No. 76–1909A (ND Ga. 1977), p. 11; Tenn. Code Ann. § 65–15–119 (Supp. 1984), Tenn. Pub. Serv. Comm'n Rule 1220–2–1–.40, Rules, Regulations and Statutes Governing Motor Carriers, p. 29 (1974).

[5] See, *e. g.*, Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra*, at 15–16.

Moreover, the uniformity in prices that collective ratemaking tends to produce is considered desirable by the legislature of at least one State and the Public Service Commission of another. See N. C. Gen. Stat. § 62–152.1(b) (1982); Miss. Pub. Serv. Comm'n Rule 39D(4), Rules of Practice and Procedure and General Rules and Regulations under the Miss. Motor Carrier Act of 1938, as amended, p. 37 (1972).

[6] N. C. Gen. Stat. § 62–152.1(e) (1982); Ga. Pub. Serv. Comm'n Rule 1–3–1–.14, *supra;* Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra*, at 11; Tenn. Pub. Serv. Comm'n Rule 1220–2–1–.40, *supra*.

As indicated above, SMCRC and NCMCA are private associations composed of motor common carriers operating in North Carolina, Georgia, Mississippi, and Tennessee.[7] Both organizations have committees that consider possible rate changes.[8] If a rate committee concludes that an intrastate rate should be changed, a collective proposal for the changed rate is submitted to the State Public Service Commission. Members of the bureau, however, are not bound by the joint proposal. Any disapproving member may submit an independent rate proposal to the state regulatory Commission.[9]

B

On November 17, 1976, the United States instituted this action against SMCRC and NCMCA in the United States District Court for the Northern District of Georgia.[10] The

---

[7] At the time this action was filed, SMCRC represented its common carrier members before Public Service Commissions in North Carolina, Georgia, Mississippi, Tennessee, and Alabama. SMCRC, however, is no longer active before the Alabama Public Service Commission. Brief for Petitioners 3, n. 2. NCMCA represents its members before the regulatory agency in North Carolina.

[8] SMCRC has a separate rate committee for each of the States in which its members operate—North Carolina, Georgia, Mississippi, and Tennessee. NCMCA, which is concerned solely with matters before the North Carolina Public Service Commission, has only one rate committee.

[9] In addition to providing a forum for their members to discuss rate proposals, the rate bureaus: "[(i)] publish tariffs and supplements containing the rates on which the carriers agree; and [(ii)] provide counsel, staff experts, and facilities for the preparation of cost studies, other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions." 702 F. 2d 532, 534 (1983).

[10] Motor Carriers Traffic Association, Inc. (MCTA), another rate bureau operating in North Carolina, also was named as a defendant. MCTA did not appeal from the District Court's judgment, and is not a party before this Court.

The District Court permitted the National Association of Regulatory Utility Commissioners (NARUC), an organization composed of state

United States charged that the two rate bureaus had violated § 1 of the Sherman Act by conspiring with their members to fix rates for the intrastate transportation of general commodities. The rate bureaus responded that their conduct was exempt from the federal antitrust laws by virtue of the state action doctrine. See *Parker* v. *Brown*, 317 U. S. 341 (1943).[11] They further asserted that their collective ratemaking activities did not violate the Sherman Act because the rates ultimately were determined by the appropriate state agencies. The District Court found the rate bureaus' arguments meritless, and entered a summary judgment in favor of the Government. 467 F. Supp. 471 (1979). The defendants were enjoined from engaging in collective ratemaking activities with their members.

The Court of Appeals for the Fifth Circuit (Unit B, now the Eleventh Circuit), sitting en banc, affirmed the judgment of the District Court. 702 F. 2d 532 (1983).[12] Relying primarily on *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the court held that the rate bureaus' challenged conduct, because it was not compelled by the State, was not entitled to *Parker* immunity. The two-pronged test set forth in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), was irrelevant, the court reasoned, for in that case a public official was the

---

agencies, to intervene as a defendant. See Fed. Rule Civ. Proc. 24(a). Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.

[11] The defendants also contended that their collective ratemaking activities were protected by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961); *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). Both the District Court and the Court of Appeals rejected this defense, and we do not address it. See n. 17, *infra*.

[12] A panel of that court, with one judge dissenting, had affirmed the District Court's judgment. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F. 2d 469 (1982).

named defendant.[13] 702 F. 2d, at 539. The Court of Appeals further held that even if *Midcal* were applicable to a private party's claim of state action immunity, the rate bureaus were not shielded from liability under the Sherman Act. The court concluded that only if the anticompetitive acts of a private party are compelled can a State's policy be held "clearly articulated and affirmatively expressed" within the meaning of *Midcal*. 702 F. 2d, at 539.

After finding the rate bureaus not entitled to *Parker* immunity, the Court of Appeals held that their collective ratemaking activities violated the Sherman Act. 672 F. 2d 469, 481 (1982).[14] It rejected the rate bureaus' contention that because the regulatory agencies had ultimate authority and control over the rates charged, the federal antitrust laws were not violated. The Court of Appeals found that "joint ratesetting . . . reduce[d] the amount of independent rate filing that otherwise would characterize the market process," and thus raised the prices charged for intrastate transportation of general commodities. *Id.*, at 478. This "naked price restraint," the court reasoned, is *per se* illegal. *Ibid.*

Four judges strongly dissented. They argued that *Midcal* was applicable to a private party's claim of state action immunity. The success of an antitrust action should depend upon the activity challenged rather than the identity of the defendant. 702 F. 2d, at 543–544. After asserting that *Midcal* provided the relevant test, the dissenters concluded that the lack of compulsion was not dispositive. Even in the absence of compulsion, a "state can articulate a clear and express policy." *Id.*, at 546. The dissent further concluded that a *per se* compulsion requirement denies States needed flexibility in the formation of regulatory programs, and thus is

---

[13] In this case, the Government elected, without explanation, not to name as defendants the state Public Service Commissions that regulated the motor common carriers' intrastate rates.

[14] The en banc Court of Appeals reinstated the part of the panel's opinion that addressed the Sherman Act violation. 702 F. 2d, at 542.

inconsistent with the principles of federalism that Congress intended to embody in the Sherman Act.[15]

We granted certiorari,[16] 467 U. S. 1240 (1984), to decide whether petitioners' collective ratemaking activities, though not compelled by the States in which they operate, are entitled to *Parker* immunity.[17]

II

In *Parker* v. *Brown*, 317 U. S., at 341, this Court held that the Sherman Act was not intended to prohibit States from imposing restraints on competition.[18] There, a raisin pro-

---

[15] Judge Clark's separate dissenting opinion criticized the majority for ignoring "the Interstate Commerce Act, public policy, history, and fairness." *Id.*, at 548.

[16] The joint petition for a writ of certiorari was filed by SMCRC, NCMCA, and the NARUC.

[17] Although we granted certiorari on the *Noerr-Pennington* issue as well, see n. 11, *supra*, our disposition of this case makes it unnecessary to consider the applicability of that doctrine to the petitioners' collective ratemaking activities.

[18] JUSTICE STEVENS, noting that "[i]mplied antitrust immunities . . . are disfavored . . . ," *post*, at 67, cites *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), for the proposition that "if exceptions are to be written into the Sherman Act, they must come from Congress, and not this Court." *Id.*, at 561. The dissent apparently finds some significance in the fact that no federal statute expressly exempts the petitioners' collective ratemaking activities from the antitrust laws. See *post*, at 70.

The dissent's argument on this point, of course, does not suggest that compulsion should be a prerequisite to a finding of state action immunity. Instead, the logical result of its reasoning would require us to overrule *Parker* v. *Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.

JUSTICE STEVENS relies primarily upon *United States* v. *South-Eastern Underwriters*, *supra*, and *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), in the first section of his dissent. Neither of these cases, however, has any bearing on the scope of *Parker* immunity. In *South-Eastern Underwriters*, *supra*, the Court held only that the "business of insurance is interstate commerce," *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 217 (1979), and thus is subject to the Sherman Act's

ducer filed an action against the California Director of Agriculture to enjoin the enforcement of the State's Agricultural Prorate Act. Under that statute, a cartel of private raisin producers was created in order to stabilize prices and prevent "economic waste." *Id.*, at 346. The Court recognized that the State's program was anticompetitive, and it assumed that Congress, "in the exercise of its commerce power, [could] prohibit a state from maintaining [such] a stabilization program . . . ." *Id.*, at 350. Nevertheless, the Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents . . . ." *Id.*, at 351.

Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties. The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce.[19] If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the

---

proscriptions. The Court did not suggest that, because of congressional silence, state regulation could not immunize insurance companies from the federal antitrust laws. Instead, it reasoned that *Parker* did not protect the insurance companies because "no states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner . . . [there] alleged." 322 U. S., at 562. In *Georgia* v. *Pennsylvania R. Co.*, *supra*, the Court was concerned with whether Congress intended to immunize a *federal* regulatory program from the antitrust laws. See n. 21, *infra*.

[19] In holding that the States were free to regulate "domestic commerce," the *Parker* Court relied upon congressional silence. There are, however, some statements in the legislative history that affirmatively express a desire not "to invade the legislative authority of the several States . . . ." H. R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890). See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 632 (1976) (Stewart, J., dissenting).

state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties. *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 616–617, n. 4 (1976) (Stewart, J., dissenting).

The circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S., at 97. See *Hallie* v. *Eau Claire*, *ante*, at 46, n. 10. In *Midcal*, we affirmed a state-court injunction prohibiting officials from enforcing a statute requiring wine producers to establish resale price schedules. We set forth a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint must be "'one clearly articulated and affirmatively expressed as state policy.'" 445 U. S., at 105, quoting *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.). Second, the State must supervise actively any private anticompetitive conduct. 445 U. S., at 105.[20] This supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a "gauzy cloak of state involvement" over what is essentially private anticompetitive conduct. *Id.*, at 106.[21]

---

[20] As we hold today in *Hallie* v. *Eau Claire*, *ante*, at 46, the second prong of the *Midcal* test is inapplicable to municipalities. Although its anticompetitive conduct must be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for *Parker* immunity. See *ante*, at 46.

[21] The dissent argues that a state regulatory program is entitled to *Parker* immunity only if an antitrust exemption is "'necessary . . . to make the [program] work . . . .'" *Post*, at 74 (quoting *Cantor* v. *Detroit Edison Co.*, *supra*, at 597). This argument overlooks the fact that, with the exception of a questionable dictum in *Cantor*, *supra*, the dissent's proposed test has been used only in deciding whether Congress intended to immunize a federal regulatory program from the Sherman Act's proscriptions. See, *e. g.*, *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357

III

The *Midcal* test does not expressly provide that the actions of a private party must be compelled by a State in order to be protected from the federal antitrust laws. The Court of Appeals, however, held that compulsion is a threshold requirement to a finding of *Parker* immunity. It reached this conclusion by finding that: (i) *Midcal* is inapplicable to suits brought against private parties; (ii) even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy," within the meaning of *Midcal*'s first prong; and (iii) because *Goldfarb* was cited with approval in *Midcal*, the *Midcal* Court endorsed the continued validity of a "compulsion requirement." We consider these points in order.

A

The Court of Appeals held that *Midcal*, that involved a suit against a state agency, is inapplicable where a private party is the named defendant. *Midcal*, however, should not be given such a narrow reading. In that case we were concerned, as we are here, with state regulation restraining competition among private parties. Therefore, the two-pronged test set forth in *Midcal* should be used to determine whether the private rate bureaus' collective ratemaking activities are protected from the federal antitrust laws. The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the

---

(1963). In this context, if the federal courts wrongly conclude that an antitrust exemption is "unnecessary," Congress can correct the error. As the dissent recognizes, however, the Supremacy Clause would prevent state legislatures from taking similar remedial action. *Post*, at 67. Moreover, the proposed test would prompt the "kind of interference with state sovereignty . . . that . . . *Parker* was intended to prevent." 1 P. Areeda & D. Turner, Antitrust Law ¶ 214, p. 88 (1978). Therefore, we hold that state action immunity is not dependent on a finding that an exemption from the federal antitrust laws is "necessary."

defendant. See *Cantor* v. *Detroit Edison Co.*, *supra*, at 604 (BURGER, C. J., concurring in part and concurring in judgment); *Lafayette* v. *Louisiana Power & Light Co.*, *supra*, at 420 (BURGER, C. J., concurring in part and concurring in judgment).

B

The Court of Appeals held that even if *Midcal* were applicable here, the rate bureaus would not be immune from federal antitrust liability. According to that court, the actions of a private party cannot be attributed to a clearly articulated state policy, within the meaning of the *Midcal* test's first prong, "when it is left to the private party to carry out that policy or not as he sees fit." 702 F. 2d, at 539. In the four States in which petitioners operate, all common carriers are free to submit proposals individually. The court therefore reasoned that the States' policies are neutral with respect to collective ratemaking, and that these policies will not be frustrated if the federal antitrust laws are construed to require individual submissions.

In reaching its conclusion, the Court of Appeals assumed that if anticompetitive activity is not compelled, the State can have no interest in whether private parties engage in that conduct. This type of analysis ignores the manner in which the States in this case clearly have intended their permissive policies to work. Most common carriers probably will engage in collective ratemaking, as that will allow them to share the cost of preparing rate proposals. If the joint rates are viewed as too high, however, carriers individually may submit lower proposed rates to the Commission in order to obtain a larger share of the market. Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions. Construing the Sherman Act to prohibit collective rate proposals eliminates the free choice necessary to ensure that these policies function in the manner intended

by the States. The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties. As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied.[22]

C

In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), this Court said that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.*, at 790. *Midcal* cited *Goldfarb* with approval. 445 U. S., at 104. On the basis of this citation, the Court of Appeals reasoned that *Midcal* did not eliminate the "compulsion requirement" of *Goldfarb*.

Goldfarb, however, is not properly read as making compulsion a *sine qua non* to state action immunity. In that case, the Virginia State Bar, a state agency, compelled Fairfax County lawyers to adhere to a minimum-fee schedule. 421 U. S., at 776–778. The *Goldfarb* Court therefore was not concerned with the necessity of compulsion—its presence in the case was not an issue. The focal point of the *Goldfarb* opinion was the *source* of the anticompetitive policy, rather than whether the challenged conduct was *compelled*. The Court held that a State Bar, *acting alone*, could not immunize its anticompetitive conduct. Instead, the Court held that private parties were entitled to *Parker* immunity only if the State "acting as sovereign" intended to displace competition. 421 U. S., at 790; see *Lafayette* v. *Louisiana Power*

[22] Under the Interstate Commerce Act, motor common carriers are permitted, but not compelled, to engage in collective *interstate* ratemaking. 49 U. S. C. §§ 10706(b)(2) and 10706(d)(2)(C). It is clear, therefore, that Congress has recognized the advantages of a permissive policy. We think it unlikely that Congress intended to prevent the States from adopting virtually identical policies at the intrastate level.

& Light Co., 435 U. S., at 410 (opinion of BRENNAN, J.) ("*Goldfarb* . . . made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign").

Although *Goldfarb* did employ language of compulsion, it is beyond dispute that the Court would have reached the same result had it applied the two-pronged test later set forth in *Midcal*. As stated above, Virginia "as sovereign" did not have a "clearly articulated policy" designed to displace price competition among lawyers. In fact, the Supreme Court of Virginia had explicitly directed lawyers not "to be controlled" by minimum-fee schedules. *Goldfarb*, *supra*, at 789, n. 19. Although we recognize that the language in *Goldfarb* is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity.

D

The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

In summary, we hold *Midcal*'s two-pronged test applicable to private parties' claims of state action immunity. Moreover, a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be "clearly articulated" within the meaning of *Midcal*.[23] Our holding today does not

[23] Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker* v. *Brown*, 317 U. S., at

suggest, however, that compulsion is irrelevant. To the contrary, compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition. See *Hallie* v. *Eau Claire*, *ante*, at 45–46; 1 P. Areeda & D. Turner, Antitrust Law ¶212.5, p. 62 (Supp. 1982) (compulsion is "powerful evidence" of existence of state policy). Nevertheless, when other evidence conclusively shows that a State intends to adopt a permissive policy, the absence of compulsion should not prove fatal to a claim of *Parker* immunity.

IV

A

Our holding that there is no inflexible "compulsion requirement" does not suggest necessarily that petitioners' collective ratemaking activities are shielded from the federal antitrust laws. A private party may claim state action immunity only if both prongs of the *Midcal* test are satisfied. Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissions actively supervise the collective ratemaking activities of the rate bureaus. Therefore, the only issue left to resolve is whether the petitioners' challenged conduct was taken pursuant to a clearly articulated state policy.

The Public Service Commissions in North Carolina, Georgia, Mississippi, and Tennessee permit collective ratemaking. See n. 4, *supra*. Acting alone, however, these agencies

---

351; see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U. S., at 106. This active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See 1 P. Areeda & D. Turner, Antitrust Law §213a, p. 73 (1978).

could not immunize private anticompetitive conduct. In *Goldfarb*, the State Bar—a special type of "state agency"—prohibited lawyers from charging fees lower than those set forth in schedules published by the local bar. Nevertheless, this Court held that the local lawyers were not immune from antitrust liability because their anticompetitive conduct was not required by the State as sovereign. 421 U. S., at 790. *Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature, see *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978), or a State Supreme Court, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977).

In this case, therefore, the petitioners are entitled to *Parker* immunity only if collective ratemaking is clearly sanctioned by the legislatures of the four States in which the rate bureaus operate. North Carolina, Georgia, and Tennessee have statutes that explicitly permit collective ratemaking by common carriers.[24] The rate bureaus' challenged actions, at least in these States, are taken pursuant to an express and clearly articulated state policy. Mississippi's legislature, however, has not specifically addressed collective ratemaking. We therefore must consider whether, in the absence of a statute expressly permitting the challenged conduct, the first prong of the *Midcal* test can be satisfied.

B

The Mississippi Motor Carrier Regulatory Law of 1938, Miss. Code Ann. § 77–7–1 *et seq.* (1972 and Supp. 1984), gives the State Public Service Commission authority to regulate common carriers. The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. § 77–7–221. The legislature thus made clear its intent that intrastate rates

[24] N. C. Gen. Stat. § 62–152.1(b) (1982); Ga. Code Ann. § 46–7–18 (1982 and Supp. 1984); Tenn. Code Ann. § 65–15–119 (1982).

would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. See Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in District Court, No. 76–1909A (ND Ga. 1977), p. 11. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity.

A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 415 (opinion of BRENNAN, J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. In *Goldfarb*, the Court held that *Parker* immunity was unavailable only because the State *as sovereign* did not intend to do away with competition among lawyers. 421 U. S., at 790. Similarly, in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market. 428 U. S., at 584–585.

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Cf. *Hallie* v. *Eau Claire*, *ante*, at 44 (requiring explicit legislative authorization of anticompetitive activity would impose "detrimental side effects upon municipalities' local autonomy"). Therefore, we hold

that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi,[25] the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

C

In summary, we hold that the petitioners' collective ratemaking activity is immune from Sherman Act liability. This anticompetitive conduct is taken pursuant to a "clearly articulated state policy." The legislatures of North Carolina, Georgia, and Tennessee expressly permit motor common carriers to submit collective rate proposals to Public Service Commissions, which have the authority to accept, reject, or modify any recommendation. Mississippi, the fourth State in which the petitioners operate, has not expressly approved of collective ratemaking, but it has articulated clearly its intent to displace price competition among common carriers with a regulatory structure. Anticompetitive conduct taken pursuant to such a regulatory program satisfies the first

---

[25] The Mississippi statute stands in sharp contrast to the Colorado Home Rule Amendment, which we considered in *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982). In *Boulder*, the State Constitution gave municipalities extensive powers of self-government. *Id.*, at 43–44. Pursuant to this authority, the city of Boulder prohibited a cable television company from expanding its operations. The Court held that because the Home Rule Amendment did not evidence an intent to displace competition in the cable television industry, *id.*, at 55, Boulder's anticompetitive ordinance was not enacted pursuant to a clearly articulated state policy. This holding was premised on the fact that Boulder, as a "home rule municipality," was authorized to elect free-market competition as an alternative to regulation. *Id.*, at 56.

In this case, on the other hand, the Mississippi Public Service Commission is not authorized to choose free-market competition. Instead, it is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. Miss. Code Ann. § 77–7–221 (1972). These factors bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market. Therefore, the Mississippi statute clearly indicates that the legislature intended to displace competition in the intrastate trucking industry with a regulatory program.

prong of the *Midcal* test. The second prong of the *Midcal* test likewise is met, for the Government has conceded that the relevant States, through their agencies, actively supervise the conduct of private parties.

V

We conclude that the petitioners' collective ratemaking activities, although not compelled by the States, are immune from antitrust liability under the doctrine of *Parker* v. *Brown*. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The term "price fixing" generally refers to a process by which competitors agree upon the prices that will prevail in the market for the goods or services they offer. Such behavior is not essential to every public program for regulating industry. In this case, for example, four Southern States have established programs for evaluating the reasonableness of rates that motor carriers propose to charge for intrastate transport, but the States do not require price fixing by motor carriers. They merely tolerate it.

Reasoning deductively from a dictum in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980), the Court holds that Congress did not intend to prohibit price fixing by motor carrier rate bureaus—at least when such conduct is prompted, but not required, by a State Public Service Commission. The result is inconsistent with the language[1] and policies of the Sherman Act, and this Court's precedent. The Sherman Act only would interfere with the regulatory process if the States compelled price

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

fixing that is unlawful under federal law. In that situation, the regulated carriers would face conflicting obligations under state and federal law, and the success of the States' regulatory programs would be threatened. Except under those circumstances, immunity from the antitrust laws under the state-action doctrine is not available for private persons.[2]

I

"Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike":[3] agreements and combinations tampering with competitive price structures are unlawful. State legislatures, whose powers are limited by the Supremacy Clause,[4] may not expressly modify the obligations of any person under this federal law. Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances. Implied antitrust immunities, however, are disfavored,[5] and any exemptions

---

[2] Of course, public agencies like municipalities need only establish that their anticompetitive conduct is taken pursuant to a clearly articulated and affirmatively expressed state policy. *Hallie* v. *Eau Claire*, *ante*, at 46–47. The less stringent requirement reflects the presumption "that the municipality acts in the public interest." *Ante*, at 45; cf. *Affiliated Capital Corp.* v. *City of Houston*, 735 F. 2d 1555, 1571–1572 (CA5 1984) (en banc) (Higginbotham, J., concurring), cert. pending, No. 84–951.

[3] *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222 (1940); see also *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 785 (1975); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309–310 (1956); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143 (1948).

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2.

[5] *E. g.*, *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross of Kansas City*, 452 U. S. 378, 388–389 (1981); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719–720 (1975).

from the antitrust laws are to be strictly construed.[6] These "canon[s] of construction . . . reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 348 (1963).

Applying these principles, this Court has consistently embraced the view that "[r]egulated industries are not *per se* exempt from the Sherman Act." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456 (1945). For many years prior to the enactment of the Sherman Act, state agencies regulated the business of insurance, but we rejected the view that these programs of public scrutiny supported "our reading into the Act an exemption" allowing insurance businesses to fix premium rates and agents' commissions. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 559 (1944). In *South-Eastern Underwriters*, the Court tersely observed that "if exceptions are to be written into the Act, they must come from Congress, not this Court." *Id.*, at 561. Thereafter, in the McCarran-Ferguson Act of 1945, 59 Stat. 33, Congress decided, as a matter of policy, that the Sherman Act's prohibition of price fixing "shall [only] be applicable to the business of insurance to the extent that such business is not regulated by State Law." 15 U. S. C. § 1012(b).

Consistent with its treatment of the insurance business in *South-Eastern Underwriters*, this Court has repeatedly held that collusive price fixing by railroads is unlawful even though the end result is a reasonable charge approved by a public rate commission.[7] *Georgia* v. *Pennsylvania R. Co.*,

---

[6] *E. g.*, *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U. S. 205, 231 (1979); *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11 (1976).

[7] "In [*Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922)], the suit was one for damages under the Sherman Act. The charge was that the defendant carriers had formed a rate bureau or committee to secure agreement in respect to freight rates among the constituent railroad companies which would otherwise be competing carriers. As we have seen, the Court held that damages could not be recovered. But Mr.

324 U. S., at 455–463.; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 337–340 (1897). In the *Pennsylvania Railroad* case, the Court explained why this is so:

> "The fact that the rates which have been fixed may or may not be held unlawful by the [Interstate Commerce] Commission is immaterial to the issue before us. . . . [E]ven a combination to fix reasonable and non-discriminatory rates may be illegal. [*Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 161 (1922)]. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a 'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.' *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 [1935]. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ

---

Justice Brandeis speaking for a unanimous Court stated that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and nondiscriminatory. He said . . . : 'All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. . . . But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 [1897], and *United States* v. *Joint Traffic Association*, 171 U. S. 505 [1898]. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.' [260 U. S., at 161–162]." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457–458 (1945). Although the Court in *Pennsylvania Railroad* was divided on the question whether Georgia could pursue its antitrust remedy by invoking this Court's original jurisdiction, the dissenting Justices recognized that the United States could obtain an injunction against the alleged price fixing in an appropriate forum. See *id.*, at 484, 489 (Stone, C. J., dissenting). It is, of course, the United States that seeks relief in the case now before us.

> unlawful tactics. . . . Damage must be presumed to flow from a conspiracy to manipulate rates within that zone." 324 U. S., at 460–461.

Collusive price fixing by regulated carriers causes upward pressure on rates within the zone of reasonableness, and such combinations and conspiracies are generally actionable under the Sherman Act on the theory of the *Pennsylvania Railroad* case.

Congress reacted to the *Pennsylvania Railroad* decision much as it reacted to the *South-Eastern Underwriters* decision. It decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate that policy choice.[8] In the Motor Carrier Act of 1980,[9] however, Congress sharply curtailed the availability of this antitrust exemption. Collective ratemaking is still permitted in limited circumstances, but rate bureaus must comply with strict procedural requirements. See n. 19, *infra*.

The defendants have stipulated that their price-fixing arrangements are identical to those followed by the Carrier Rate Committees in the *Pennsylvania Railroad* case which were declared unlawful under the Sherman Act. See App. 40–41. They also acknowledge that neither the Reed-Bulwinkle Act nor any other federal statute expressly exempts their price fixing from the antitrust laws. Nevertheless, they contend that Congress would not have intended to prohibit collective ratemaking by intrastate motor carriers when it is permitted, but not required, by state law.

---

[8] "Parties to any agreement approved by the Commission under this section and other persons are . . . hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission." 62 Stat. 473. The current version of the exemption is codified at 49 U. S. C. § 10706(b)(2).

[9] 94 Stat. 803, 49 U. S. C. §§ 10706(b)(3)(B)–(D).

II

The basis for the defendants' claim of implied immunity from the antitrust laws is the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943). This Court, however, has repeatedly recognized that private entities may not claim the state-action immunity unless their unlawful conduct is compelled by the State.

In the *Parker* case, this Court held that the Sherman Act does not reach "state action or official action directed by a state." *Id.*, at 351. The case involved price fixing that was mandated by a California statute in the furtherance of a price-support program for raisin farmers. The Court held that the price fixing was not prohibited by the Sherman Act:

> "[T]he prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.*, at 350–351.

Under *Parker*, private anticompetitive conduct must be "directed" by the State to be eligible for the state-action immunity.

In a later case involving price fixing by attorneys through minimum-fee schedules, the Court unanimously stated: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker* v. *Brown*, 317 U. S., at 350–352; *Continental Co.* v. *Union Carbide*, 370 U. S. 690, 706–707 (1962)." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 790 (1975). In *Goldfarb*, no state statute or Supreme Court rule required the defendant County Bar Association to

adopt the minimum-fee schedule, and this Court concluded that this "is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.*, at 791.

In *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), the Court was also unanimous in its understanding that sovereign compulsion was a prerequisite for state-action immunity.[10] The opinion for the Court observed that it has long been settled "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.*, at 592–593 (footnotes omitted).[11] The dissenting Justices agreed: "private conduct, if it is to come within the state-action exemption, must be not merely 'prompted' but 'compelled' by state action." *Id.*, at 637 (Stewart, J., dissenting, joined by POWELL and REHNQUIST, JJ.).

In *Cantor*, the Court only divided on the question whether the compulsion requirement *alone* was sufficient to confer antitrust immunity. The dissent argued that Congress would not have intended to penalize Detroit Edison for engaging in a light-bulb-distribution program that had been approved by the Michigan Public Service Commission and that could not be discontinued without approval of the Commission. *Id.*, at 614–615. The Court, on the other hand, acknowledged that continuation of the light-bulb program was ostensibly required by the State, but went on to consider

---

[10] See, *e. g.*, *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 609 (BLACKMUN, J., concurring in judgment).

[11] For the proposition stated, the Court relied on *Goldfarb* v. *Virginia State Bar*, 421 U. S., at 791; *Continental Co.* v. *Union Carbide*, 370 U. S. 690, 706–707 (1962); *Parker* v. *Brown*, 317 U. S. 341, 351 (1943); *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 467–468 (1941); and *Northern Securities Co.* v. *United States*, 193 U. S. 197, 346 (1904).

whether an antitrust exemption for this conduct was fundamental to the State's regulatory program. Since Michigan's statutes only expressed an interest in regulating the electricity market, and not the light-bulb market, the Court concluded that "[r]egardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired." *Id.*, at 598. Because the State had not articulated any intention to regulate the light-bulb market, and the idea for the distribution program had come from the private utility, the State's requirement that the program continue was not sufficient to establish state-action immunity from the antitrust laws.

The Court's unanimous decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), signaled no departure from settled principles in this area. In discussing the principles of law applicable to state-action immunity, the Court quoted extensively from the language in *Parker* and *Goldfarb*[12] that recognized the compulsion requirement. In any case, it was quite clear in *Midcal* that the California statutes required the unlawful resale-price-maintenance activities. Thus, this Court had no occasion in that case to explore the contours of the compulsion requirement. The references, in the *Midcal* opinion, to "clearly articulated and affirmatively expressed" policies and "actively supervised" activities merely restated the standards to be applied in evaluating whether conduct ostensibly compelled by the State is entitled to the state-action immunity. These requirements *limited* the scope of the

[12] "Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. 'It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.' *Id.*, at 791." 445 U. S., at 104.

state-action immunity for private entities; they did not expand the immunity to protect conduct that is merely prompted by the State.[13]

III

Today the Court abandons the settled view that a private party is not entitled to state-action immunity unless the State compelled him to act in violation of federal law. Hereafter, a State may exempt price fixing from the federal antitrust laws if it clearly articulates its intention to supplant competition with regulation in the relevant market, and if it actively supervises the unlawful conduct by evaluating the reasonableness of the prices charged. The Court justifies this change in the law by finding it more consistent with "principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Ante*, at 61. I believe these conclusions are unsound.

Deference to State Regulatory Programs

The Court's reliance today on vague "principles of federalism" obscures our traditional disfavor for implied exemptions to the Sherman Act. We have only authorized exemptions from the Sherman Act for businesses regulated by federal law when "that exemption was necessary in order to make the regulatory Act work 'and even then only to the minimum extent necessary.'"[14] No lesser showing of repugnancy

[13] As in *Cantor*, the Court concluded in the *Midcal* case that the State's ostensible compulsion of the resale-price-maintenance program was not alone sufficient to confer state-action immunity. The State neither set the prices nor reviewed their reasonableness, nor did it monitor market conditions and evaluate the effectiveness of the program. Under those conditions, the "State simply authorizes price setting and enforces the prices set by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U. S., at 105–106.

[14] *Cantor* v. *Detroit Edison Co.*, 428 U. S., at 597 (quoting *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963)). In *United States* v. *National Assn. of Securities Dealers*, the Court pointed out that "[i]mplied

should be sufficient to justify an implied exemption based on a state regulatory program.

Any other view separates the state-action exemption from the reason for its existence. The program involved in the *Parker* case was designed to enhance the market price of raisins by regulating both output and price.[15] In other words, the state policy was one that replaced price competition with economic regulation. Price support programs like the one involved in *Parker* cannot possibly succeed if every individual producer is free to participate or not participate in the program at his option. In *Parker*, the challenged price fixing was the heart of California's support program for agriculture; without immunity from the Sherman Act, the State would have had to abandon the project.

In this case, the common denominator in the States' regulatory programs for motor carriers is their reservation of the power to evaluate the reasonableness of proposed rates and

---

antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between antitrust laws and the regulatory system. See, *e. g.*, *United States* v. *Philadelphia National Bank*, 374 U. S., at 348; *United States* v. *Borden Co.*, 308 U. S. 188, 197–206 (1939)." 422 U. S., at 719–720; see also nn. 5, 6, *supra*. These cases are, of course, consistent with the "cardinal rule," applicable to legislation generally, that repeals by implication are not favored. *Posadas* v. *National City Bank*, 296 U. S. 497, 503. (1936).

[15] "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." 317 U. S., at 346.

"The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.'" *Id.*, at 355.

terms of carriage.[16] In these programs, "no State requires that all rates among competing carriers for identical service be uniform, [and] no State requires, either by statute or regulation, or other express legislative or administrative mandate, that rates proposed by carriers be formulated by rate conferences." 467 F. Supp. 471, 477 (ND Ga. 1979). When, as here, state regulatory policies are permissive rather than mandatory, there is no necessary conflict between the antitrust laws and the regulatory systems; the regulated entity may comply with the edicts of each sovereign. Indeed, it is almost meaningless to contemplate a "regulatory" policy that gives every regulated entity *carte blanche* to excuse itself from the consequences of the regulation. Even a policy against speeding could not be enforced if every motorist could drive as fast as he chose. When a State declares that a regulated entity need not follow a regulatory procedure, it as much as admits that this element is inconsequential to the ultimate success of the regulatory program.[17]

---

[16] See Ga. Code Ann. §§ 46–2–25(b), 46–7–18 (Supp. 1984); Miss. Code Ann. §§ 77–7–217, 77–7–221 (1972); N. C. Gen. Stat. §§ 62–134(b), 62–146, 62–147 (1982); Tenn. Code Ann. §§ 65–5–203, 65–15–119 (1982).

[17] By consolidating petitions for rate modifications, collective ratemaking arguably preserves the resources of the state regulatory Commissions and promotes simplicity and uniformity in the intrastate rate structure. See App. 60–61, 83–84, 90–91. Under the statutes governing the state regulatory programs, however, the carriers may, at any time, decline to participate in collective ratemaking, and deprive the States of these purported advantages. *Ante*, at 51. That being so, it is difficult for the States to argue that these facets of their regulatory systems are essential to the program's success. Brief for State of Iowa et al. as *Amici Curiae* 6 ("The authorization of the price-fixing agreement, collective ratemaking, by the states serves no cognizable state interest").

The States also contend that the defendants provide a valuable information-gathering service for motor carriers. App. 60–61, 84, 90. The District Court's final judgment, however, would not have interfered with this function. *Id.*, at 99 ("Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise").

As I have noted, the Reed-Bulwinkle Act[18] authorizes collective ratemaking by interstate carriers under some circumstances. The Court doubts whether "Congress intended to prevent the States from adopting virtually identical policies at the intrastate level." *Ante*, at 60, n. 22. The Reed-Bulwinkle exemption, however, has been abolished for single-line rate requests, and to the extent that it still applies to general rate requests, the rate bureaus must follow stringent procedural safeguards which channel their conduct into useful informational tasks and thereby diminish the threat of anticompetitive misconduct.[19] Even if there were sound policy reasons[20] for extending the Reed-Bulwinkle exemp-

---

[18] See n. 8, *supra*.

[19] Under the exemption, as amended, the ratemaking conferences, among other things, must disclose the names of their members and affiliates of their members, 49 U. S. C. § 10706(b)(3)(A); the organization must limit discussion and voting to allowed subjects and parties, § 10706(b)(3)(B)(i); "the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier," § 10706(b)(3)(B)(iii); "the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item," § 10706(b)(3)(B)(iv); "upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization," § 10706(b)(3)(B)(v); and the organization shall make a final disposition of rate proposals within 120 days, § 10706(b)(3)(B)(vii). See generally *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354 (1984).

[20] In the legislative history of the 1980 Motor Carrier Act, however, Congress suggested otherwise:

"During the course of its hearings, the Committee heard a good deal of criticism of the rate bureau process. . . . The disadvantage is that the system inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions. When this happens, consumers lose the benefit of price competition that would occur if more efficient carriers were able to offer more attractive rates. Another serious problem has been the closed nature of the rate bureau proceedings. Voting upon specific rate proposals is done behind

tion, as amended, to a state regulatory program that did not contain comparable procedural safeguards, "[t]hese considerations are . . . not for us. . . . Congress is the body to amend [the statute] and not this court, by a process of judicial legislation wholly unjustifiable." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S., at 340.

The Policy of Competition

The Court embraces the defendants' specious argument that "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade." *Ante*, at 61. The Court finds this "result" inconsistent with the policies of the Sherman Act. This argument is seriously flawed.

On a practical level, the Court's argument assumes that a decision for the Government today would cause the States to rush into enactment legislation compelling price fixing in the motor carrier industry. Moreover, the Court's argument assumes that a Congress that only recently has acted to increase competition in the interstate motor carrier field would remain silent in the face of anticompetitive legislation at the intrastate level. These assumptions are wholly speculative.

On a more theoretical level, the Court ignores the anticompetitive effect of the collective ratemaking practices challenged in *this* litigation.[21] The Court of Appeals correctly observed that "[c]ollective [rate] formulation clearly tampers with the price structure for intrastate commodities; the rate

---

closed doors." S. Rep. No. 96–641, p. 13 (1980). See also H. R. Rep. No. 96–1069, p. 27 (1980).

[21] "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of unreasonableness since it is conclusively presumed to be unreasonable." *United States* v. *McKesson & Robbins, Inc.*, 351 U. S., at 309–310.

bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of impersonal market forces on proposed rates." 672 F. 2d 469, 478 (CA5, Unit B, now CA11, 1982). The increased rates for transportation caused by this behavior are especially grave in a basic industry, like transportation, where the ripple effects of the increased rates are magnified as raw materials, semifinished and finished goods are transported at various stages of production and distribution.

Active supervision of the rate bureau process—like that provided in the Motor Carrier Act of 1980—might minimize the anticompetitive effects of collective ratemaking.[22] To the extent that the State Regulatory Commissions are structured like the ICC in the *Pennsylvania Railroad* case, however, they only have the power to reject the rates proposed by the carriers if those rates fall outside the "zone of reasonableness." Unless the Commissions "actively supervise" the price-fixing process itself, they cannot eliminate the upward pressure on rates caused by collusive ratemaking. Unfortunately, the nature of the "active supervision" of those carriers who take part in collective ratemaking is not fully disclosed by the record.[23]

IV

Whether it is wise or unwise policy for the Federal Government to seek to enforce the Sherman Act in this case is not a question that this Court is authorized to consider. The District Court and the Court of Appeals correctly applied established precedent in holding that the Government is en-

---

[22] The Court of Appeals, however, found that the State Commissions' scrutiny of the reasonableness of proposed rates satisfies the active supervision requirement. 702 F. 2d 532, 539, n. 12 (CA5, Unit B, now CA11, 1983) (en banc).

[23] Some of the States' statutes and implementing regulations indicate that the process of collective ratemaking is being supervised on a limited basis. See, *e. g.*, N. C. Gen. Stat. § 62–152.1(c) (1982); Ga. Pub. Serv. Comm'n Rule 1–3–1–.14 (1983); Tenn. Pub. Serv. Comm'n Rule 1220–2–1–.40 (1974).

titled to an injunction against the defendants' price fixing. Such price fixing is unlawful unless it is expressly authorized by statute, or required by a State's regulatory program. Today the Court authorizes collective ratemaking by intrastate motor carriers even though the State has only permitted it in a program regulating the reasonableness of prices in the industry. Immunity of this type was rejected by the Court in the *South-Eastern Underwriters* and *Pennsylvania Railroad* cases, but today, under the shroud of the state-action doctrine,[24] it is resurrected.

Accordingly, I respectfully dissent.

---

[24] Since the Court does not reach it, *ante*, at 53, n. 11, 55, n. 17, I do not address the merits of the *Noerr-Pennington* question. See *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961).

CORY ET AL. *v.* WESTERN OIL & GAS ASSN. ET AL.

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

No. 84–16. Argued February 26, 1985—Decided March 27, 1985

726 F. 2d 1340, affirmed by an equally divided Court.

Dennis M. Eagan, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General, and *N. Gregory Taylor*, Assistant Attorney General.

Philip K. Verleger argued the cause for appellees. With him on the brief was *John P. Zaimes*.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

---

*A brief of *amici curiae* urging reversal was filed for the City of Santa Monica et al. by *Robert M. Myers*, *Karl M. Manheim*, *Bert Glennon, Jr.*, and *Stanley E. Remelmeyer*.

SPENCER ET UX. *v.* SOUTH CAROLINA TAX COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 84–249. Argued February 27, 1985—Decided March 27, 1985

281 S. C. 492, 316 S. E. 2d 386, affirmed by an equally divided Court.

Henry L. Parr, Jr., argued the cause for petitioners. With him on the briefs were *Eric B. Amstutz* and *Frank S. Holleman III*.

Ray N. Stevens, Senior Assistant Attorney General of South Carolina, argued the cause for respondents. With him on the brief were *T. Travis Medlock*, Attorney General, and *Joe L. Allen, Jr.*, Chief Deputy Attorney General.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

---

*Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, *Thomas R. Kiley*, First Assistant Attorney General, *Judith S. Yogman*, Assistant Attorney General, *Norman Gorsuch*, Attorney General of Alaska, *Steve Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Jim Jones*, Attorney General of Idaho, *Thomas J. Miller*, Attorney General of Iowa, *David L. Armstrong*, Attorney General of Kentucky, *Alex W. Rose*, Assistant Attorney General, *Stephan H. Sachs*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Brian McKay*, Attorney General of Nevada, *Peter W. Mosseau*, Acting Attorney General of New Hampshire, *Robert O. Wefald*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Mark V. Meierhenry*, Attorney General of South Dakota; and for the Council of State Governments et al. by *Joyce Holmes Benjamin*.

BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE ET AL. *v.* McCREARY ET AL.

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

No. 84–277. Argued February 20, 1985—Decided March 27, 1985

739 F. 2d 716, affirmed by an equally divided Court.

Marvin E. Frankel argued the cause for petitioners. With him on the briefs was *Marc D. Stern.*

Marvin Schwartz argued the cause for respondents and filed a brief for respondents Scarsdale Crèche Committee et al. *Vincent K. Gilmore* filed a brief for respondents McCreary et al.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

---

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Burt Neuborne, Charles S. Sims, Norman Dorsen,* and *Steven R. Shapiro;* for the American Jewish Committee et al. by *Samuel Rabinove;* and for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Meyer Eisenberg, Justin J. Finger,* and *Jeffrey P. Sinensky.*

Solicitor General Lee, Acting Assistant Attorney General Willard, and *Deputy Solicitor General Bator* filed a brief for the United States as *amicus curiae* urging affirmance.

Steven Frederick McDowell filed a brief for the Catholic League for Religious and Civil Rights as *amicus curiae.*

UNITED STATES ET AL. *v.* LOCKE ET AL.

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

No. 83–1394. Argued November 6, 1984—Decided April 1, 1985

Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA) establishes a federal recording system that is designed to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions. Section 314(b) requires that mining claims located prior to FLPMA's enactment be initially recorded with the Bureau of Land Management (BLM) within three years of the enactment, and § 314(a) requires that the claimant, in the year of initial recording and "prior to December 31" of every year after that, file with state officials and the BLM a notice of intention to hold a claim, an affidavit of assessment work performed on the claim, or a detailed reporting form. Section 314(c) provides that failure to comply with either of these requirements "shall be deemed conclusively to constitute an abandonment" of the claim. Appellees, who had purchased mining claims before 1976, complied with the initial recording requirement but failed to meet on time their first annual filing requirement, not filing with the BLM until December 31. Subsequently, the BLM notified appellees that their claims had been declared abandoned and void due to their tardy filing. After an unsuccessful administrative appeal, appellees filed an action in Federal District Court, alleging that § 314(c) effected an unconstitutional taking of their property without just compensation and denied them due process. The District Court issued summary judgment in appellees' favor, holding that § 314(c) created an impermissible irrebuttable presumption that claimants who fail to make a timely filing intended to abandon their claims. Alternatively, the court held that the 1-day late filing "substantially complied" with § 314(a) and the implementing regulations.

Held:

1. Section 314(a)'s plain language—"prior to December 31"—read in conjunction with BLM regulations makes clear that the annual filings must be made on or before December 30. Thus, the BLM did not act ultra vires in concluding that appellees' filing was untimely. Pp. 93–96.

2. Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost. Pp. 97–100.

3. The annual filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day. Pp. 100–102.

4. Section 314(c) is not unconstitutional. Pp. 103–110.

(a) Congress was well within its affirmative powers in enacting the filing requirement, in imposing the penalty of extinguishment in § 314(c), and in applying the requirement and sanction to claims located before FLPMA was enacted. Pp. 104–107.

(b) Appellees' property loss was one they could have avoided with minimal burden; it was their failure to file on time, not Congress' action, that caused their property rights to be extinguished. Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulations. Pp. 107–108.

(c) FLPMA provides appellees with all the process that is their constitutional due. The Act's recording provisions clearly afford those within the Act's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. As the Act constitutes purely economic regulation, Congress was entitled to conclude that it was preferable to place a substantial portion of the burden on claimants to make the national recording system work. Pp. 108–110.

573 F. Supp. 472, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 110. POWELL, J., filed a dissenting opinion, *post*, p. 112. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 117.

Carolyn F. Corwin argued the cause for appellants. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, *David C. Shilton*, and *Arthur E. Gowran*.

Harold A. Swafford argued the cause for appellees. With him on the brief was *John W. Hoffman*.*

**Laurens H. Silver* and *John Leshy* filed a brief for the Sierra Club as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Nevada by *Brian McKay*, Attorney General, and *James C. Smith*, Deputy Attorney General; for the Alaska Miners Association et al. by *Ronald A. Zumbrun* and *Robin L. Rivett;* for the Colorado Mining Association by

JUSTICE MARSHALL delivered the opinion of the Court.

The primary question presented by this appeal is whether the Constitution prevents Congress from providing that holders of unpatented mining claims who fail to comply with the annual filing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1744, shall forfeit their claims.

I

From the enactment of the general mining laws in the 19th century until 1976, those who sought to make their living by locating and developing minerals on federal lands were virtually unconstrained by the fetters of federal control. The general mining laws, 30 U. S. C. § 22 *et seq.*, still in effect today, allow United States citizens to go onto unappropriated, unreserved public land to prospect for and develop certain minerals. "Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U. S. C. § 26; as long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without paying any royalty to the United States, 30 U. S. C. § 28. For a nominal sum, and after certain statutory conditions are fulfilled, an individual may patent the claim, thereby purchasing from the Federal Government the land and minerals and obtaining ultimate title to them. Patenting, however, is not required, and an unpatented mining claim remains a fully recognized possessory interest. *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335 (1963).

By the 1960's, it had become clear that this 19th-century laissez-faire regime had created virtual chaos with respect to the public lands. In 1975, it was estimated that more than

---

Randy L. Parcel; for Mobil Oil Corp. by *Stephen D. Alfers* and *William A. Hillhouse II;* and for the Mountain States Legal Foundation by *K. Preston Oade, Jr.*

6 million unpatented mining claims existed on public lands other than the national forests; in addition, more than half the land in the National Forest System was thought to be covered by such claims. S. Rep. No. 94–583, p. 65 (1975). Many of these claims had been dormant for decades, and many were invalid for other reasons, but in the absence of a federal recording system, no simple way existed for determining which public lands were subject to mining locations, and whether those locations were valid or invalid. *Ibid.* As a result, federal land managers had to proceed slowly and cautiously in taking any action affecting federal land lest the federal property rights of claimants be unlawfully disturbed. Each time the Bureau of Land Management (BLM) proposed a sale or other conveyance of federal land, a title search in the county recorder's office was necessary; if an outstanding mining claim was found, no matter how stale or apparently abandoned, formal administrative adjudication was required to determine the validity of the claim.[1]

After more than a decade of studying this problem in the context of a broader inquiry into the proper management of the public lands in the modern era, Congress in 1976 enacted FLPMA, Pub. L. 94–579, 90 Stat. 2743 (codified at 43 U. S. C. § 1701 *et seq.*). Section 314 of the Act establishes a federal recording system that is designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions.[2] For claims located before FLPMA's enact-

---

[1] See generally Strauss, Mining Claims on Public Lands: A Study of Interior Department Procedures, 1974 Utah L. Rev. 185, 193, 215–219.

[2] The text of 43 U. S. C. § 1744 provides, in relevant part, as follows:

"Recordation of Mining Claims

"(a) Filing requirements

"The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21,

ment,[3] the federal recording system imposes two general requirements. First, the claims must initially be registered with the BLM by filing, within three years of FLPMA's enactment, a copy of the official record of the notice or cer-

---

1976 and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. . . .

"(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28–1 of title 30, relating thereto.

"(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

"(b) Additional filing requirements

"The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976 shall, within the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an unpatented lode or placer mining claim or mill or tunnel site located after October 21, 1976 shall, within ninety days after the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.

"(c) Failure to file as constituting abandonment; defective or untimely filing

"The failure to file such instruments as required by subsections (a) and (b) of this subsection shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site."

[3] A somewhat different scheme applies to claims located after October 21, 1976, the date the Act took effect.

tificate of location. 90 Stat. 2743, § 314(b), 43 U. S. C. § 1744(b). Second, in the year of the initial recording, and "prior to December 31" of every year after that, the claimant must file with state officials and with BLM a notice of intention to hold the claim, an affidavit of assessment work performed on the claim, or a detailed reporting form. 90 Stat. 2743, § 314(a), 43 U. S. C. § 1744(a). Section 314(c) of the Act provides that failure to comply with either of these requirements "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner." 43 U. S. C. § 1744(c).

The second of these requirements—the annual filing obligation—has created the dispute underlying this appeal. Appellees, four individuals engaged "in the business of operating mining properties in Nevada,"[4] purchased in 1960 and 1966 10 unpatented mining claims on public lands near Ely, Nevada. These claims were major sources of gravel and building material: the claims are valued at several million dollars,[5] and, in the 1979–1980 assessment year alone, appellees' gross income totaled more than $1 million.[6] Throughout the period during which they owned the claims, appellees complied with annual state-law filing and assessment work requirements. In addition, appellees satisfied FLPMA's initial recording requirement by properly filing with BLM a notice of location, thereby putting their claims on record for purposes of FLPMA.

At the end of 1980, however, appellees failed to meet on time their first annual obligation to file with the Federal Government. After allegedly receiving misleading information from a BLM employee,[7] appellees waited until December 31

---

[4] Complaint ¶ 2.

[5] *Id.*, ¶ 15.

[6] 573 F. Supp. 472, 474 (1983). From 1960 to 1980, total gross income from the claims exceeded $4 million. *Ibid.*

[7] An affidavit submitted to the District Court by one of appellees' employees stated that BLM officials in Ely had told the employee that the

to submit to BLM the annual notice of intent to hold or proof of assessment work performed required under § 314(a) of FLPMA, 43 U. S. C. § 1744(a). As noted above, that section requires these documents to be filed annually "prior to December 31." Had appellees checked, they further would have discovered that BLM regulations made quite clear that claimants were required to make the annual filings in the proper BLM office "on or before December 30 of each calendar year." 43 CFR § 3833.2–1(a) (1980) (current version at 43 CFR § 3833.2–1(b)(1) (1984)). Thus, appellees' filing was one day too late.

This fact was brought painfully home to appellees when they received a letter from the BLM Nevada State Office informing them that their claims had been declared abandoned and void due to their tardy filing. In many cases, loss of a claim in this way would have minimal practical effect; the

---

filing could be made at the BLM Reno office "on or before December 31, 1980." Affidavit of Laura C. Locke ¶ 3. The 1978 version of a BLM question and answer pamphlet erroneously stated that the annual filings had to be made "on or before December 31" of each year. Staking a Mining Claim on Federal Lands 9–10 (1978). Later versions have corrected this error to bring the pamphlet into accord with the BLM regulations that require the filings to be made "on or before December 30."

JUSTICE STEVENS and JUSTICE POWELL seek to make much of this pamphlet and of the uncontroverted evidence that appellees were told a December 31 filing would comply with the statute. See *post*, at 117, 122, 128. However, at the time appellees filed in 1980, BLM regulations and the then-current pamphlets made clear that the filing was required "on or before December 30." Thus, the dissenters' reliance on this pamphlet would seem better directed to the claim that the United States was equitably estopped from forfeiting appellees' claims, given the advice of the BLM agent and the objective basis the 1978 pamphlet provides for crediting the claim that such advice was given. The District Court did not consider this estoppel claim. Without expressing any view as to whether, as a matter of law, appellees could prevail on such a theory, see *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51 (1984), we leave any further treatment of this issue, including fuller development of the record, to the District Court on remand.

claimant could simply locate the same claim again and then rerecord it with BLM. In this case, however, relocation of appellees' claims, which were initially located by appellees' predecessors in 1952 and 1954, was prohibited by the Common Varieties Act of 1955, 30 U. S. C. § 611; that Act prospectively barred location of the sort of minerals yielded by appellees' claims. Appellees' mineral deposits thus escheated to the Government.

After losing an administrative appeal, appellees filed the present action in the United States District Court for the District of Nevada. Their complaint alleged, *inter alia*, that § 314(c) effected an unconstitutional taking of their property without just compensation and denied them due process. On summary judgment, the District Court held that § 314(c) did indeed deprive appellees of the process to which they were constitutionally due. 573 F. Supp. 472 (1983). The District Court reasoned that § 314(c) created an impermissible irrebuttable presumption that claimants who failed to make a timely filing intended to abandon their claims. Rather than relying on this presumption, the Government was obliged, in the District Court's view, to provide individualized notice to claimants that their claims were in danger of being lost, followed by a post-filing-deadline hearing at which the claimants could demonstrate that they had not, in fact, abandoned a claim. Alternatively, the District Court held that the 1-day late filing "substantially complied" with the Act and regulations.

Because a District Court had held an Act of Congress unconstitutional in a civil suit to which the United States was a party, we noted probable jurisdiction under 28 U. S. C. § 1252. 467 U. S. 1225 (1984).[8] We now reverse.

---

[8] That the District Court decided the case on both constitutional and statutory grounds does not affect this Court's obligation under 28 U. S. C. § 1252 to take jurisdiction over the case; as long as the unconstitutionality of an Act of Congress is one of the grounds of decision below in a civil suit

II

Appeal under 28 U. S. C. § 1252 brings before this Court not merely the constitutional question decided below, but the entire case. *McLucas* v. *DeChamplain*, 421 U. S. 21, 31 (1975); *United States* v. *Raines*, 362 U. S. 17, 27, n. 7 (1960). The entire case includes nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court. *United States* v. *Clark*, 445 U. S. 23, 27–28 (1980).[9] These principles are important aids in the prudential exercise of our appellate jurisdiction, for when a case arrives here by appeal under 28 U. S. C. § 1252, this Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided. See *Heckler* v. *Mathews*, 465 U. S. 728, 741–744 (1984); *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974); cf. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106, 110 (1948) (appeals under former Criminal Appeals Act); see generally *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, we turn first to the nonconstitutional questions pressed below.

---

to which the United States is a party, appeal lies directly to this Court. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 541 (1939).

Another District Court in the West similarly has declared § 314(c) unconstitutional with respect to invalidation of claims based on failure to meet the initial recordation requirements of § 314(a) in timely fashion. *Rogers* v. *United States*, 575 F. Supp. 4 (Mont. 1982).

[9] When the nonconstitutional questions have not been passed on by the lower court, we may vacate the decision below and remand with instructions that those questions be decided, see *Youakim* v. *Miller*, 425 U. S. 231 (1976), or we may choose to decide those questions ourselves without benefit of lower court analysis, see *United States* v. *Clark*. The choice between these options depends on the extent to which lower court factfinding and analysis of the nonconstitutional questions will be necessary or useful to our disposition of those questions.

III

A

Before the District Court, appellees asserted that the § 314(a) requirement of a filing "prior to December 31 of each year" should be construed to require a filing "on or before December 31." Thus, appellees argued, their December 31 filing had in fact complied with the statute, and the BLM had acted ultra vires in voiding their claims.

Although the District Court did not address this argument, the argument raises a question sufficiently legal in nature that we choose to address it even in the absence of lower court analysis. See, *e. g.*, *United States* v. *Clark*, *supra*. It is clear to us that the plain language of the statute simply cannot sustain the gloss appellees would put on it. As even counsel for appellees conceded at oral argument, § 314(a) "is a statement that Congress wanted it filed by December 30th. I think that is a clear statement . . . ." Tr. of Oral Arg. 27; see also *id.*, at 37 ("A literal reading of the statute would require a December 30th filing . . ."). While we will not allow a literal reading of a statute to produce a result "demonstrably at odds with the intentions of its drafters," *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982), with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually "intended" by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. "Actual purpose is sometimes unknown," *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 180 (1980) (STEVENS, J., concurring), and such is the case with filing deadlines; as might be expected, nothing in the legislative history suggests why Congress chose December 30 over December 31,

or over September 1 (the end of the assessment year for mining claims, 30 U. S. C. § 28), as the last day on which the required filings could be made. But "[d]eadlines are inherently arbitrary," while fixed dates "are often essential to accomplish necessary results." *United States* v. *Boyle*, 469 U. S. 241, 249 (1984). Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute. Cf. *United States Railroad Retirement Board* v. *Fritz*, *supra*, at 179.[10]

Moreover, BLM regulations have made absolutely clear since the enactment of FLPMA that "prior to December 31" means what it says. As the current version of the filing regulations states:

> "The owner of an unpatented mining claim located on Federal lands . . . shall have filed or caused to have been filed *on or before December 30* of each calendar year . . . evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim." 43 CFR § 3833.2–1(b)(1) (1984) (emphasis added).

See also 43 CFR § 3833.2–1(a) (1982) (same); 43 CFR § 3833.2–1(a) (1981) (same); 43 CFR § 3833.2–1(a) (1980) (same); 43 CFR § 3833.2–1(a) (1979) (same); 43 CFR § 3833.2–1(a)(1) (1978) ("prior to" Dec. 31); 43 CFR § 3833.2–1(a)(1) (1977) ("prior to" Dec. 31). Leading mining treatises similarly

---

[10] Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 392–398 (1982). Whether this general principle applies to deadlines that run in favor of the Government is a question on which we express no opinion today. In addition, no showing has been made that appellees were in any way "*unable* to exercise the usual care and diligence" that would have allowed them to meet the filing deadline or to learn of its existence. See *United States* v. *Boyle*, 469 U. S. 241, 253 (1985) (BRENNAN, J., concurring). Of course, at issue in *Boyle* was an explicit provision in the Internal Revenue Code that provided a reasonable-cause exception to the Code's filing deadlines, while FLPMA contains no analogous provision.

inform claimants that "[i]t is important to note that the filing of a notice of intention or evidence of assessment work must be done *prior* to December 31 of each year, *i. e.*, on or before December 30." 2 American Law of Mining § 7.23D, p. 150.2 (Supp. 1983) (emphasis in original); see also 23 Rocky Mountain Mineral Law Institute 25 (1977) (same). If appellees, who were businessmen involved in the running of a major mining operation for more than 20 years, had any questions about whether a December 31 filing complied with the statute, it was incumbent upon them, as it is upon other businessmen, see *United States* v. *Boyle*, *supra*, to have checked the regulations or to have consulted an attorney for legal advice. Pursuit of either of these courses, rather than the submission of a last-minute filing, would surely have led appellees to the conclusion that December 30 was the last day on which they could file safely.

In so saying, we are not insensitive to the problems posed by congressional reliance on the words "prior to December 31." See *post*, p. 117 (STEVENS, J., dissenting). But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978). Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. See *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 98 (1981). On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to

be taken cautiously' even under the best of circumstances." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 75 (1982) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 26 (1977)). When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation. The phrase "prior to" may be clumsy, but its meaning is clear.[11] Under these circumstances, we are obligated to apply the "prior to December 31" language by its terms. See, *e. g.*, *American Tobacco Co.* v. *Patterson*, *supra*, at 68; *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).

The agency's regulations clarify and confirm the import of the statutory language by making clear that the annual filings must be made on or before December 30. These regulations provide a conclusive answer to appellees' claim, for where the language of a filing deadline is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found "sufficiently unreasonable" as to be unacceptable. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981).

We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933) (Cardozo, J.).[12] We therefore hold that BLM did not act ultra vires in concluding that appellees' filing was untimely.

---

[11] Legislative drafting books are filled with suggestions that the phrase "prior to" be replaced with the word "before," see, *e. g.*, R. Dickerson, Materials on Legal Drafting 293 (1981), but we have seen no suggestion that "prior to" be replaced with "on or before"—a phrase with obviously different substantive content.

[12] We note that the United States Code is sprinkled with provisions that require action "prior to" some date, including at least 14 provisions that contemplate action "prior to December 31." See 7 U. S. C. § 609(b)(5); 12 U. S. C. § 1709(o)(1)(E); 12 U. S. C. § 1823(g); 12 U. S. C. § 1841(a)(5)(A);

B

Section 314(c) states that failure to comply with the filing requirements of §§ 314(a) and 314(b) "shall be deemed conclusively to constitute an abandonment of the mining claim." We must next consider whether this provision expresses a congressional intent to extinguish all claims for which filings have not been made, or only those claims for which filings have not been made *and* for which the claimants have a specific intent to abandon the claim. The District Court adopted the latter interpretation, and on that basis concluded that § 314(c) created a constitutionally impermissible irrebuttable presumption of abandonment. The District Court reasoned that, once Congress had chosen to make loss of a claim turn on the specific intent of the claimant, a prior hearing and findings on the claimant's intent were constitutionally required before the claim of a nonfiling claimant could be extinguished.

In concluding that Congress was concerned with the specific intent of the claimant even when the claimant had failed

---

22 U. S. C. § 3784(c); 26 U. S. C. § 503(d)(1); 33 U. S. C. § 1319(a)(5)(B); 42 U. S. C. § 415(a)(7)(E)(ii) (1982 ed., Supp. III); 42 U. S. C. § 1962(d)–17(b); 42 U. S. C. § 5614(b)(5); 42 U. S. C. § 7502(a)(2); 42 U. S. C. § 7521 (b)(2); 43 U. S. C. § 1744(a); 50 U. S. C. App. § 1741(b)(1). Dozens of state statutes and local ordinances undoubtedly incorporate similar "prior to December 31" deadlines. In addition, legislatures know how to make explicit an intent to allow action on December 31 when they employ a December 31 date in a statute. See, *e. g.*, 7 U. S. C. § 609(b)(2); 22 U. S. C. §§ 3303 (b)(3)(B) and (c); 43 U. S. C. § 256a.

It is unclear whether the arguments advanced by the dissenters are meant to apply to all of these provisions, or only to some of them; if the latter, we are given little guidance as to how a court is to go about the rather eclectic task of choosing which "prior to December 31" deadlines it can interpret "flexibly." Understandably enough, the dissenters seek to disavow any intent to call all these "prior to December 31" deadlines into question and assure us that *this* is a "unique case," *post*, at 117, n. 4 (POWELL, J., dissenting), involving a "unique factual matrix," *post*, at 128 (STEVENS, J., dissenting). The only thing we can find unique about this particular December 31 deadline is that the dissenters are willing to go through such tortured reasoning to evade it.

to make the required filings, the District Court began from the fact that neither § 314(c) nor the Act itself defines the term "abandonment" as that term appears in § 314(c). The District Court then noted correctly that the common law of mining traditionally has drawn a distinction between "abandonment" of a claim, which occurs only upon a showing of the claimant's intent to relinquish the claim, and "forfeiture" of a claim, for which only noncompliance with the requirements of law must be shown. See, *e. g.*, 2 American Law of Mining § 8.2, pp. 195–196 (1983) (relied upon by the District Court). Given that Congress had not expressly stated in the statute any intent to depart from the term-of-art meaning of "abandonment" at common law, the District Court concluded that § 314(c) was intended to incorporate the traditional common-law distinction between abandonment and forfeiture. Thus, reasoned the District Court, Congress did not intend to cause a forfeiture of claims for which the required filings had not been made, but rather to focus on the claimant's actual intent. As a corollary, the District Court understood the failure to file to have been intended to be merely one piece of evidence in a factual inquiry into whether a claimant had a specific intent to abandon his property.

This construction of the statutory scheme cannot withstand analysis. While reference to common-law conceptions is often a helpful guide to interpreting open-ended or undefined statutory terms, see, *e. g.*, *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981); *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59 (1911), this principle is a guide to legislative intent, not a talisman of it, and the principle is not to be applied in defiance of a statute's overriding purposes and logic. Although § 314(c) is couched in terms of a conclusive presumption of "abandonment," there can be little doubt that Congress intended § 314(c) to cause a forfeiture of all claims for which the filing requirements of §§ 314(a) and 314(b) had not been met.

To begin with, the Senate version of § 314(c) provided that any claim not properly recorded "shall be conclusively pre-

sumed to be abandoned and shall be void." S. 507, 94th Cong., 1st Sess., § 311 (1975).[13] The Committee Report accompanying S. 507 repeatedly indicated that failure to comply with the filing requirements would make a claim "void." See S. Rep. No. 94–583, pp. 65, 66 (1975). The House legislation and Reports merely repeat the statutory language without offering any explanation of it, but it is clear from the Conference Committee Report that the undisputed intent of the Senate—to make "void" those claims for which proper filings were not timely made—was the intent of both Chambers. The Report stated: "Both the Senate bill and House amendments provided for recordation of mining claims and for *extinguishment* of abandoned claims." H. R. Rep. No. 94–1724, p. 62 (1976) (emphasis added).

In addition, the District Court's construction fails to give effect to the "deemed conclusively" language of § 314(c). If the failure to file merely shifts the burden to the claimant to prove that he intends to keep the claim, nothing "conclusive" is achieved by § 314(c). The District Court sought to avoid this conclusion by holding that § 314(c) does extinguish automatically those claims for which *initial* recordings, as opposed to annual filings, have not been made; the District Court attempted to justify its distinction between initial recordings and annual filings on the ground that the dominant purpose of § 314(c) was to avoid forcing BLM to the "awesome task of searching every local title record" to establish initially a federal recording system. 573 F. Supp., at 477. Once this purpose had been satisfied by an initial recording, the primary purposes of the "deemed conclusively" language, in the District Court's view, had been met. But the clear language of § 314(c) admits of no distinction between

---

[13] The Senate bill required only initial recordings, not annual filings, but this factor is not significant in light of the actions of the Conference Committee; the clear structure of the Senate bill was to impose the sanction of claim extinguishment on those who failed to make whatever filings federal law required.

initial recordings and annual filings: failure to do either "shall be deemed conclusively to constitute an abandonment." And the District Court's analysis of the purposes of § 314(c) is also misguided, for the annual filing requirements serve a purpose similar to that of the initial recording requirement; millions of claims undoubtedly have now been recorded, and the presence of an annual filing obligation allows BLM to keep the system established in § 314 up to date on a yearly basis. To put the burden on BLM to keep this system current through its own inquiry into the status of recorded claims would lead to a situation similar to that which led Congress initially to make the federal recording system self-executing. The purposes of a self-executing recording system are implicated similarly, if somewhat less substantially, by both the annual filing obligation and the initial recording requirement, and the District Court was not empowered to thwart these purposes or the clear language of § 314(c) by concluding that § 314(c) was actually concerned with only initial recordings.

For these reasons, we find that Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is simply made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost. See *Western Mining Council* v. *Watt*, 643 F. 2d 618, 628 (CA9 1981).

C

A final statutory question must be resolved before we turn to the constitutional holding of the District Court. Relying primarily on *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970), the District Court held that, even if the statute required a filing on or before December 30, appellees had "substantially complied" by filing on December 31. We cannot accept this view of the statute.

The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the

least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attitude toward filing dates," *United States* v. *Boyle*, 469 U. S., at 249. A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day. *Hickel* v. *Oil Shale Corp.*, *supra*, does not support a contrary conclusion. *Hickel* suggested, although it did not hold, that failure to meet the annual assessment work requirements of the general mining laws, 30 U. S. C. § 28, which require that "not less than $100 worth of labor shall be performed or improvements made during each year," would not render a claim automatically void. Instead, if an individual complied substantially but not fully with the requirement, he might under some circumstances be able to retain possession of his claim.

These suggestions in *Hickel* do not afford a safe haven to mine owners who fail to meet their filing obligations under any federal mining law. Failure to comply fully with the physical requirement that a certain amount of work be performed each year is significantly different from the complete failure to file on time documents that federal law commands be filed. In addition, the general mining laws at issue in *Hickel* do not clearly provide that a claim will be lost for failure to meet the assessment work requirements. Thus, it was open to the Court to conclude in *Hickel* that Congress had intended to make the assessment work requirement merely an indicium of a claimant's specific intent to retain a

claim. Full compliance with the assessment work requirements would establish conclusively an intent to keep the claim, but less than full compliance would not by force of law operate to deprive the claimant of his claim. Instead, less than full compliance would subject the mine owner to a case-by-case determination of whether he nonetheless intended to keep his claim. See *Hickel*, *supra*, at 56–57.

In this case, the statute explicitly provides that failure to comply with the applicable filing requirements leads automatically to loss of the claim. See Part II–B, *supra*. Thus, Congress has made it unnecessary to ascertain whether the individual in fact intends to abandon the claim, and there is no room to inquire whether substantial compliance is indicative of the claimant's intent—intent is simply irrelevant if the required filings are not made. *Hickel*'s discussion of substantial compliance is therefore inapposite to the statutory scheme at issue here. As a result, *Hickel* gives miners no greater latitude with filing deadlines than other individuals have.[14]

---

[14] Since 1982, BLM regulations have provided that filings due on or before December 30 will be considered timely if postmarked on or before December 30 and received by BLM by the close of business on the following January 19. 43 CFR § 3833.0–5(m) (1983). Appellees and the dissenters attempt to transform this regulation into a blank check generally authorizing "substantial compliance" with the filing requirements. We disagree for two reasons. First, the regulation was not in effect when appellees filed in 1980; it therefore cannot now be relied on to validate a purported "substantial compliance" in 1980. Second, that an agency has decided to take account of holiday mail delays by treating as timely filed a document postmarked on the statutory filing date does not require the agency to accept all documents hand-delivered any time before January 19. The agency rationally could decide that either of the options in this sort of situation—requiring mailings to be received by the same date that hand-deliveries must be made or requiring mailings to be postmarked by that date—is a sound way of administering the statute.

JUSTICE STEVENS further suggests that BLM would have been well within its authority to promulgate regulations construing the statute to allow for December 31 filings. Assuming the correctness of this sugges-

IV

Much of the District Court's constitutional discussion necessarily falls with our conclusion that § 314(c) automatically deems forfeited those claims for which the required filings are not timely made. The District Court's invalidation of the statute rested heavily on the view that § 314(c) creates an "irrebuttable presumption that mining claims are abandoned if the miner fails to timely file" the required documents—that the statute presumes a failure to file to signify a specific intent to abandon the claim. But, as we have just held, § 314(c) presumes nothing about a claimant's actual intent; the statute simply and conclusively deems such claims to be forfeited. As a forfeiture provision, § 314(c) is not subject to the individualized hearing requirement of such irrebuttable presumption cases as *Vlandis* v. *Kline*, 412 U. S. 441 (1973), or *Cleveland Bd. of Education* v. *LaFleur*, 414 U. S. 632 (1974), for there is nothing to suggest that, in enacting § 314(c), Congress was in any way concerned with whether a particular claimant's tardy filing or failure to file indicated an actual intent to abandon the claim.

There are suggestions in the District Court's opinion that, even understood as a forfeiture provision, § 314(c) might be unconstitutional. We therefore go on to consider whether automatic forfeiture of a claim for failure to make annual filings is constitutionally permissible. The framework for analysis of this question, in both its substantive and procedural dimensions, is set forth by our recent decision in *Texaco, Inc.* v. *Short*, 454 U. S. 516 (1982). There we upheld a state statute pursuant to which a severed mineral interest that had not been used for a period of 20 years automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner filed a statement of

---

tion, the fact that two interpretations of a statute are equally reasonable suggests to us that the agency's interpretation is sufficiently reasonable as to be acceptable. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981).

claim in the county recorder's office within 2 years of the statute's passage.

A

Under *Texaco*, we must first address the question of affirmative legislative power: whether Congress is authorized to "provide that property rights of this character shall be extinguished if their owners do not take the affirmative action required by the" statute. *Id.*, at 525. Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties. See, *e. g.*, *Village of Euclid* v. *Ambler Realty, Co.*, 272 U. S. 365 (1926); *Turner* v. *New York*, 168 U. S. 90, 94 (1897); *Vance* v. *Vance*, 108 U. S. 514, 517 (1883); *Terry* v. *Anderson*, 95 U. S. 628 (1877). "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16 (1976) (citations omitted).

This power to qualify existing property rights is particularly broad with respect to the "character" of the property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, see *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335 (1963), we have recognized that these interests are a "unique form of property." *Ibid.* The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. See, *e. g.*, *Kleppe* v. *New Mexico*, 426 U. S. 529, 539 (1976).

> "A mining location which has not gone to patent is of no higher quality and no more immune from attack and in-

> vestigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Cameron* v. *United States*, 252 U. S. 450, 460 (1920).

Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests. Cf. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 413 (1983). In addition, the property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life. See, *e. g.*, *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 468–469 (1985); *Usery* v. *Turner Elkhorn Mining Co.*, *supra;* see generally *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 315 (1920) ("[I]n the interest of the community, [government may] limit one [right] that others may be enjoyed").

Against this background, there can be no doubt that Congress could condition initial receipt of an unpatented mining claim upon an agreement to perform annual assessment work and make annual filings. That this requirement was applied to claims already located by the time FLPMA was enacted and thus applies to vested claims does not alter the analysis, for any "retroactive application of [FLPMA] is supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 729 (1984). The purposes of applying FLPMA's filing provisions to claims located before the Act was passed—to rid federal lands of stale mining claims and to

provide for centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims—are clearly legitimate. In addition, § 314(c) is a reasonable, if severe, means of furthering these goals; sanctioning with loss of their claims those claimants who fail to file provides a powerful motivation to comply with the filing requirement, while automatic invalidation for noncompliance enables federal land managers to know with certainty and ease whether a claim is currently valid. Finally, the restriction attached to the continued retention of a mining claim imposes the most minimal of burdens on claimants; they must simply file a paper once a year indicating that the required assessment work has been performed or that they intend to hold the claim.[15] Indeed,

---

[15] Appellees suggest that *Texaco, Inc.* v. *Short*, 454 U. S. 516 (1982), further requires that the restriction imposed be substantively reasonable in the sense that it adequately relate to some common-law conception of the nature of the property right involved. Thus, appellees point to the fact that, in *Texaco*, failure to file could produce a forfeiture only if, in addition, the mineral interest had lain dormant for 20 years; according to appellees, conjunction of a 20-year dormancy period with failure to file a statement of claim sufficiently indicated abandonment, as that term is understood at common law, to justify the statute.

Common-law principles do not, however, entitle an individual to retain his property until the common law would recognize it as abandoned. Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. See *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 467 (1831) ("What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself"). As long as proper notice of these rules exists, and the burdens they impose are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced "alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole," *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960), the burden imposed is a reasonable restriction on the property right. Here Congress has chosen to redefine the way in which an unpatented mining claim can be lost through imposition of a filing requirement that serves valid public objec-

appellees could have fully protected their interests against the effect of the statute by taking the minimal additional step of patenting the claims. As a result, Congress was well within its affirmative powers in enacting the filing requirement, in imposing the penalty of extinguishment set forth in § 314(c), and in applying the requirement and sanction to claims located before FLPMA was passed.

B

We look next to the substantive effect of § 314(c) to determine whether Congress is nonetheless barred from enacting it because it works an impermissible intrusion on constitutionally protected rights. With respect to the regulation of private property, any such protection must come from the Fifth Amendment's proscription against the taking of private property without just compensation. On this point, however, *Texaco* is controlling: "this Court has never required [Congress] to compensate the owner for the consequences of his own neglect." 454 U. S., at 530. Appellees failed to inform themselves of the proper filing deadline and failed to file in timely fashion the documents required by federal law. Their property loss was one appellees could have avoided with minimal burden; it was their failure to file on time—not the action of Congress—that caused the property right to be extinguished. Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed. See, *e. g.*, *Miller* v. *Schoene*, 276 U. S. 272, 279–280 (1928); *Terry* v. *Anderson*, 95 U. S., at 632–633; cf. *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 465

---

tives, imposes the most minimal of burdens on property holders, and takes effect only after appellees have had sufficient notice of their need to comply and a reasonable opportunity to do so. That the filing requirement meets these standards is sufficient, under *Texaco*, to make it a reasonable restriction on the continued retention of the property right.

(1831) ("What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?").

C

Finally, the Act provides appellees with all the process that is their constitutional due. In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. *Texaco*, 454 U. S., at 532; see also *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243 (1944); *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925). Here there can be no doubt that the Act's recording provisions meet these minimal requirements. Although FLPMA was enacted in 1976, owners of existing claims, such as appellees, were not required to make an initial recording until October 1979. This 3-year period, during which individuals could become familiar with the requirements of the new law, surpasses the 2-year grace period we upheld in the context of a similar regulation of mineral interests in *Texaco*. Moreover, the specific annual filing obligation at issue in this case is not triggered until the year after which the claim is recorded initially; thus, every claimant in appellees' position already has filed once before the annual filing obligations come due. That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands.[16] The

[16] As a result, this is not a case in which individual notice of a statutory change must be given because a statute is "sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations." *Texaco*, 454 U. S., at 547 (BRENNAN, J., dissenting).

requirement of an annual filing thus was not so unlikely to come to the attention of those in the position of appellees as to render unconstitutional the notice provided by the 3-year grace period.[17]

Despite the fact that FLPMA meets the three standards laid down in *Texaco* for the imposition of new regulatory restraints on existing property rights, the District Court seemed to believe that individualized notice of the filing deadlines was nonetheless constitutionally required. The District Court felt that such a requirement would not be "overly burdensome" to the Government and would be of great benefit to mining claimants. The District Court may well be right that such an individualized notice scheme would be a sound means of administering the Act.[18] But in the regulation of private property rights, the Constitution offers the courts no warrant to inquire into whether some other scheme might be more rational or desirable than the one chosen by Congress; as long as the legislative scheme is *a* rational way of reaching Congress' objectives, the efficacy of alternative routes is for Congress alone to consider. "It is enough to say that the Act approaches the problem of [developing a national recording system] rationally; whether a [different notice scheme] would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery* v. *Turner Elkhorn Mining*, 428 U. S., at 19. Because we deal here with purely economic legislation, Congress was entitled to conclude that it was preferable

[17] BLM does provide for notice and a hearing on the adjudicative fact of whether the required filings were actually made, and appellees availed themselves of this process by appealing, to the Department of Interior Board of Land Appeals, the BLM order that extinguished their claims for failure to make a timely filing.

[18] In the exercise of its administrative discretion, BLM for the last several years has chosen to mail annual reminder notices to claimants several months before the end of the year; according to the Government, these notices state: "[Y]ou must file on or before 12/30 [of the relevant year]. Failure to file timely with the proper BLM office will render your claim abandoned." Brief for Appellants 31–32, n. 22.

to place a substantial portion of the burden on claimants to make the national recording system work. See *ibid.*; *Weinberger* v. *Salfi*, 422 U. S. 749 (1975); *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973). The District Court therefore erred in invoking the Constitution to supplant the valid administrative scheme established by Congress. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I agree that the District Court erred in holding that § 314(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1744(c), violates due process by creating an "irrebuttable presumption" of abandonment. Whatever the force of *Vlandis* v. *Kline*, 412 U. S. 441 (1973), beyond the facts underlying that case, I believe that § 314(c) comports with due process under the analysis of our later decision in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975). Because I also believe that the statute does not otherwise violate the Fifth Amendment and that the District Court erred in its alternative holding that substantial compliance satisfies the filing requirements of § 314 and corresponding regulations, I agree that the judgment below must be reversed. Nonetheless, I share many of the concerns expressed in the dissenting opinions of JUSTICE POWELL and JUSTICE STEVENS. If the facts are as alleged by appellees, allowing the Bureau of Land Management (BLM) to extinguish active mining claims that appellees have owned and worked for more than 20 years would seem both unfair and inconsistent with the purposes underlying FLPMA.

The Government has not disputed that appellees sought in good faith to comply with the statutory deadline. Appellees contend that in order to meet the requirements of § 314, they contacted the BLM and were informed by agency personnel

that they could file the required materials on December 31, 1980. Appellees apparently relied on this advice and hand-delivered the appropriate documents to the local BLM office on that date. The BLM accepted the documents for filing, but some three months later sent appellees a notice stating that their mining claims were "abandoned and void" because the filing was made on, rather than prior to, December 31, 1980. Although BLM regulations clarify the filing deadlines contained in § 314, the existence of those regulations does not imply that appellees were unjustified in their confusion concerning the deadlines or in their reliance on the advice provided by BLM's local office. The BLM itself in 1978 issued an explanatory pamphlet stating that the annual filings were to be made "on or before December 31" of each year. *Ante*, at 89–90, n. 7. Moreover, the BLM evidently has come to understand the need to clarify the nature of the annual filing requirement, because it now sends reminder notices every year to holders of recorded mining claims warning them that the deadline is approaching and that filings must be made on or before December 30.

The unusual facts alleged by appellees suggest that the BLM's actions might estop the Government from relying on § 314(c) to obliterate a property interest that has provided a family's livelihood for decades. The Court properly notes that the estoppel issue was not addressed by the District Court and will be open on remand. *Ante*, at 89–90, n. 7. In this regard, I merely note that in my view our previous decisions do not preclude application of estoppel in this context. In *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51 (1984), we expressly declined to adopt "a flat rule that estoppel may not in any circumstances run against the Government." *Id.*, at 60. Such a rule was unnecessary to the decision in that case, and we noted our reluctance to hold that "there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervail-

ing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Id.*, at 60–61 (footnote omitted).

Although "it is well settled that the Government may not be estopped on the same terms as any other litigant," *id.*, at 60 (footnote omitted), we have never held that the Government can extinguish a vested property interest that has been legally held and actively maintained for more than 20 years merely because the private owners relied on advice from agency personnel concerning a poorly worded statutory deadline and consequently missed a filing deadline by one day. Thus, if the District Court ultimately determines that appellees reasonably relied on communications from the BLM in making their annual filing on December 31, 1980, our previous decisions would not necessarily bar application of the doctrine of equitable estoppel. Accordingly, the fact that the Court reverses the decision of the District Court does not establish that appellees must ultimately forfeit their mining claims.

JUSTICE POWELL, dissenting.

I agree with much of JUSTICE STEVENS' dissent. I write separately only because under the special circumstances of this case I do not believe it necessary to decide what Congress actually intended. Even if the Court is correct in believing that Congress intended to require filings on or before the next-to-the-last day of the year, rather than, more reasonably, by the end of the calendar year itself, the statutory deadline is too uncertain to satisfy constitutional requirements. It simply fails to give property holders clear and definite notice of what they must do to protect their existing property interests.

As the Court acknowledges, *ante*, at 86, the Government since the 19th century has encouraged its citizens to discover and develop certain minerals on the public lands. Under the general mining laws, 30 U. S. C. §22 *et seq.*, an individual who locates a mining claim has the right of exclusive posses-

sion of the land for mining purposes and may extract and sell minerals he finds there without paying a royalty to the Federal Government. § 26. After making a valuable mineral discovery, the claimant may hold the claim so long as he performs $100 worth of assessment work each year. § 28. If he performs certain additional conditions, the claimant may patent the claim for a nominal sum and thereby obtain further rights over the land and minerals. See § 29. Until recently, there were no federal recordation requirements.

Faced with the uncertainty stale mining claims had created as to property rights on public lands, Congress enacted § 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2769, 43 U. S. C. § 1744.[1] This provision required existing claimholders to record their claims in order to retain them. More specifically, it required that "within the three-year period following October 21, 1976 and prior to December 31 of each year thereafter," § 1744(a), claimholders file with

---

[1] Section 314(a), 43 U. S. C. § 1744(a), states in its entirety:

"Recordation of Mining Claims

"(a) Filing requirements

"The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976 and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

"(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on *[sic]* a detailed report provided by section 28–1 of title 30, relating thereto.

"(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground."

the Bureau of Land Management (BLM) a copy of a notice of intention to retain their claims, an affidavit of assessment work, or a special form, §§ 1744(a)(1) and (2). Failure to make either the initial or a subsequent yearly filing was to "be deemed conclusively to constitute an abandonment of the mining claim . . . ." § 1744(c).

Appellees (the Lockes) are owners of 10 unpatented mining claims on federal land in Nevada. Appellees' predecessors located these claims in 1952 and 1954, and appellees have, since they purchased the claims in 1960, earned their livelihood by producing gravel and other building materials from them. From 1960 to the present, they have produced approximately $4 million worth of materials. During the 1979–1980 assessment year alone, they produced gravel and other materials worth more than $1 million. In no sense were their claims stale.

The Lockes fully complied with § 314's initial recordation requirement by properly filing a notice of location on October 19, 1979. In order to ascertain how to comply with the subsequent yearly recordation requirements, the Lockes sent their daughter, who worked in their business office, to the Ely, Nevada, office of the BLM. There she inquired into how and when they should file the assessment notice and was told, among other things, that the documents should be filed at the Reno office "on or before December 31, 1980." 573 F. Supp. 472, 474 (Nev. 1983). Following this advice, the Lockes hand-delivered their documents at the Reno office on that date. On April 4, 1981, they received notice from the BLM that their mining claims were "abandoned and void," App. to Juris. Statement 22a, because they had filed *on*, rather than *prior to*, December 31.[2] It is this 1-day differ-

[2] The notice from the BLM also stated that "[s]ubject to valid intervening rights of third parties or the United States void or abandoned claims or sites may be relocated and, based on the new location date, the appropriate instruments may be refiled within the time periods prescribed by the regulations." App. to Juris. Statement 22a. Unlike most claimants, however,

ence in good-faith interpretation of the statutory deadline that gives rise to the present controversy.

JUSTICE STEVENS correctly points to a number of circumstances that cast doubt both on the care with which Congress drafted § 314 and on its meaning. Specifically, he notes that (i) the section does not clearly describe *what* must be filed, let alone *when* it must be filed; (ii) BLM's rewording of the deadline in its implementing regulations, 43 CFR § 3833.2–1(a)(1) (1984), indicates that the BLM itself considered the statutory deadline confusing; (iii) lest there be any doubt that the BLM recognized this possible confusion, even it had described the section in a pamphlet distributed to miners in 1978 as requiring filing "*on or before December 31*"; (iv) BLM, charged with enforcing the section, has interpreted it quite flexibly; and (v) irrationally requiring property holders to file by one day before the end of the year, rather than by the end of the year itself, creates "a trap for the unwary," *post*, at 123. As JUSTICE STEVENS also states, these facts, particularly the last, suggest not only that Congress drafted § 314 inartfully but also that Congress may actually have intended to require filing "on or before," not "prior to," December 31. This is certainly the more reasonable interpretation of congressional intent and is consistent with all the policies of the Act.

I do not believe, however, that given the special circumstances of this case we need determine what Congress actually intended. As the Court today recognizes, the Takings Clause imposes some limitations on the Government's power to impose forfeitures. *Ante*, at 103–108. In *Texaco, Inc.* v. *Short*, 454 U. S. 516 (1982), we identified one of the most important of these limitations when we stated that "the State has the power to condition the permanent retention of [a]

---

the Lockes were unable to relocate their claims because the Common Varieties Act of 1955, 30 U. S. C. § 611 *et seq.*, had withdrawn deposits of common building materials from coverage of the general mining laws. To them, forfeiture meant not relocation and refiling, but rather irrevocable loss of their claims—the source of their livelihood.

property right on the performance of *reasonable conditions* . . . ." *Id.*, at 526 (emphasis added); accord, *Jackson* v. *Lamphire*, 3 Pet. 280, 290 (1830) ("Cases may occur where the [forfeiture] provisio[n] . . . may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court . . ."). Furthermore, conditions, like those here, imposed after a property interest is created must also meet due process standards. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976). These standards require, among other things, that there be no question as to what actions an individual must take to protect his interests. *Texaco, Inc.* v. *Short*, *supra*, at 532–533. Together the Takings and Due Process Clauses prevent the Government from depriving an individual of property rights arbitrarily.

In the present case there is no claim that a yearly filing requirement is itself unreasonable. Rather, the claim arises from the fact that the language "prior to December 31" creates uncertainty as to when an otherwise reasonable filing period ends.[3] Given the natural tendency to interpret this phrase as "by the end of the calendar year," rather than "on or before the next-to-the-last day of the calendar year," I believe this uncertainty violated the standard of certainty

---

[3] The Court believes it is "obligated to apply the 'prior to December 31' language by its terms" because "its meaning is clear." *Ante*, at 96. Such clarity, however, is not to be found in the words themselves. Courts, for example, have used these same words in similar contexts clearly to mean "by the end of the year," *e. g.*, *AMF Inc.* v. *Jewett*, 711 F. 2d 1096, 1108, 1115 (CA1 1983); *Bay State Gas Co.* v. *Commissioner*, 689 F. 2d 1, 2 (CA1 1982), or have contrasted them with other phrases such as "[f]rom January 1," *NYSA–ILA Vacation & Holiday Fund* v. *Waterfront Comm'n of New York Harbor*, 732 F. 2d 292, 295, and n. 6 (CA2), cert. denied, 469 U. S. 852 (1984), or "after December 31," *Peabody Coal Co.* v. *Lowis*, 708 F. 2d 266, 267, n. 3 (CA7 1983), in ways that strongly suggest this meaning. Various administrative agencies have also followed this same usage in promulgating their regulations. *E. g.*, 24 CFR § 570.423(b) (1984); 31 CFR § 515.560(i) (1984); 40 CFR § 52.1174 (1984).

and definiteness that the Constitution requires. The statement in at least one of the Government's own publications that filing was required "on or before December 31," Department of the Interior, Staking a Mining Claim on Federal Lands 10 (1978), supports this conclusion. Terminating a property interest because a property holder reasonably believed that under the statute he had an additional day to satisfy any filing requirements is no less arbitrary than terminating it for failure to satisfy these same conditions in an unreasonable amount of time. Cf. *Wilson* v. *Iseminger*, 185 U. S. 55, 62 (1902); *Terry* v. *Anderson*, 95 U. S. 628, 632–633 (1877). Although the latter may rest on impossibility, the former rests on good-faith performance a day late of what easily could have been performed the day before. Neither serves a purpose other than forcing an arbitrary forfeiture of property rights to the State.

I believe the Constitution requires that the law inform the property holder with more certainty and definiteness than did § 314 when he must fulfill any recording requirements imposed after a property interest is created. Given the statutory uncertainty here, I would find a forfeiture imposed for filing on December 31 to be invalid.[4]

I accordingly dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The Court's opinion is contrary to the intent of Congress, engages in unnecessary constitutional adjudication, and unjustly creates a trap for unwary property owners. First, the choice of the language "prior to December 31" when read in

---

[4] Parties, of course, ordinarily are bound to the consequences of their failing strictly to meet statutory deadlines. This is true, for example, as to statutes of limitations and other filing deadlines clearly specified. Because of the special circumstances JUSTICE STEVENS identifies and the constitutional concerns identified above, this case is unique.

context in 43 U. S. C. § 1744(a)[1] is, at least, ambiguous, and, at best, "the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Con-

[1] The full text of 43 U. S. C. § 1744 reads as follows:

"Recordation of Mining Claims

"(a) Filing requirements

"The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976 and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

"(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28–1 of title 30, relating thereto.

"(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

"(b) Additional filing requirements

"The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to October 21, 1976 shall, within the three-year period following October 21, 1976, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an unpatented lode or placer mining claim or mill or tunnel site located after October 21, 1976 shall, within ninety days after the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.

"(c) Failure to file as constituting abandonment; defective or untimely filing

"The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandon-

gress is too busy to do all of its work as carefully as it should."[2] In my view, Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st, that is, prior to the end of the calendar year to which the filing pertains.[3] Second, even if Congress irrationally intended that the applicable deadline for a calendar year should end *one day before* the end of the calendar year that has been recognized since the amendment of the Julian Calendar in 8 B.C., it is clear that appellees have substantially complied with the requirements of the statute, in large part because the Bureau of Land Management has issued interpreting regulations that recognize sub-

---

ment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

"(d) Validity of claims, waiver of assessment, etc., as unaffected

"Such recordation or application by itself shall not render valid any claim which would not be otherwise valid under applicable law. Nothing in this section shall be construed as a waiver of the assessment and other requirements of such law."

[2] *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 97 (1977) (STEVENS, J., dissenting) (emphasis added).

[3] This view was expressed at the Rocky Mountain Mineral Law Institute in July 1977:

"It is plain that Congress intended the filing requirement to expire with the last day of the year, but inartful draftsmanship requires all filings under Subsection 314(a) of the Act to be made on or before December 30th. Such is the result of the unfortunate use of the words 'prior to December 31.' And since December 31st bears no relationship to the assessment year, which ends at noon on September 1st of each year, the statutory requirement that the locator shall file the necessary documents on or before December 30th of each year following the calendar year in which a claim was located, means that where a claim is located after noon on September 1st in any calendar year, the locator must file in the next full calendar year a notice of intention to hold, because no assessment work requirement has yet arisen." Sherwood, Mining-claim Recordation and Prospecting under The Federal Land Policy and Management Act of 1976, 23 Rocky Mountain Mineral Law Institute 1, 25 (1977) (footnotes omitted).

stantial compliance. Further, the Court today violates not only the long-followed principle that a court should "not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided,"[4] but also the principle that a court should "not decide a constitutional question if there is some other ground upon which to dispose of the case."[5]

I

Congress enacted § 314 of the Federal Land Policy and Management Act to establish for federal land planners and managers a federal recording system designed to cope with the problem of stale claims, and to provide "an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations."[6] I submit that the appellees' actions in this case did not diminish the importance of these congressional purposes; to the contrary, their actions were entirely consistent with the statutory purposes, despite the confusion created by the "inartful draftsmanship" of the statutory language.[7]

A careful reading of § 314 discloses at least three respects in which its text cannot possibly reflect the actual intent of Congress. First, the description of what must be filed in the initial filing and subsequent annual filings is quite obviously garbled. Read literally, § 314(a)(2) seems to require that a

---

[4] *United States* v. *Clark*, 445 U. S. 23, 27 (1980).

[5] *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) *(per curiam);* see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

[6] S. Rep. No. 94–583, p. 65 (1975). The Court agrees regarding the first purpose, but inexplicably and without citation concludes that another purpose of § 314 is "to provide federal land managers with up-to-date information that allows them to make informed management decisions." *Ante*, at 87. This latter statutory "purpose" is not mentioned in the legislative history; rather, it is a variation of a "purpose," equally without citation, offered by appellants. See Brief for Appellants 45, 47.

[7] See n. 3, *supra.*

notice of intent to hold the claim and an affidavit of assessment work performed on the claim must be filed "on a detailed report provided by § 28–1 of Title 30." One must substitute the word "or" for the word "on" to make any sense at all out of this provision. This error should cause us to pause before concluding that Congress commanded blind allegiance to the remainder of the literal text of § 314.

Second, the express language of the statute is unambiguous in describing the place where the second annual filing shall be made. If the statute is read inflexibly, the owner must "file in the office of the Bureau" the required documents.[8] Yet the regulations that the Bureau itself has drafted, quite reasonably, construe the statute to allow filing in a mailbox, provided that the document is actually received by the Bureau prior to the close of business on January 19th of the year following the year in which the statute requires the filing to be made.[9] A notice mailed on December 30, 1982, and received by the Bureau on January 19, 1983, was filed "in the office of the Bureau" during 1982 within the meaning of the statute, but one that is hand-delivered to the office on December 31, 1982, cannot be accepted as a 1982 "filing."

The Court finds comfort in the fact that the implementing regulations have eliminated the risk of injustice. *Ante*, at 94. But if one must rely on those regulations, it should be apparent that the meaning of the statute itself is not all that obvi-

---

[8] See 43 U. S. C. § 1744(a)(2).

[9] Title 43 CFR § 3833.0–5(m) (1984) provides:

"'Filed or file' means being received and date stamped by the proper BLM office. For the purpose of complying with § 3833.2–1 of this title, 'timely filed' means being filed within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. This 20 day period does not apply to a notice of location filed pursuant to § 3833.1–2 of this title. (See § 1821.2–2(e) of this title where the last day falls on a date the office is closed.)"

ous. To begin with, the regulations do not use the language "prior to December 31"; instead, they use "on or before December 30 of each year."[10] The Bureau's drafting of the regulations using this latter phrase indicates that the meaning of the statute itself is not quite as "plain," *ante*, at 93, as the Court assumes; if the language were plain, it is doubtful that the Bureau would have found it necessary to change the language at all. Moreover, the Bureau, under the aegis of the Department of the Interior, once issued a pamphlet entitled "Staking a Mining Claim on Federal Lands" that contained the following information:

> "Owners of claims or sites located on or before Oct. 21, 1976, have until Oct. 22, 1979, to file evidence of assessment work performed the preceding year or to file a notice of intent to hold the claim or site. Once the claim or site is recorded with BLM, *these documents must be filed on or before December 31 of each subsequent year.*" *Id.*, at 9–10 (1978) (emphasis added).

"Plain language," *ante*, at 93, indeed.

There is a more important reason why the implementing regulations cannot be supportive of the result the Court reaches today: the Bureau's own deviation from the statutory language in its mail-filing regulation. See n. 9, *supra*. If the Bureau had issued regulations expressly stating that a

---

[10] 43 CFR § 3833.2–1(b)(1) (1984). It is undisputed that the regulations did not come to the attention of the appellees. To justify the forfeiture in this case on the ground that appellees are chargeable with constructive notice of the contents of the Federal Register is no more acceptable to me today than it would have been to Justice Jackson in 1947. "To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops." *Federal Crop Insurance Corporation* v. *Merrill*, 332 U. S. 380, 387 (1947) (Jackson, J., dissenting).

December 31 filing would be considered timely—just as it has stated that a mail filing received on January 19 is timely—it is inconceivable that anyone would question the validity of its regulation. It appears, however, that the Bureau has more power to interpret an awkwardly drafted statute in an enlightened manner consistent with Congress' intent than does this Court.[11]

In light of the foregoing, I cannot believe that Congress intended the words "prior to December 31 of each year" to be given the literal reading the Court adopts today. The statutory scheme requires periodic filings on a calendar-year basis. The end of the calendar year is, of course, correctly described either as "prior to the close of business on December 31," or "on or before December 31," but it is surely understandable that the author of § 314 might inadvertently use the words "prior to December 31" when he meant to refer to the end of the calendar year. As the facts of this case demonstrate, the scrivener's error is one that can be made in good faith. The risk of such an error is, of course, the greatest when the reference is to the end of the calendar year. That it was in fact an error seems rather clear to me because no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made, and I would not presume that Congress deliberately created a trap for the unwary by such an omission.

---

[11] The Court, *ante*, at 102–103, n. 14, criticizes my citation of the BLM regulations to demonstrate that the agency has itself departed from the "plain" statutory language by allowing mail filings to be received by January 19th. In the same breath, the Court acknowledges that the agency is not bound by the "plain" language in "administering the statute." *Ibid.* The mail-delivery deadline makes it clear that the Court's judicially created "up-to-date" statutory purpose is utterly lacking in foundation. The agency's adoption of the January 19 deadline illustrates that it does not need the information by December 30; that it is not bound by the language of the provision; and that substantial compliance does not interfere with the agency's statutory functions or with the intent of Congress.

It would be fully consistent with the intent of Congress to treat any filing received during the 1980 calendar year as a timely filing for that year. Such an interpretation certainly does not interfere with Congress' intent to establish a federal recording system designed to cope with the problem of stale mining claims on federal lands. The system is established, and apparently, functioning.[12] Moreover, the claims here were *active;* the Bureau was well aware that the appellees intended to hold and to operate their claims.

Additionally, a sensible construction of the statute does not interfere with Congress' intention to provide "an easy way of discovering which Federal lands are subject to either valid or

---

[12] Several *amici* have filed materials listing numerous cases in which it is asserted that the Bureau is using every technical construction of the statute to suck up active mining claims much as a vacuum cleaner, if not watched closely, will suck up jewelry or loose money. See Brief for Mountain States Legal Foundation as *Amicus Curiae* 2 (claiming that an "overwhelming number of mining claims have been lost to the pitfalls of section 314"), 3 (claiming that from 1977 to 1984 "unpatented mining claimants lost almost 20,000 active locations due to the technical rigors and conclusive presumption of section 314"); App. 1–86 (listing cases); Brief for Alaska Miners Association, California Mining Association, Nevada Mining Association, Miners Advocacy Council, and Placer Miners Association as *Amici Curiae,* Exhibit A (letter from Bureau's Utah State Office stating that well over 1,400 claims were invalidated from 1979–1983 because § 1744(a)(1) filings were made on December 31), Exhibit B (letter from Bureau's Billings, Montana Office stating that 198 claims were invalidated from 1979–1983 because § 1744(a)(1) filings were made on December 31), Exhibit C (letter from Bureau's Wyoming State Office stating that 11 claims were invalidated in 1980–1982 because § 1744(a)(2) filings were made on December 31), Exhibit D (letter from Bureau's Arizona State Office stating that "approximately 500 claims have been invalidated due to filing an affidavit one day late"); Brief for Mobil Oil Corporation as *Amicus Curiae* 2–4 (claiming to be in a situation similar to the appellees'). According to the Bureau's own calculations, thousands of active mining claims have been terminated because filings made on December 31 were considered untimely. These representations confirm the picture painted by *amici* of a federal bureaucracy virtually running amok, and surely operating contrary to the intent of Congress, by terminating the valuable property rights of hardworking, productive citizens of our country.

invalid mining claim locations."[13] The Bureau in this case was well aware of the existence and production of appellees' mining claims; only by blinking reality could the Bureau reach the decision that it did. It is undisputed that the appellees made the first 1980 filing on August 29, 1980, and made the second required filing on December 31, 1980; the Bureau did not declare the mining claims "abandoned and void" until April 4, 1981. Thus, appellees lost their entire livelihood for no practical reason, contrary to the intent of Congress, and because of the hypertechnical construction of a poorly drafted statute, which an agency interprets to allow "filings" far beyond December 30 in some circumstances, but then interprets inflexibly in others.[14] Appellants acknowledge that "[i]t may well be that Congress wished to require filing by the end of the calendar year and that the earlier deadline resulted from careless draftmanship." Brief for Appellants 42, n. 31. I have no doubt that Congress would have chosen to adopt a construction of the statute that filing take place by the end of the calendar year if its attention had been focused on this precise issue. Cf. *DelCostello* v. *Teamsters*, 462 U. S. 151, 158 (1983).[15]

---

[13] S. Rep. No. 94–583, p. 65 (1975).

[14] The Court suggests that appellees' failure to file by December 30 "caused the property right to be extinguished." *Ante*, at 107. However, the Court, on the one hand, carefully avoids mentioning the 3-month period that elapsed after December 31 before the Bureau declared the appellees' mining claims abandoned, and, on the other hand, describes the Bureau as needing "up-to-date information that allows them to make informed land management decisions." *Ante*, at 87, 107.

[15] The Court, *ante*, at 96–97, n. 12, lists several provisions in the United States Code as supportive of its position that "prior to December 31" is somehow less ambiguous because of its occasional use in various statutory provisions. It then states that it "is unclear whether the arguments advanced by the dissenters are meant to apply to all of the provisions, or only to some of them." *Ibid.* However, the provisions cited for support illustrate the lack of justification for the Court's approach, and highlight the uniqueness of the provision in this case. Eleven of the provisions refer to a one-time specific date; the provision at issue here requires specific action

II

After concluding its constitutional analysis, the District Court also held that "the standard to be applied to assessment notice requirements is substantial compliance. Measured against this, the Lockes have satisfied their statutory duties under Section 1744 by filing their notices one day late."[16] The District Court grounded its holding on this Court's analysis in *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970).

In *Hickel*, the Court construed 30 U. S. C. § 28, which reads:

> "On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements

---

on a continual annual basis, thus involving a much greater risk of creating a trap for the unwary. Further, each of the specific dates mentioned in the 11 provisions is long past; thus, contrary to the Court's premise, this decision would have no effect on them because they require no future action. See 7 U. S. C. § 609(b)(5) ("prior to December 31, 1937"); 12 U. S. C. § 1709)(o)(1)(E) ("prior to December 31, 1976"); 12 U. S. C. § 1823(g) ("prior to December 31, 1950"); 12 U. S. C. § 1841(a)(5)(A) ("prior to December 31, 1970"); 26 U. S. C. § 503(d)(1) ("prior to December 31, 1955"); 33 U. S. C. § 1319(a)(5)(B) ("prior to December 31, 1974"); 42 U. S. C. § 415(a)(7)(E)(ii) (1982 ed., Supp. III) ("prior to December 31, 1983"); 42 U. S. C. § 1962d–17(b) ("prior to December 31, 1969"); 42 U. S. C. § 5614 (b)(5) ("after the first year following October 3, 1977, prior to December 31"); 42 U. S. C. § 7502(a)(2) ("prior to December 31, 1982"); 42 U. S. C. § 7521(b)(2) ("prior to December 31, 1970"); 50 U. S. C. App. § 1741(b)(1) ("prior to December 31, 1946"). The remaining provision cited as authority by the Court, 22 U. S. C. § 3784(c), states that the Panama Canal and certain other property "shall not be transferred to the Republic of Panama prior to December 31, 1999." The legislative history indicates that that language was added to make "clear that the President is not authorized to accelerate the final transfer of the Panama Canal in 1999, as provided by the Panama Canal Treaty of 1977." H. R. Conf. Rep. No. 96–473, p. 61 (1979). The Panama Canal Treaty of 1977, Art. II, indicates that it "shall terminate at noon, Panama time, December 31, 1999." Therefore, the language of § 3784(c) was tailored to a unique treaty provision.

[16] 573 F. Supp. 472, 479 (Nev. 1983).

made during each year. . . . *[U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made*, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." (Emphasis added.)

Recognizing that a claimant's "possessory title" should not be disturbed on "flimsy or insubstantial grounds," 400 U. S., at 57, the Court wrote:

"We agree . . . that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U. S. C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support [*Wilbur* v. *Krushnic*, 280 U. S. 306 (1930),] and [*Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935)], on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements. . . ." *Ibid.*

Hickel thus demonstrates that the District Court was correct that substantial-compliance analysis was appropriate in this case, and that appellees substantially complied with the statute. Appellees earned their livelihood since 1960 by mining the 10 unpatented mining claims now in dispute.[17] They paid income taxes, and property and production taxes to the State of Nevada, which appears as an *amicus* in sup-

[17] *Id.*, at 474.

port of appellees. The statute, passed in 1976, required appellees to register their mining claims "in the office where the location notice or certificate is recorded" and "in the office of the Bureau" by October 21, 1979; it is not disputed that appellees met the statute's two initial filing requirements.[18] Moreover, the statute required, within three years of October 21, 1976, that appellees file "in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location."[19] Appellees also met this third requirement, thus completely informing the Bureau of the existence, the sizes, the locations, and the ownership of appellees' active mining claims. After the three initial filing requirements, the statute required that appellees make two separate annual filings: (1) an initial filing with the county recorder; and (2) a copy of the official record of the first filing filed with the Bureau. Appellees made the first of these filings for the 1980 calendar year on August 29, 1980. Because 1980 was generally the first year that claimants—including appellees—had to comply with the annual filing requirements that the new legislation mandated, the Bureau began the practice of mailing reminder notices about the filing due in the Bureau's office. Appellants acknowledge that appellees did not receive a reminder notice.[20] Nevertheless, appellees responsibly inquired about the date of filing with the Bureau for the 1980 calendar year; it is undisputed that Bureau personnel informed them that the filing was due "on or before December 31, 1980."[21] On December 31, 1980, appellees made a 700-mile round trip from Ely to Reno, Nevada, to hand-deliver their filings to the Bureau. The Bureau accepted the filings on that date.

In my view, this unique factual matrix unequivocally contradicts the statutory presumption of an intent to abandon by

---

[18] *Ibid.*

[19] 43 U. S. C. § 1744(b).

[20] Reply Brief for Appellants 13, n. 12.

[21] Affidavit of Laura C. Locke ¶ 3.

reason of a late filing. In sum, this case presents an ambiguous statute, which, if strictly construed, will destroy valuable rights of appellees, property owners who have complied with all local and federal statutory filing requirements apart from a 1-day "late" filing caused by the Bureau's own failure to mail a reminder notice necessary because of the statute's ambiguity and caused by the Bureau's information to appellees that the date on which the filing occurred would be acceptable. Further, long before the Bureau declared a technical "abandonment," it was in complete possession of all information necessary to assess the activity, locations, and ownership of appellees' mining claims and it possessed all information needed to carry out its statutory functions. Finally, the Bureau has not claimed that the filing is contrary to the congressional purposes behind the statute, that the filing affected the Bureau's land-use planning functions in any manner, or that it interfered "in any measurable way" with the Bureau's need to obtain information.[22] A showing of substantial compliance necessitates a significant burden of proof; appellees, whose active mining claims will be destroyed contrary to Congress' intent, have convinced me that they have substantially complied with the statute.

I respectfully dissent.

---

[22] Brief for Appellants 45.

UNITED STATES *v.* MILLER

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

No. 83–1750. Argued January 16, 1985—Decided April 1, 1985

A federal grand jury returned a multicount indictment charging respondent with mail fraud in violation of 18 U. S. C. § 1341. He was alleged to have defrauded his insurer in connection with a burglary at his place of business both by consenting to the burglary in advance and by lying to the insurer about the value of his loss. The proof at his jury trial, however, concerned only the latter allegation, and he was convicted. Respondent appealed on the basis that the trial proof had fatally varied from the scheme alleged in the indictment. The Court of Appeals agreed and vacated the conviction, holding that under the Fifth Amendment's grand jury guarantee a conviction could not stand where the trial proof corresponded to a fraudulent scheme much narrower than, though included in, the scheme that the indictment alleged.

Held: Respondent's Fifth Amendment grand jury right was not violated. Pp. 135–145.

(a) As long as the crime and the elements thereof that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime. Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment. A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored. Pp. 135–138.

(b) Respondent has shown no deprivation of his substantial right to be tried only on charges presented in a grand jury indictment. He was tried on an indictment that clearly set out the offense for which he was ultimately convicted. *Stirone* v. *United States*, 361 U. S. 212, distinguished. Pp. 138–140.

(c) The proposition that a narrowing of an indictment constitutes an "amendment" that renders the indictment void, *Ex parte Bain*, 121 U. S. 1, is now explicitly rejected. Pp. 140–145.

(d) The variance complained of here added nothing new to the indictment and constituted no broadening, and what was removed from the case was in no way essential to the offense on which respondent was convicted. P. 145.

715 F. 2d 1360 and 728 F. 2d 1269, reversed.

MARSHALL, 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 case.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott, Carolyn F. Corwin,* and *Vincent L. Gambale.*

Jerrold M. Ladar, by appointment of the Court, 469 U. S. 1103, argued the cause and filed a brief for respondent.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented is whether the Fifth Amendment's grand jury guarantee[1] is violated when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme.

A grand jury in the Northern District of California returned an indictment charging respondent Miller with three counts of mail fraud in violation of 18 U. S. C. § 1341. After the Government moved to dismiss the third count, Miller was tried before a jury and convicted of the remaining two. He appealed asserting that there had been a fatal variance between the "scheme and artifice" to defraud charged in the indictment and that which the Government proved at trial. The Court of Appeals for the Ninth Circuit agreed and vacated the judgment of conviction. 715 F. 2d 1360 (1983), modified, 728 F. 2d 1269 (1984). We granted certiorari, 469 U. S. 814 (1984), and reverse.

I

A

The indictment had charged Miller with various fraudulent acts in connection with a burglary at his place of business.

---

[1] The Grand Jury Clause reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

Miller allegedly had defrauded his insurer both by consenting to the burglary in advance and by lying to the insurer about the value of his loss.[2] The trial proof, however, concerned only the latter allegation, focusing on whether, prior to the burglary, Miller actually had possessed all the property that he later claimed was taken. This proof was clearly sufficient

---

[2] The scheme to defraud was set out in paragraphs 1 through 7 of count one of the indictment:

"'1. Beginning on or about July 2, 1981 and continuing to on or about October 26, 1981, in the City and County of San Francisco, in the State and Northern District of California, JAMES RUAL MILLER, defendant herein, being the President of San Francisco Scrap Metal, Inc., did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.

"'2. At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so devised and intended to be devised, was implemented in substance as follows:

"'3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.

"'4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.

"'5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.

"'6. It was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.

"'7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance company.'" 715 F. 2d 1360, 1361–1362 (1983).

Each count in the indictment was based on this same scheme to defraud, and these paragraphs were included by reference in the other two counts. The separate counts reflected only separate uses of the mails.

to support a jury finding that Miller's claim to his insurer had grossly inflated the value of any actual loss.[3]

The Government moved to strike the part of the indictment that alleged prior knowledge of the burglary, and it correctly argued that even without that allegation the indictment still made out a violation of § 1341.[4] Respondent's counsel opposed the change, and at his urging the entire indictment was sent to the jury. The jury found Miller

---

[3] The facts, as stipulated to by the parties, included the following: The respondent, James Rual Miller, was the owner of San Francisco Scrap Metals, Inc., a company that regularly purchased scrap wire, and stripped, baled, and resold it. On the morning of July 15, 1981, Miller reported that his business had been burglarized the previous evening and that two trucks and 201,000 pounds of copper wire had been stolen. On July 20, 1981, Miller reported to the insurance adjuster that the missing copper had been purchased from L. K. Comstock, Inc., and Kingston Electric. Kingston Electric had indeed sold a quantity of copper to San Francisco Scrap Metals, but San Francisco Scrap Metals had resold a similar quantity to Battery Salvage Company. Miller claimed that the copper sold to Battery Salvage had been purchased from another company. But in fact, neither that other company nor L. K. Comstock had sold San Francisco Scrap Metals the copper claimed to have been purchased. Miller sent his proof of loss through the United States mail and received $100,000. Aetna sent one $50,000 check to Miller through the mail. *Id.*, at 1361.

[4] Title 18 U. S. C. § 1341 reads as follows:

"Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

guilty, and respondent appealed on the basis that the trial proof had fatally varied from the scheme alleged in the indictment.

Agreeing that Miller's Fifth Amendment right to be tried only on a grand jury indictment had been violated, the Court of Appeals vacated the conviction. It succinctly stated its rationale:

> "The grand jury may well have declined to indict Miller simply on the basis of his exaggeration of the amount of his claimed loss. . . . In fact it is quite possible that the grand jury would have been unwilling or unable to return an indictment based solely on Miller's exaggeration of the amount of his claimed loss even though it had concluded that an indictment could be returned based on the overall scheme involving a use of the mail caused by Miller's knowing consent to the burglary." 715 F. 2d, at 1362–1363.

B

Miller's indictment properly alleged violations of 18 U. S. C. § 1341, and it fully and clearly set forth a number of ways in which the acts alleged constituted violations. The facts proved at trial clearly conformed to one of the theories of the offense contained within that indictment, for the indictment gave Miller clear notice that he would have to defend against an allegation that he "'well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.'" 715 F. 2d, at 1361–1362 (quoting indictment). Competent defense counsel certainly should have been on notice that that offense was charged and would need to be defended against. Accordingly, there can be no showing here that Miller was prejudicially surprised at trial by the absence of proof concerning his alleged complicity in the burglary;

nor can there be a showing that the variance prejudiced the fairness of respondent's trial in any other way. Cf. *Kotteakos* v. *United States*, 328 U. S. 750 (1946). See also *Berger* v. *United States*, 295 U. S. 78, 83 (1935). Cf. also *United States* v. *Ballard*, 322 U. S. 78, 91 (1944) (Stone, C. J., dissenting). The indictment was also sufficient to allow Miller to plead it in the future as a bar to subsequent prosecutions. Therefore, none of these "notice" related concerns—which of course are among the important concerns underlying the requirement that criminal charges be set out in an indictment—would support the result of the Court of Appeals. See *Russell* v. *United States*, 369 U. S. 749, 763–764 (1962).

The Court of Appeals did not disagree, but instead argued that Miller had been prejudiced in his right to be free from a trial for any offense other than that alleged in the grand jury's indictment. 728 F. 2d, at 1270. It reasoned that a grand jury's willingness to indict an individual for participation in a broad criminal plan does not establish that the same grand jury would have indicted the individual for participating in a substantially narrower, even if wholly included, criminal plan. 715 F. 2d, at 1362–1363. Relying on the Fifth Amendment's grand jury guarantee, the Court of Appeals concluded that a conviction could not stand where the trial proof corresponded to a fraudulent scheme much narrower than, though included within, the scheme that the grand jury had alleged. The Court of Appeals cited two prior decisions of this Court that emphasized the right of an accused to be tried only on charges that had in fact been passed on by a grand jury. *Ibid.* (citing *Stirone* v. *United States*, 361 U. S. 212 (1960), and *Ex parte Bain*, 121 U. S. 1 (1887)). Cf. *United States* v. *Mastelotto*, 717 F. 2d 1238, 1248–1250 (CA9 1983) (similarly relying on *Stirone* and *Bain*).

II

The Government correctly argues that the Court of Appeals' result conflicts with a number of this Court's prior

decisions interpreting the Fifth Amendment's Grand Jury Clause. The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime. See, *e. g.*, *Ford* v. *United States*, 273 U. S. 593 (1927); *Salinger* v. *United States*, 272 U. S. 542 (1926). See also *Berger* v. *United States*, *supra; Hall* v. *United States*, 168 U. S. 632, 638–640 (1898). Indeed, a number of longstanding doctrines of criminal procedure are premised on the notion that each offense whose elements are fully set out in an indictment can independently sustain a conviction. See, *e. g.*, *Turner* v. *United States*, 396 U. S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged"); *Crain* v. *United States*, 162 U. S. 625, 634–636 (1896) (indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are proved); *Dealy* v. *United States*, 152 U. S. 539, 542 (1894) (prosecution's failure to prosecute certain counts of an indictment does not affect the validity of the indictment as to the other counts).

A review of prior cases allowing convictions to stand in the face of variances between the indictment and proof makes the Court of Appeals' error clear. Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment. A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as "a useless averment" that "may be ignored." *Ford* v. *United States*, 273 U. S., at 602. In *Ford*, for example, an indictment charged a defendant with

conspiring to import liquor in violation of various federal laws and in violation of a treaty. "The validity of the indictment [was] attacked . . . because it charge[d] that the conspiracy was to violate the treaty, although the treaty create[d] no offense against the law of the United States." *Ibid.* Although the grand jury had included the treaty allegation as part of the indictment, this Court upheld the conviction because "that part of the indictment [was] merely surplusage and may be rejected." *Ibid.*

This treatment of allegations independent of and unnecessary to the offense on which a conviction ultimately rests has not been confined to allegations that, like those in *Ford*, would have had no legal relevance if proved. In *Salinger* v. *United States*, *supra*, for example, the Court was presented with facts quite similar to the instant case. A grand jury charged Salinger with mail fraud in an indictment containing several counts, "[a]ll relat[ing] to the same scheme to defraud, but each charg[ing] a distinct use of the mail for the purpose of executing the scheme." *Id.*, at 546. As was the case with Miller, Salinger's "scheme to defraud as set forth in the indictment . . . comprehended several relatively distinct plans for fleecing intended victims." *Id.*, at 548. Because the evidence only sustained the charge as to one of the plans, the trial judge withdrew from the jury those portions of the indictment that related to all other plans. Salinger argued then, just as Miller argues now, that the variance between the broad allegations in the indictment and the narrower proof at trial violated his right to have had a grand jury screen any alleged offenses upon which he might be convicted at trial.

This Court unanimously rejected Salinger's argument on the ground that the offense proved was fully contained within the indictment. Nothing had been added to the indictment which, in the Court's view, "remained just as it was returned by the grand jury." *Ibid.* "[T]he trial was on the charge preferred in it and not on a modified charge," *ibid.*, and there

was thus "not even remotely an infraction of the constitutional provision that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.'" *Id.*, at 549. See also *Berger* v. *United States*, 295 U. S. 78 (1935); *Goto* v. *Lane*, 265 U. S. 393 (1924); *Hall* v. *United States*, *supra*, at 638–640.[5]

The result reached by the Court of Appeals thus conflicts with the results reached by this Court in such cases as *Salinger* and *Ford*. See also *Hall* v. *United States*, *supra*, at 638–640; *Crain* v. *United States*, *supra*, at 634–636.

III

The Court of Appeals principally relied on this Court's decision in *Stirone* v. *United States*, 361 U. S. 212 (1960), to support its conclusion that the Fifth Amendment's grand jury right is violated by a conviction for a criminal plan narrower than, but fully included within, the plan set forth in the indictment. *Stirone*, however, stands for a very different proposition. In *Stirone* the offense proved at trial was *not* fully contained in the indictment, for trial evidence had "amended" the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment. *Stirone* was thus wholly unlike the cases discussed in Part II, *supra*, and unlike respondent's case, all of which involve trial evidence that narrowed the indictment's charges without adding any new offenses. As the *Stirone* Court said, the issue was "whether [Stirone] was convicted of an offense *not*

---

[5] As is discussed *supra*, at 134–135, Miller has shown no prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions, and the Court of Appeals did not rest on any such theories of prejudice. Cf. *Kotteakos* v. *United States*, 328 U. S. 750 (1946) (finding prejudice in a case of extreme variance between a charge of a very broad conspiracy and proof of far narrower but technically included conspiracies). See also *Berger* v. *United States*, 295 U. S., at 83.

charged in the indictment." 361 U. S., at 213 (emphasis added).

Stirone, a union official, was indicted for and convicted of unlawfully interfering with interstate commerce in violation of the Hobbs Act. 18 U. S. C. § 1951. More specifically, the indictment charged that he had engaged in extortion that obstructed shipments of sand from outside Pennsylvania into that State, where it was to be used in the construction of a steel mill. At trial, however, the prosecution's proof of the required interference with interstate commerce went beyond the allegation of obstructed sand shipments. The prosecutor also attempted to prove that Stirone had obstructed the steel mill's eventual export of steel to surrounding States. Because the conviction might have been based on the evidence of obstructed steel exports, an element of an offense not alleged in the indictment, a unanimous Court held that the indictment had been unconstitutionally "broadened."

> "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, . . . we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error." 361 U. S., at 218–219.

The Court contrasted Stirone's case with cases like *Ford* v. *United States*. See 361 U. S., at 217. As we discussed in Part II, *supra*, in *Ford* the Court had refused to invalidate a conviction because of variances between the indictment and the narrower trial proof. The *Stirone* Court declared that, unlike that sort of variance, "the addition charging interference with steel exports [in *Stirone* was] neither trivial,

useless, nor innocuous. While there was a variance in the sense of a variation between pleading and proof, that variation [had in *Stirone*] destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." 361 U. S., at 217 (citations omitted). Accord, *Russell* v. *United States*, 369 U. S., at 770–771 (following *Stirone*).

Miller has shown no deprivation of his "substantial right to be tried only on charges presented in an indictment returned by a grand jury." 361 U. S., at 217. In contrast to Stirone, Miller was tried on an indictment that clearly set out the offense for which he was ultimately convicted. His complaint is not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary.

IV

The one decision of this Court that does offer some support to the Court of Appeals' result is *Ex parte Bain*, 121 U. S. 1 (1887), for there the Court treated as an unconstitutional "amendment" the deletion from an indictment of allegations that would not have been necessary to prove the offense. This deletion, in the Court's view, did constitute a compromise of the defendant's right to be tried only on a grand jury's indictment.

Bain was a bank cashier who had been indicted for including false statements in a report required to be made to the Comptroller of the Currency. The indictment charged that when Bain filed these required reports, he "did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth; and [he] made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said [banking] association . . . ." *Id.*, at 4. The relevant statute made it a criminal offense to file

"'any false entry in any book, report, or statement . . . with intent . . . to deceive . . . any agent appointed to examine the affairs of any such association . . . .'" *Id.*, at 3 (quoting Rev. Stat. § 5209). Thus under the terms of the statute, there was no need to charge Bain with intending to deceive "the Comptroller of the Currency." An intent to deceive the agent appointed to examine the reports was all that was necessary to prove the offense.

Under later cases, such as *Ford* and *Salinger*, the presence of such surplusage in the indictment would not invalidate a conviction as long as the necessary intent was also alleged and proved. But in *Bain* the trial court sustained Bain's demurrer to the indictment. After sustaining the demurrer, however, the court granted a motion by the Government "that the indictment be amended by striking out the words *'the Comptroller of the Currency and.'*" 121 U. S., at 5. Bain was then required to plead to the amended indictment, and was tried and convicted under that indictment. *Ibid.* This Court granted a writ of habeas corpus on the ground that Bain's Fifth Amendment right to stand trial only on an indictment returned by a grand jury had been violated. The opinion reasoned that a court could not, consistent with the Fifth Amendment, assume that the narrower indictment would have been returned by the grand jury that returned the broader one.[6]

---

[6] This analysis is apparent in *Bain*'s discussion of the issue:

"The learned judge who presided . . . at the time the change was made in this indictment . . . rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury

Bain may best be understood in terms of two distinct propositions. Most generally, *Bain* stands for the proposition that a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment. But more specifically, *Bain* can support the proposition that the striking out of parts of an indictment invalidates the whole of the indictment, for a court cannot speculate as to whether the grand jury had meant for any remaining offense to stand independently, even if that remaining offense clearly was included in the original text. Under this latter proposition, the narrowing of an indictment is no different from the adding of a new allegation that had never been considered by the grand jury; both are treated as "amendments" that alter the nature of the offense charged. In evaluating the relevance of *Bain* to the instant case, it is necessary to examine these two aspects of *Bain* separately, for the Court has treated these two propositions quite differently in the years since *Bain*.

The proposition that a defendant cannot be convicted of an offense different from that which was included in the indictment was broadly declared in *Bain:*

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which

---

should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. . . . How can the court say there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?" 121 U. S., at 9–10.

> the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." *Id.*, at 10.

This aspect of *Bain* has been reaffirmed in a number of subsequent cases. See, *e. g.*, *United States* v. *Norris*, 281 U. S. 619, 622 (1930) (citing *Bain* for the rule that "nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found"). The most important reaffirmation, of course, was *Stirone*. See Part III, *supra*. In *Stirone*, the Court's unanimous opinion extensively relied on *Bain* for the proposition that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," 361 U. S., at 217, and therefore that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.*, at 215–216. See also *Russell* v. *United States*, 369 U. S., at 770 (citing *Bain* for the "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form").[7]

---

[7] Cf. *United States* v. *Fabrizio*, 385 U. S. 263, 275 (1966) (Stewart, J. dissenting) (quoting *Bain* for proposition that "[w]e long ago rejected the notion that 'it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes . . .'"); *United States* v. *Ballard*, 322 U. S. 78, 90–91 (1944) (Stone, C. J., dissenting) (under *Bain* an indictment is unconstitutionally amended "when it is so altered as to charge a different offense from that found by the grand jury"). See generally *Smith* v. *United States*, 360 U. S. 1, 9 (1959) (citing *Bain* for importance of a grand jury's intervention as "a substantial safeguard against oppressive and arbitrary proceedings"); *Jenkins* v. *McKeithen*, 395 U. S. 411, 430 (1969) (plurality opinion) (citing *Bain* for proposition that "grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court").

But this aspect of *Bain* gives no support to Miller in this case, see Part III, *supra*, for the offense that formed the basis of Miller's conviction was clearly and fully set out in the indictment. Miller must instead rest on the second, and more specific, proposition found in *Bain*, that a narrowing of the indictment constitutes an amendment that renders the indictment void.

As is clear from the discussion of cases in Part II, *supra*, this second proposition did not long survive *Bain*. Indeed, when defendants have sought to rely on *Bain* for this point, this Court has limited or distinguished the case, sustaining convictions where courts had withdrawn or ignored independent and unnecessary allegations in the indictments. See, *e. g.*, *Ford* v. *United States*, 273 U. S., at 602 (distinguishing *Bain*); *Salinger* v. *United States*, 272 U. S., at 549 (same). Modern criminal law has generally accepted that an indictment will support each offense contained within it. To the extent *Bain* stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.

Rejecting this aspect of *Bain* is hardly a radical step, however, given that in the years since *Bain* this Court has largely ignored this element of the case. Moreover, in rejecting this proposition's continued validity, we do not limit *Bain*'s more general proposition concerning the impermissibility of actual additions to the offenses alleged in an indictment, a proposition we have repeatedly reaffirmed. See Part III, *supra;* text accompanying n. 7, *supra*. That our holding today is fully consistent with prior legal understanding is apparent from an examination of the state of the law, as seen by Chief Justice Stone, more than 40 years ago:

> "An indictment is amended when it is so altered as to charge a different offense from that found by the grand

jury. *Ex parte Bain*, 121 U. S. 1. But here there was no alteration of the indictment, *Salinger* v. *United States*, 272 U. S. 542, 549, nor did the court's action, in effect, add anything to it by submitting to the jury matters which it did not charge. *United States* v. *Norris*, 281 U. S. 619, 622. In *Salinger* v. *United States*, *supra*, 548–9, we explicitly held that where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. See also *Goto* v. *Lane*, 265 U. S. 393, 402–3; *Ford* v. *United States*, 273 U. S. 593, 602. Were the rule otherwise the common practice of withdrawing from the jury's consideration one count of an indictment while submitting others for its verdict, sustained in *Dealy* v. *United States*, 152 U. S. 539, 542, would be a fatal error." *United States* v. *Ballard*, 322 U. S., at 90–91 (dissenting).

V

In light of the foregoing, the proper disposition of this case is clear. The variance complained of added nothing new to the grand jury's indictment and constituted no broadening. As in *Salinger* and *Ford*, what was removed from the case was in no way essential to the offense on which the jury convicted. We therefore disagree with the Court of Appeals on the issue of whether Miller has shown any compromise of his right to be tried only on offenses for which a grand jury has returned an indictment. No such compromise has been shown. The judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

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

OKLAHOMA *v.* CASTLEBERRY ET AL.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 83–2126. Argued March 20, 1985—Decided April 1, 1985

678 P. 2d 720, affirmed by an equally divided Court.

David W. Lee, Assistant Attorney General of Oklahoma, argued the cause for petitioner. With him on the briefs were *Michael C. Turpen*, Attorney General, and *Hugh A. Manning*, Assistant Attorney General.

Charles Foster Cox argued the cause and filed a brief for respondents.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

---

*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Robert R. Granucci*, Assistant Attorney General, and *Clifford K. Thompson, Jr.*, and *Ronald E. Niver*, Deputy Attorneys General; and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *David Crump*, and *Daniel B. Hales*.

RAMIREZ *v.* INDIANA

CERTIORARI TO THE COURT OF APPEALS OF INDIANA

No. 84–5059. Argued March 19, 1985—Decided April 1, 1985

455 N. E. 2d 609, affirmed by an equally divided Court.

Kenneth F. Ripple, by appointment of the Court, 469 U. S. 1015, argued the cause for petitioner. With him on the briefs were *David T. Link*, *Douglas W. Kenyon*, *Mollie A. Murphy*, and *Richard S. Myers*.

William E. Daily, Deputy Attorney General of Indiana, argued the cause for respondent. With him on the brief were *Linley E. Pearson*, Attorney General, and *Lisa M. Paunicka*, Deputy Attorney General.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF CALIFORNIA, ET AL. *v.* STUDENTS OF THE CALIFORNIA SCHOOL FOR THE BLIND ET AL.

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

No. 84–436. Decided April 1, 1985

Respondents, students of the California School for the Blind, brought suit in Federal District Court against petitioner state officials, claiming that the school's physical plant did not meet applicable seismic safety standards and alleging rights of action under federal statutes. After trial, the court issued a "preliminary injunction" requiring the State to conduct additional tests of school grounds to aid in assessment of the school's seismic safety. The Court of Appeals affirmed the issuance of the injunction, noting that it was not finally deciding the merits of the action. Petitioners sought certiorari to review the Court of Appeals' judgment, but in the meantime the tests ordered by the District Court's preliminary injunction were completed.

Held: Since petitioners have complied with the terms of the preliminary injunction, the only question of law ruled on by the Court of Appeals—that is, whether the District Court abused its discretion in applying the complicated calculus for determining whether the preliminary injunction should have issued—is moot. However, other claims for relief still remain to be resolved by the District Court. Thus, the petition for certiorari is granted, and the Court of Appeals' judgment is vacated, with instructions to remand the case to the District Court.

Certiorari granted; 736 F. 2d 538, vacated and remanded.

PER CURIAM.

Respondents, students of the California School for the Blind, brought this lawsuit in Federal District Court against petitioner state officials, claiming among other things that the school's physical plant did not meet applicable seismic safety standards. Their complaint alleged rights of action under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U. S. C. §§ 1232, 1401, 1405, 1406, 1411–1420, 1453, and § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794. After a lengthy

trial the District Court issued a "preliminary injunction" requiring the State to conduct additional tests of school grounds to aid in assessment of the school's seismic safety. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U. S. C. § 1292(a)(1). That court affirmed the issuance of the preliminary injunction on the ground that the lower court had not abused its discretion. 736 F. 2d 538 (1984). The court expressly noted that it was not finally deciding the merits of the action, but only was assessing the District Court's reasoning to determine whether it had appropriately applied the traditional calculus for granting or denying preliminary injunctions. *Id.*, at 542–543, 546–547, 550.

Petitioners have petitioned this Court for a writ of certiorari to review the judgment of the Ninth Circuit, but in the meantime the tests ordered by the District Court's preliminary injunction have been completed. We therefore are confronted with a situation nearly identical to that addressed in *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), in which the petitioners had completely complied with the terms of a preliminary injunction by the time the case reached this Court. In *Camenisch* we concluded that "the question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out." *Id.*, at 398. Because only that aspect of the lawsuit was moot, however, we merely vacated the judgment of the Court of Appeals, and remanded the case for further proceedings. *Ibid.* Here, as in *Camenisch*, the only question of law actually ruled on by the Court of Appeals was whether the District Court abused its discretion in applying the complicated calculus for determining whether the preliminary injunction should have issued, an issue now moot. No order of this Court could affect the parties' rights with respect to the injunction we are called upon to review. Other claims for relief, however, still remain to be resolved by the District Court. We accordingly

grant the petition for writ of certiorari, and vacate the judgment of the Court of Appeals, with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

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

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

Although I agree with the majority that a case such as this could be moot if the full burden imposed by the preliminary injunction has passed, it is not at all clear that that is the situation here. If this case is moot, the facts making it moot occurred subsequent to the Court of Appeals decision, and so do not appear on the record. That makes this case quite distinct from *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981), where the issue of mootness had been raised, argued, and decided by the Court of Appeals. In the instant case, this Court has received no papers from the parties on this issue other than a petition for certiorari and a response. In those papers, neither party has assured the Court that the factual premises of mootness have actually been fulfilled, nor have the parties agreed that the case is moot. Since the Court has not requested any supplemental information or argument from the parties, the Court is determining that the case is moot without a clear understanding of the facts of the case or their precise legal implications for the parties. I cannot accept that the Court can simply assume, as a factual matter, that mootness exists. We should inform the parties of our suspicion as to mootness and allow briefing on the issue. Absent this procedure, I dissent.

Mootness is mentioned twice in the papers before the Court. First, petitioners argue in their petition for certiorari that the case is not moot in spite of the fact that "by the time this Court considers the instant petition, the state officials may well have already complied with the injunction. . . ."

Pet. for Cert. 17. Leaving aside the merits of their arguments that full compliance would not render the action moot, their statement is hardly sufficient to inform the Court that there has been full compliance.

This theme is repeated in the respondents' opposition. Respondents assert that the tests ordered by the District Court have been completed "and the final report *in all likelihood* will be completed before this Court determines whether to grant the present petition." Brief in Opposition 14 (emphasis added). The opposition goes on to assure the Court that "should the final report of the trial court's experts indicate, and the trial court find, that the Fremont site is seismically safe, there will remain *no live issue whatsoever* between the parties as to *any* aspect of the case." *Id.*, at 15 (emphasis in original). Although respondents have vigorously argued that once certain events occur this case will become moot, they have stopped conspicuously short of assuring the Court that those events have occurred. Indeed, they do not argue that the case is moot, but instead argue that the case "will become moot before [the] Court can hear or determine the issues presented." *Id.*, at 10.

In support of the opposition, respondents have attached to their filing a letter written by a consulting geologist who presumably is doing work that the preliminary injunction requires petitioners to have done. The letter, like the pleadings, stops short of informing this Court of the completion of all work done pursuant to the District Court's preliminary injunction. Dated November 27, 1984, the letter states that additional review of aerial photographs will be completed in "the next 45 days," that a draft report by investigators "should be completed in December" to be followed by a final report "by mid-January," and that the consulting geologists' report "should be submitted about 60 days later." App. to Brief in Opposition 1–2.

The last filing in this case was the opposition, filed on December 7, 1984, and that, as I discussed above, went no

further than to predict events in the following months that would render the case moot in respondents' view. If the situation is still as it was there described, the case may well not yet be moot. Although it is well understood that it is "the duty of counsel to call such facts [as would suggest mootness] to [this Court's] attention," R. Stern & E. Gressman, Supreme Court Practice 896 (5th ed. 1978), nothing has been received since.

Although the Court may believe that the end is so near that it can safely be assumed, the future may well hold surprises for the parties as well as for the Court. A clear understanding of the facts of a case and of their legal implications should be a prerequisite to disposing of a case as moot. This case is a complex one and prior to disposition on mootness the parties should be informed of the Court's suspicion as to mootness and be asked to provide the Court with facts and arguments. Because this was not done, I dissent.

OHIO *v.* KENTUCKY

ON BILL OF COMPLAINT

No. 27, Orig. Decided March 5, 1973, and January 21, 1980—Decree entered April 15, 1985

Decree entered.

Opinions reported: 410 U. S. 641, 444 U. S. 335.

The Report of the Special Master is received and ordered filed. The Report is adopted.

DECREE

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The boundary line between the State of Ohio and the Commonwealth of Kentucky is fixed as geodetically described in Joint Exhibit 30 to the Special Master's Report filed with this Court on April 15, 1985. Joint Exhibit 30 is incorporated by reference herein.

2. Copies of this Decree, and the Special Master's Report (including Joint Exhibits 1–31 and 35) shall be filed with the Clerk of this Court, the Auditor of the State of Ohio, and the Secretary of State of the Commonwealth of Kentucky.

3. Copies of this Decree, and the Special Master's Report (including Joint Exhibits 30 and 35, and paper prints of Joint Exhibits 1–29, once they become available) shall be filed with the County Recorder's Office in Ohio and with the County Clerk's Office in the Commonwealth of Kentucky in each of the following counties: in Ohio, the Counties of Lawrence, Scioto, Adams, Brown, Clermont and Hamilton; and in Kentucky, the Counties of Boyd, Greenup, Lewis, Mason, Bracken, Pendleton, Campbell, Kenton, and Boone.

4. The State of Ohio and the Commonwealth of Kentucky each have concurrent jurisdiction over the Ohio River.

5. The costs of this proceeding shall be divided between the parties as recommended by the Special Master.

MINTZES, WARDEN *v.* BUCHANON

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

No. 84–501. Decided April 15, 1985

Order granting certiorari vacated, and certiorari dismissed. Reported below: 734 F. 2d 274.

PER CURIAM.

The Court is advised that the respondent died in Ingham County, Mich., on December 7, 1984. The Court's order granting the writ of certiorari, see 469 U. S. 1033 (1984), therefore is vacated, and the petition for certiorari is dismissed. See *Warden* v. *Palermo*, 431 U. S. 911 (1977).

It is so ordered.

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

CHIEF JUSTICE BURGER, dissenting.

In this case, the District Court and the Court of Appeals for the Sixth Circuit ordered that respondent either be released or given a new hearing on the degree of his crimes and a resentencing. This was ordered despite the passage of 25 years since respondent's convictions for two murders committed while he was a fugitive on escape from prison. Both courts held that laches did not bar respondent's claim that he did not knowingly and intelligently waive his right to counsel at the hearing and sentencing in 1956. Understandably troubled by the possible ramifications of such a drastic holding and concerned that even in this particular case it would be prejudiced in its defense to the allegations, given the loss of records, faded memories, and intervening deaths, the State of Michigan sought certiorari to review the judgment of the Court of Appeals. We granted the State's petition and set the case for argument. 469 U. S. 1033 (1984).

Now, having been informed that the respondent has died, the Court simply directs that our order granting certiorari be vacated and the petition for certiorari dismissed, thereby leaving the Court of Appeals' opinion standing. In reaching this surprising result, the Court relies upon a single authority which, it is clear upon analysis, does not support, let alone require, such a disposition, see *Warden* v. *Palermo*, 431 U. S. 911 (1977). And it ignores the one precedent which *does* directly control on this question. See *McMann* v. *Ross*, 396 U. S. 118 (1969) *(per curiam); McMann* v. *Richardson*, 397 U. S. 759, 760, n. 1 (1970).

In *McMann* v. *Ross*, the only case to have presented the precise issue we have here, the Court vacated the judgment of the Court of Appeals and remanded to the District Court with instructions to dismiss the respondent's petition for writ of habeas corpus as moot. I would, as petitioner urges, dispose of this case in the same way. This is the course we have chosen to pursue in every civil case that becomes moot either pending a decision on certiorari or after we have granted a writ of certiorari, except *Warden* v. *Palermo*, which even if it were correct is plainly distinguishable. Thirty-five years ago, the Court noted that

> "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here *or pending our decision on the merits* is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950) (footnote omitted; emphasis added).

Indeed, as the Court said in *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936), this is the "duty" of this Court. Such a disposition "clears the path for future relitigation of the issues between the parties." *Munsingwear*, *supra*, at 40. In this case it is possible, for example, that by applying collateral estoppel offensively, relatives of the defendant might well invoke the Sixth Circuit's decision in a

subsequent civil suit for damages. Moreover, by vacating the Court of Appeals' judgment and remanding with instructions to dismiss as moot, we "eliminat[e] a judgment, review of which was prevented through happenstance." 340 U. S., at 40. And it is *only* through this procedure that "the rights of all parties are preserved." *Ibid.*

The Court mistakenly believes that our four-line order in *Palermo*, *supra*, *requires* that we only vacate the order granting certiorari and dismiss the petition. I do not understand how *Palermo* can possibly be regarded as controlling the disposition here. *Palermo* is significantly different from this case in at least one obvious respect—there, we had *not* granted the petition for certiorari. So also was the case in *Dove* v. *United States*, 423 U. S. 325 (1976), the authority we relied upon for our dismissal of the petition in *Palermo*. While in some circumstances we may wish to treat cases in which we have granted certiorari similarly to those in which a petition for certiorari has merely been filed here, it is inconceivable to me that we would ever consider ourselves *bound* to treat these two patently different categories of cases identically.

In my view, the Court has a higher duty when it learns that a case has become moot after it has granted review than when it discovers that a case in which review is being sought has become moot. In the former instance, the Court has, by its grant of the writ, asserted jurisdiction over the case, and brought the judgment of the lower court before it. If the Court simply vacates its order granting certiorari, it forces upon the parties and the courts below the problems it avoids for the sake of its own convenience. The Court's action today leaves unclear, for instance, whether the Court of Appeals' opinion remains as precedent as between the parties or their successors in any future proceeding. It is likewise unclear whether the opinion is generally to have precedential value in the Sixth Circuit. Finally, there remains considerable uncertainty over whether the Court of Appeals is

required or permitted to vacate its opinion. Indeed, I suppose there will be a question whether the Court of Appeals even has jurisdiction to vacate or otherwise modify its opinion, given that our writ of certiorari is still lodged in that court; at the very least, the Court should vacate its writ of certiorari. Cf. *Westinghouse Electric Corp.* v. *Vaughn*, 466 U. S. 521 (1984); *Colorado* v. *Nunez*, 465 U. S. 324 (1984); *Gillette Co.* v. *Miner*, 459 U. S. 86 (1982). The Court's disposition leaves the status of the Court of Appeals' judgment and opinion in limbo. I believe we have an institutional obligation to avoid such confusion. This is easily achieved by following what heretofore, with the exception of *Warden* v. *Palermo*, has been our "established practice."

Even if one accepts the dubious proposition that the Court is duty-bound to treat *granted* cases identical to cases where the petition for a writ of certiorari is pending, I still believe the Court's disposition is incorrect because I am convinced the Court disposed of *Palermo* improperly. *Palermo*, it is true, was a case before us on habeas and we did dismiss the certiorari petition. The Court relied entirely, however, on *Dove*, a case which was before us on direct review, not habeas. In a case on *direct* review, it may be necessary simply to dismiss the petition to avoid the result in *Durham* v. *United States*, 401 U. S. 481 (1971), of having a defendant's indictment dismissed, which in turn has the effect of "wip-[ing] the slate entirely clean of a federal conviction which was unsuccessfully appealed throughout the entire appeal process to which the petitioner was entitled as of right," *id.*, at 484 (BLACKMUN, J., dissenting). The only alternative—and surely an unsatisfying one—would be for the Court to decide case-by-case whether it believes the decision in question to be correct or incorrect, and dismiss the petition for certiorari or vacate the judgment accordingly.

But plainly there is no such dilemma presented when a case is before us on writ of certiorari to review a judgment obtained on habeas. In such a case, our objectives of elimi-

nating as precedent an opinion and judgment of which no final review is possible and clearing the path for any future litigation are achievable—and incidentally, without at the same time embracing a principle that would require dismissal of indictments—by vacating the judgment below and remanding with instructions to dismiss the habeas petition.

Even the Court in *Durham* recognized the validity of distinguishing in this context between cases on direct and habeas review; the Court very carefully limited its holding to cases on direct review, see *id.*, at 482–483. Our order in *Dove* also contemplated this distinction. In *Dove*, we overruled *Durham only* "[t]o the extent that *[Durham]* may be inconsistent with" our disposition in *Dove*, 423 U. S., at 325. We thereby removed any doubt that *Ross*—which otherwise one might have thought the Court also intended to overrule—was still valid precedent. Under the circumstances, especially since *Palermo* not only relied upon inapposite authority but failed even to acknowledge *Ross*, I would not, as the Court does, read *Palermo* as limiting us to a dismissal.

If it were true, however, as the Court implicitly must believe, that we are required now to overrule either *Ross* or *Palermo*, I would "overrule" the latter. *Palermo* is the case inconsistent with our asserted "established practice." *Palermo*, not *Ross*, is the disposition in search of a rationale.

Because I believe we should not compound the evils of a bad practice by repeating the error here, I dissent.

Syllabus

CENTRAL INTELLIGENCE AGENCY ET AL. *v.* SIMS ET AL.

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

No. 83–1075. Argued December 4, 1984—Decided April 16, 1985*

Between 1953 and 1966, the Central Intelligence Agency (CIA) financed a research project, code-named MKULTRA, that was established to counter Soviet and Chinese advances in brainwashing and interrogation techniques. Subprojects were contracted out to various universities, research foundations, and similar institutions. In 1977, respondents in No. 83–1075 (hereafter respondents) filed a request with the CIA under the Freedom of Information Act (FOIA), seeking, *inter alia*, the names of the institutions and individuals who had performed the research under MKULTRA. Citing Exemption 3 of the FOIA—which provides that an agency need not disclose "matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute . . . refers to particular types of matters to be withheld"—the CIA declined to disclose the requested information. The CIA invoked, as the exempting statute referred to in Exemption 3, § 102(d)(3) of the National Security Act of 1947, which states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Respondents then filed suit under the FOIA in Federal District Court. Applying, as directed by the Court of Appeals on an earlier appeal, a definition of "intelligence sources" as meaning only those sources to which the CIA had to guarantee confidentiality in order to obtain the information, the District Court held that the identities of researchers who had received express guarantees of confidentiality need not be disclosed, and also exempted from disclosure other researchers on the ground that their work for the CIA, apart from MKULTRA, required that their identities remain secret. The court further held that there was no need to disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure. The Court of Appeals affirmed this latter holding, but reversed the District Court's ruling with respect to which individual researchers satisfied "the need-for-confidentiality" aspect of its formula-

---

*Together with No. 83–1249, *Sims et al.* v. *Central Intelligence Agency et al.*, also on certiorari to the same court.

tion of exempt "intelligence sources." The Court of Appeals held that it was error automatically to exempt from disclosure those researchers to whom confidentiality had been promised, and that an individual qualifies as an "intelligence source" exempt from disclosure under the FOIA only when the CIA offers sufficient proof that it needs to protect its efforts in confidentiality in order to obtain the type of information provided by the researcher.

Held:

1. Section 102(d)(3) qualifies as a withholding statute under Exemption 3. Section 102(d)(3) clearly refers to "particular types of matters" within the meaning of Exemption 3. Moreover, the FOIA's legislative history confirms that Congress intended § 102(d)(3) to be a withholding statute under that Exemption. And the plain meaning of § 102(d)(3)'s language, as well as the National Security Act's legislative history, indicates that Congress vested in the Director of Central Intelligence broad authority to protect all sources of intelligence information from disclosure. To narrow this authority by limiting the definition of "intelligence sources" to sources to which the CIA had to guarantee confidentiality in order to obtain the information, not only contravenes Congress' express intention but also overlooks the practical necessities of modern intelligence gathering. Pp. 166–173.

2. MKULTRA researchers are protected "intelligence sources" within § 102(d)(3)'s broad meaning, because they provided, or were engaged to provide, information that the CIA needed to fulfill its statutory obligations with respect to foreign intelligence. To force the CIA to disclose a source whenever a court determines, after the fact, that the CIA could have obtained the kind of information supplied without promising confidentiality, could have a devastating impact on the CIA's ability to carry out its statutory mission. The record establishes that the MKULTRA researchers did in fact provide the CIA with information related to its intelligence function, and therefore the Director was authorized to withhold these researchers' identities from disclosure under the FOIA. Pp. 173–177.

3. The FOIA does not require the Director to disclose the institutional affiliations of the exempt researchers. This conclusion is supported by the record. The Director reasonably concluded that an observer who is knowledgeable about a particular intelligence research project, such as MKULTRA, could, upon learning that the research was performed at a certain institution, deduce the identities of the protected individual researchers. Pp. 177–181.

228 U. S. App. D. C. 269, 709 F. 2d 95, affirmed in part and reversed in part.

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 result, in which BRENNAN, J., joined, *post*, p. 181.

Acting Assistant Attorney General Willard argued the cause for petitioners in No. 83–1075 and respondents in No. 83–1249. With him on the briefs were *Solicitor General Lee*, *Deputy Solicitor General Geller*, *David A. Strauss*, *Robert E. Kopp*, *Leonard Schaitman*, and *Stanley Sporkin*.

Paul Alan Levy argued the cause for respondents in No. 83–1075 and petitioners in No. 83–1249. With him on the briefs were *Alan B. Morrison* and *David C. Vladeck*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

In No. 83–1075, we granted certiorari to decide whether § 102(d)(3) of the National Security Act of 1947, as incorporated in Exemption 3 of the Freedom of Information Act, exempts from disclosure only those sources of intelligence information to which the Central Intelligence Agency had to guarantee confidentiality in order to obtain the information. In No. 83–1249, the cross-petition, we granted certiorari to decide whether the Freedom of Information Act requires the Agency to disclose the institutional affiliations of persons whose identities are exempt from disclosure as "intelligence sources."

I

Between 1953 and 1966, the Central Intelligence Agency financed a wide-ranging project, code-named MKULTRA, concerned with "the research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior."[1] The

[1] Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities, S. Rep. No. 94–755, Book I, p. 389 (1976) (footnote omitted) (Final Report). MKULTRA began with a pro-

program consisted of some 149 subprojects which the Agency contracted out to various universities, research foundations, and similar institutions. At least 80 institutions and 185 private researchers participated. Because the Agency funded MKULTRA indirectly, many of the participating individuals were unaware that they were dealing with the Agency.

MKULTRA was established to counter perceived Soviet and Chinese advances in brainwashing and interrogation techniques. Over the years the program included various medical and psychological experiments, some of which led to untoward results.[2] These aspects of MKULTRA surfaced publicly during the 1970's and became the subject of executive and congressional investigations.[3]

On August 22, 1977, John C. Sims, an attorney, and Sidney M. Wolfe, M.D., the director of the Public Citi-

---

posal from Richard Helms, then the Agency's Assistant Deputy Director for Plans. Helms outlined a special funding mechanism for highly sensitive Agency research and development projects that would study the use of biological and chemical materials in altering human behavior. MKULTRA was approved by Allen Dulles, then the Director of Central Intelligence, on April 13, 1953.

[2] Several MKULTRA subprojects involved experiments where researchers surreptitiously administered dangerous drugs, such as LSD, to unwitting human subjects. At least two persons died as a result of MKULTRA experiments, and others may have suffered impaired health because of the testing. See *id.*, at 392–403. This type of experimentation is now expressly forbidden by Executive Order. Exec. Order No. 12333, § 2.10, 3 CFR 213 (1982).

[3] See generally Final Report, at 385–422, 471–472; Report to the President by the Commission on CIA Activities Within the United States 226–228 (June 1975); Project MKULTRA, the CIA's Program of Research in Behavioral Modification: Joint Hearings before the Select Committee on Intelligence and the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977); Human Drug Testing by the CIA, 1977: Hearings on S. 1893 before the Subcommittee on Health and Scientific Research of the Senate Committee on Human Resources, 95th Cong., 1st Sess. (1977).

An internal Agency report by its Inspector General had documented the controversial aspects of the MKULTRA project in 1963. See Report of Inspection of MKULTRA (July 26, 1963).

zen Health Research Group,[4] filed a request with the Central Intelligence Agency seeking certain information about MKULTRA. Respondents invoked the Freedom of Information Act (FOIA), 5 U. S. C. § 552. Specifically, respondents sought the grant proposals and contracts awarded under the MKULTRA program and the names of the institutions and individuals that had performed research.[5]

Pursuant to respondents' request, the Agency made available to respondents all of the MKULTRA grant proposals and contracts. Citing Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3)(B),[6] however, the Agency declined to disclose the names of all individual researchers and 21 institutions.[7] Exemption 3 provides that an agency need not disclose "matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute . . . refers to par-

---

[4] Sims and Wolfe are the respondents in No. 83–1075 and the cross-petitioners in No. 83–1249. In order to avoid confusion, we refer to Sims and Wolfe as respondents throughout this opinion.

[5] Twenty years after the conception of the MKULTRA project, all known files pertaining to MKULTRA were ordered destroyed. Final Report, at 389–390, 403–405. In 1977, the Agency located some 8,000 pages of previously undisclosed MKULTRA documents. These consisted mostly of financial records that had inadvertently survived the 1973 records destruction. Upon this discovery, Agency Director Stansfield Turner notified the Senate Select Committee on Intelligence and later testified at a joint hearing before the Select Committee and the Subcommittee on Health and Scientific Resources of the Senate Committee on Human Resources. Although the Joint Committee was given a complete list of the MKULTRA researchers and institutions, the Committee honored the Agency's request to treat the names as confidential. Respondents sought the surviving MKULTRA records that would provide this information.

[6] The Agency also cited Exemption 6, 5 U. S. C. § 552(b)(6), which insulates from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This claim, rejected by the District Court and the Court of Appeals, is no longer at issue.

[7] The Agency tried to contact each institution involved in MKULTRA to ask permission to disclose its identity; it released the names of the 59 institutions that had consented. Evidently, the Agency made no parallel effort to contact the 185 individual researchers. See n. 22, *infra*.

ticular types of matters to be withheld." *Ibid.* The Agency relied on § 102(d)(3) of the National Security Act of 1947, 61 Stat. 498, 50 U. S. C. § 403(d)(3), which states that

> "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

Dissatisfied with the Agency's limited disclosure, respondents filed suit under the FOIA, 5 U. S. C. § 552(a)(4)(B), in the United States District Court for the District of Columbia. That court ordered disclosure of the withheld names, holding that the MKULTRA researchers and affiliated institutions were not "intelligence sources" within the meaning of § 102(d)(3). 479 F. Supp. 84 (1979).

On appeal, the United States Court of Appeals concluded, as had the District Court, that § 102(d)(3) qualifies as a withholding statute under Exemption 3 of the FOIA. The court held, however, that the District Court's analysis of that statute under the FOIA lacked a coherent definition of "intelligence sources." Accordingly, it remanded the case for reconsideration in light of the following definition:

> "[A]n 'intelligence source' is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." 206 U. S. App. D. C. 157, 166, 642 F. 2d 562, 571 (1980).

On remand, the District Court applied this definition and ordered the Agency to disclose the names of 47 researchers and the institutions with which they had been affiliated. The court rejected respondents' contention that the MKULTRA research was not needed to perform the Agency's intelligence function, explaining that

> "[i]n view of the agency's concern that potential foreign enemies could be engaged in similar research and the

> desire to take effective counter-measures, . . . [the Agency] could reasonably determine that this research was needed for its intelligence function." App. to Pet. for Cert. in No. 83–1075, pp. 22a–23a.

The court then turned to the question whether the Agency could show, as the Court of Appeals' definition requires, that it could not reasonably have expected to obtain the information supplied by the MKULTRA sources without guaranteeing confidentiality to them. The court concluded that the Agency's policy of considering its relationships with MKULTRA researchers as confidential was not sufficient to satisfy the Court of Appeals' definition because "the chief desire for confidentiality was on the part of the CIA." *Id.*, at 24a. The court recognized that some of the researchers had sought, and received, express guarantees of confidentiality from the Agency, and as to those held that their identities need not be disclosed. The court also exempted other researchers from disclosure on the ground that their work for the Agency, apart from MKULTRA, required that their identities remain secret in order not to compromise the Agency's intelligence networks in foreign countries. *Id.*, at 26a–27a, 30a–31a. Finally, the court held that there was no need to disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure; this withholding was justified by the need to eliminate the unnecessary risk that such intelligence sources would be identified indirectly. *Id.*, at 27a, 34a.

Both the Agency and respondents appealed. The Court of Appeals affirmed that part of the District Court's judgment exempting from disclosure the institutional affiliations of individual researchers found to be intelligence sources. However, it reversed the District Court's ruling with respect to which individual researchers satisfied "the need-for-confidentiality" aspect of its formulation of exempt "intelligence sources." 228 U. S. App. D. C. 269, 275, 709 F. 2d 95, 101 (1983).

At the outset, the court rejected the suggestion that it reconsider the definition of "intelligence sources." *Id.*, at 271, 709 F. 2d, at 97. The court then criticized the District Court for focusing its inquiry on whether the Agency had in fact promised confidentiality to individual researchers. The court held that the District Court's decision automatically to exempt from disclosure those researchers to whom confidentiality had been promised was erroneous; it directed the District Court on remand to focus its inquiry on whether the Agency offered sufficient proof that it needed to cloak its efforts in confidentiality in order to obtain the type of information provided by the researcher. Only upon such a showing would the individual qualify as an "intelligence source" exempt from disclosure under the FOIA.[8]

We granted certiorari, 465 U. S. 1078 (1984) and 467 U. S. 1240 (1984). We now reverse in part and affirm in part.

II

No. 83–1075

A

The mandate of the FOIA calls for broad disclosure of Government records.[9] Congress recognized, however, that

---

[8] Judge Bork wrote a separate opinion, concurring in part and dissenting in part. He criticized the majority's narrow definition of "intelligence sources," urging in particular that there is "no reason to think that section 403(d)(3) was meant to protect sources of information only if secrecy was needed in order to obtain the information." 228 U. S. App. D. C., at 277, 709 F. 2d, at 103. He noted that "[i]t seems far more in keeping with the broad language and purpose of [§ 403(d)(3)] to conclude that it authorizes the nondisclosure of a source of information whenever disclosure might lead to discovery of what subjects were of interest to the CIA." *Ibid.* He also took issue with the majority's conclusion that the FOIA sometimes requires the Agency to break a promise of confidentiality it has given to an intelligence source. This is "not an honorable way for the government of the United States to behave," and would produce "pernicious results." *Id.*, at 276–277, 709 F. 2d, at 102–103.

[9] The Court has consistently recognized this principle. See, *e. g.*, *Baldrige* v. *Shapiro*, 455 U. S. 345, 352 (1982); *NLRB* v. *Robbins Tire &*

public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U. S. C. § 552(b). Under Exemption 3 disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, § 552(b)(3)(A), establishes particular criteria for withholding the information, or refers to the particular types of material to be withheld, § 552(b)(3)(B).

The question in No. 83–1075 is twofold: first, does § 102(d)(3) of the National Security Act of 1947 constitute a statutory exemption to disclosure within the meaning of Exemption 3; and second, are the MKULTRA researchers included within § 102(d)(3)'s protection of "intelligence sources."

B

Congress has made the Director of Central Intelligence "responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403(d)(3). As part of its postwar reorganization of the national defense system, Congress chartered the Agency with the responsibility of coordinating intelligence activities relating to national security.[10] In order to carry out its mission, the Agency was expressly entrusted with protecting the heart of all intelligence operations—"sources and methods."

Section 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect "intelligence sources and methods," clearly "refers to particular types of matters," 5 U. S. C. § 552(b)(3)(B), and thus qualifies as a withholding statute under Exemption 3. The "plain meaning" of the relevant statutory provisions is sufficient to resolve the question, see, *e. g.*, *Garcia* v. *United*

Rubber Co., 437 U. S. 214, 220 (1978); *EPA* v. *Mink*, 410 U. S. 73, 80 (1973).

[10] See, *e. g.*, H. R. Rep. No. 961, 80th Cong., 1st Sess., 3 (1947); S. Rep. No. 239, 80th Cong., 1st Sess., 1 (1947).

States, 469 U. S. 70, 75 (1984); *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 798 (1984). Moreover, the legislative history of the FOIA confirms that Congress intended § 102(d)(3) to be a withholding statute under Exemption 3.[11] Indeed, this is the uniform view among other federal courts.[12]

Our conclusion that § 102(d)(3) qualifies as a withholding statute under Exemption 3 is only the first step of the inquiry. Agency records are protected under § 102(d)(3) only to the extent they contain "intelligence sources and methods" or if disclosure would reveal otherwise protected information.

C

Respondents contend that the Court of Appeals' definition of "intelligence sources," focusing on the need to guarantee confidentiality in order to obtain the type of information desired, draws the proper line with respect to intelligence sources deserving exemption from the FOIA. The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the Director of Central Intelligence very

---

[11] See H. R. Rep. No. 94–880, pt. 2, p. 15, n. 2 (1976). See also H. R. Conf. Rep. No. 93–1380, p. 12 (1974); S. Conf. Rep. No. 93–1200, p. 12 (1974); S. Rep. No. 93–854, p. 16 (1974). For a thorough review of the relevant background, see *DeLaurentiis* v. *Haig*, 686 F. 2d 192, 195–197 (CA3 1982) *(per curiam)*.

Recently, Congress enacted the Central Intelligence Agency Information Act, Pub. L. 98–477, 98 Stat. 2209, exempting the Agency's "operational files" from the FOIA. The legislative history reveals that Congress maintains the position that § 102(d)(3) is an Exemption 3 statute. See, *e. g.*, H. R. Rep. No. 98–726, pt. 1, p. 5 (1984); S. Rep. No. 98–305, p. 7, n. 4 (1983).

[12] See, *e. g.*, *Miller* v. *Casey*, 235 U. S. App. D. C. 11, 15, 730 F. 2d 773, 777 (1984); *Gardels* v. *CIA*, 223 U. S. App. D. C. 88, 91, 689 F. 2d 1100, 1103 (1982); *Halperin* v. *CIA*, 203 U. S. App. D. C. 110, 113, 629 F. 2d 144, 147 (1980); *National Comm'n on Law Enforcement and Social Justice* v. *CIA*, 576 F. 2d 1373, 1376 (CA9 1978).

broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals' narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its "intelligence sources and methods."

We begin with the language of § 102(d)(3). *Baldrige* v. *Shapiro*, 455 U. S. 345, 356 (1982); *Steadman* v. *SEC*, 450 U. S. 91, 97 (1981). Section 102(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

The "plain meaning" of § 102(d)(3) may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence. Section 102(d)(3) does not state, as the Court of Appeals' view suggests, that the Director of Central Intelligence is authorized to protect intelligence sources only if such protection is needed to obtain information that otherwise could not be acquired. Nor did Congress state that only confidential or nonpublic intelligence sources are protected.[13] Section 102(d)(3) contains no such limiting language. Congress simply and pointedly protected all sources

[13] Congress certainly is capable of drafting legislation that narrows the category of protected sources of information. In other provisions of the FOIA and in the Privacy Act, Congress has protected "confidential source[s]," sources of "confidential information," and sources that provided information under an express promise of confidentiality. See 5 U. S. C. §§ 552(b)(7)(D), 552a(k)(2) and (5).

of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored. *Weber Aircraft Corp.*, *supra*, at 798.

The legislative history of § 102(d)(3) also makes clear that Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent.

Enacted shortly after World War II, § 102(d)(3) of the National Security Act of 1947 established the Agency and empowered it, among other things, "to correlate and evaluate intelligence relating to the national security." 50 U. S. C. § 403(d)(3). The tragedy of Pearl Harbor and the reported deficiencies in American intelligence during the course of the war convinced the Congress that the country's ability to gather and analyze intelligence, in peacetime as well as in war, must be improved. See, *e. g.*, H. R. Rep. No. 961, 80th Cong., 1st Sess., 3–4 (1947); S. Rep. No. 239, 80th Cong., 1st Sess., 2 (1947).

Congress knew quite well that the Agency would gather intelligence from almost an infinite variety of diverse sources. Indeed, one of the primary reasons for creating the Agency was Congress' recognition that our Government would have to shepherd and analyze a "mass of information" in order to safeguard national security in the postwar world. See *ibid.* Witnesses with broad experience in the intelligence field testified before Congress concerning the practical realities of intelligence work. Fleet Admiral Nimitz, for example, explained that "intelligence is a composite of authenticated and evaluated information covering not only the armed forces establishment of a possible enemy, but also his industrial capacity, racial traits, religious beliefs, and other related aspects." National Defense Establishment:

Hearings on S. 758 before the Senate Committee on Armed Services, 80th Cong., 1st Sess., 132 (1947) (Senate Hearings). General Vandenberg, then the Director of the Central Intelligence Group, the Agency's immediate predecessor, emphasized that "foreign intelligence [gathering] consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States." *Id.*, at 497.[14]

Witnesses spoke of the extraordinary diversity of intelligence sources. Allen Dulles, for example, the Agency's third Director, shattered the myth of the classic "secret agent" as the typical intelligence source, and explained that "American businessmen and American professors and Americans of all types and descriptions who travel around the world are one of the greatest repositories of intelligence that we have." National Security Act of 1947: Hearings on H. R. 2319 before the House Committee on Expenditures in the Executive Departments, 80th Cong., 1st Sess., 22 (1947) (Closed House Hearings).[15] In a similar vein, General Vandenberg spoke of "the great open sources of information upon which roughly 80 percent of intelligence should be based," and identified such sources as "books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts, and general information from

---

[14] Congressmen certainly appreciated the special nature of the Agency's intelligence function. For example, Representative Wadsworth remarked that the "function of [the Agency] is to constitute itself as a gathering point for information coming from all over the world through all kinds of channels." 93 Cong. Rec. 9397 (1947). Representative Boggs, during the course of the House hearings, commented that the Director of Central Intelligence "is dealing with all the information and the evaluation of that information, from wherever we can get it." National Security Act of 1947: Hearings on H. R. 2319 before the House Committee on Expenditures in the Executive Departments, 80th Cong., 1st Sess., 112 (1947).

[15] These hearings were held in executive session. The transcript was declassified in 1982. The Senate also held hearings behind closed doors. See S. Rep. No. 239, 80th Cong., 1st Sess., 1 (1947).

people with knowledge of affairs abroad." Senate Hearings, at 492.

Congress was also well aware of the importance of secrecy in the intelligence field. Both General Vandenberg and Allen Dulles testified about the grim consequences facing intelligence sources whose identities became known. See Closed House Hearings, at 10–11, 20. Moreover, Dulles explained that even American citizens who freely supply intelligence information "close up like a clam" unless they can hold the Government "responsible to keep the complete security of the information they turn over." *Id.*, at 22.[16] Congress was plainly alert to the need for maintaining confidentiality—both Houses went into executive session to consider the legislation creating the Agency—a rare practice for congressional sessions. See n. 15, *supra*.

Against this background highlighting the requirements of effective intelligence operations, Congress expressly made the Director of Central Intelligence responsible for "protecting intelligence sources and methods from unauthorized disclosure." This language stemmed from President Truman's Directive of January 22, 1946, 11 Fed. Reg. 1337, in which he established the National Intelligence Authority and the Central Intelligence Group, the Agency's predecessors. These institutions were charged with "assur[ing] the most effective accomplishment of the intelligence mission related to the national security," *ibid.*, and accordingly made "responsible

[16] Secrecy is inherently a key to successful intelligence operations. In the course of issuing orders for an intelligence mission, George Washington wrote to his agent:

"The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated . . . ." 8 Writings of George Washington 478–479 (J. Fitzpatrick ed. 1933) (letter from George Washington to Colonel Elias Dayton, July 26, 1777).

for fully protecting intelligence sources and methods," *id.*, at 1339. The fact that the mandate of § 102(d)(3) derives from this Presidential Directive reinforces our reading of the legislative history that Congress gave the Agency broad power to control the disclosure of intelligence sources.

III

A

Applying the definition of "intelligence sources" fashioned by the Congress in § 102(d)(3), we hold that the Director of Central Intelligence was well within his statutory authority to withhold the names of the MKULTRA researchers from disclosure under the FOIA. The District Court specifically ruled that the Agency "could reasonably determine that this research was needed for its intelligence function,"[17] and the Court of Appeals did not question this ruling. Indeed, the record shows that the MKULTRA research was related to the Agency's intelligence-gathering function in part because it revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against adversaries. During the height of the cold war period, the Agency was concerned, not without reason, that other countries were charting new advances in brainwashing and interrogation techniques.[18]

Consistent with its responsibility to maintain national security, the Agency reasonably determined that major research

---

[17] App. to Pet. for Cert. in No. 83–1075, pp. 22a–23a.

[18] For example, Director of Intelligence Stansfield Turner explained in an affidavit that the MKULTRA program was initiated because the Agency was confronted with "learning the state of the art of behavioral modification at a time when the U. S. Government was concerned about inexplicable behavior of persons behind the 'iron curtain' and American prisoners of war who had been subjected to so called 'brainwashing.'" *Id.*, at 89a.

efforts were necessary in order to keep informed of our potential adversaries' perceived threat. We thus conclude that MKULTRA researchers are "intelligence sources" within the broad meaning of § 102(d)(3) because these persons provided, or were engaged to provide, information the Agency needs to fulfill its statutory obligations with respect to foreign intelligence.

Respondents' belated effort to question the Agency's authority to engage scientists and academic researchers as intelligence sources must fail. The legislative history of § 102(d)(3) indicates that Congress was well aware that the Agency would call on a wide range and variety of sources to provide intelligence. Moreover, the record developed in this case confirms the obvious importance of scientists and other researchers as American intelligence sources. Notable examples include those scientists and researchers who pioneered the use of radar during World War II as well as the group which took part in the secret development of nuclear weapons in the Manhattan Project. See App. 43; App. to Pet. for Cert. in No. 83–1075, p. 88a.[19]

B

The Court of Appeals narrowed the Director's authority under § 102(d)(3) to withhold only those "intelligence sources" who supplied the Agency with information unattainable without guaranteeing confidentiality. That crabbed reading of the statute contravenes the express language of § 102(d)(3), the statute's legislative history, and the harsh realities of the present day. The dangerous consequences of that narrowing of the statute suggest why Congress chose to vest the

[19] Indeed, the legislative history of the recently enacted Central Intelligence Agency Information Act, Pub. L. 98–477, 98 Stat. 2209, in which Congress exempted the Agency's "operational files" from disclosure under the FOIA, 50 U. S. C. § 431 (1982 ed., Supp. III), reveals Congress' continued understanding that scientific researchers would be valuable intelligence sources. See H. R. Rep. No. 98–726, pt. 1, p. 22 (1984).

Director of Central Intelligence with the broad discretion to safeguard the Agency's sources and methods of operation.

The Court of Appeals underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court's approach, the Agency would be forced to disclose a source whenever a court determines, after the fact, that the Agency could have obtained the kind of information supplied without promising confidentiality.[20] This forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980) *(per curiam)*. See *Haig* v. *Agee*, 453 U. S. 280, 307 (1981). If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place.

Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to "close up like a clam." To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can. "The continued availability of [intelligence] sources depends upon the CIA's ability to guarantee the security of information

---

[20] Indeed, the Court of Appeals suggested that the Agency would be required to betray an explicit promise of confidentiality if a court determines that the promise was not necessary, or if a court concludes that the intelligence source to whom the promise was given was "unreasonably and atypically leery" of cooperating with the Agency. 228 U. S. App. D. C., at 273, 709 F. 2d, at 99. However, "[g]reat nations, like great men, should keep their word." *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (Black, J., dissenting).

that might compromise them and even endanger [their] personal safety." *Snepp* v. *United States*, *supra*, at 512.

We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information. An intelligence source will "not be concerned with the underlying rationale for disclosure of" his cooperation if it was secured "under assurances of confidentiality." *Baldrige* v. *Shapiro*, 455 U. S., at 361. Moreover, a court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments. See, *e. g.*, *Fitzgibbon* v. *CIA*, 578 F. Supp. 704 (DC 1983). There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly.

The Court of Appeals also failed to recognize that when Congress protected "intelligence sources" from disclosure, it was not simply protecting sources of secret intelligence information. As noted above, Congress was well aware that secret agents as depicted in novels and the media are not the typical intelligence source; many important sources provide intelligence information that members of the public could also obtain. Under the Court of Appeals' approach, the Agency could not withhold the identity of a source of intelligence if that information is also publicly available. This analysis ignores the realities of intelligence work, which often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.

Disclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources. A foreign government can learn a great deal about the Agency's activities by knowing the

public sources of information that interest the Agency. The inquiries pursued by the Agency can often tell our adversaries something that is of value to them. See 228 U. S. App. D. C., at 277, 709 F. 2d, at 103 (Bork, J., concurring in part and dissenting in part). For example, disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal could thwart the Agency's efforts to exploit its value as a source of intelligence information. Similarly, had foreign governments learned the Agency was using certain public journals and ongoing open research projects in its MKULTRA research of "brainwashing" and possible countermeasures, they might have been able to infer both the general nature of the project and the general scope that the Agency's inquiry was taking.[21]

C

The "statutory mandate" of § 102(d)(3) is clear: Congress gave the Director wide-ranging authority to "protec[t] intelligence sources and methods from unauthorized disclosure." *Snepp* v. *United States*, *supra*, at 509, n. 3. An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations. The record establishes that the MKULTRA researchers did in fact provide the Agency with information related to the Agency's intelligence function. We therefore hold that the Director was authorized to withhold the identities of these researchers from disclosure under the FOIA.

IV

No. 83–1249

The cross-petition, No. 83–1249, calls for decision on whether the District Court and the Court of Appeals cor-

[21] In an affidavit, Director of Central Intelligence Turner stated that "[t]hroughout the course of the [MKULTRA] Project, CIA involvement or association with the research was concealed in order to avoid stimulating the interest of hostile countries in the same research areas." App. to Pet. for Cert. in No. 83–1075, pp. 89a–90a.

rectly ruled that the Director of Central Intelligence need not disclose the institutional affiliations of the MKULTRA researchers previously held to be "intelligence sources." Our conclusion that the MKULTRA researchers are protected from disclosure under § 102(d)(3) renders unnecessary any extended discussion of this discrete issue.

In exercising the authority granted by Congress in § 102(d)(3), the Director must, of course, do more than simply withhold the names of intelligence sources. Such withholding, standing alone, does not carry out the mandate of Congress. Foreign intelligence services have an interest in knowing what is being studied and researched by our agencies dealing with national security and by whom it is being done. Foreign intelligence services have both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details.

In this context, the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data "may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." *Halperin* v. *CIA*, 203 U. S. App. D. C. 110, 116, 629 F. 2d 144, 150 (1980). Thus,

> "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *Halkin* v. *Helms*, 194 U. S. App. D. C. 82, 90, 598 F. 2d 1, 9 (1978), quoting *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (CA4), cert. denied, 409 U. S. 1063 (1972).

Accordingly, the Director, in exercising his authority under § 102(d)(3), has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. See, *e. g.*,

Gardels v. *CIA*, 223 U. S. App. D. C. 88, 91–92, 689 F. 2d 1100, 1103–1104 (1982); *Halperin* v. *CIA*, *supra*, at 113, 629 F. 2d, at 147.

Here the Director concluded that disclosure of the institutional affiliations of the MKULTRA researchers could lead to identifying the researchers themselves and thus the disclosure posed an unacceptable risk of revealing protected "intelligence sources."[22] The decisions of the Director, who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.

The District Court, in a ruling affirmed by the Court of Appeals, permitted the Director to withhold the institutional affiliations of the researchers whose identities were exempt from disclosure on the ground that disclosure of "the identities of the institutions . . . might lead to the indirect disclosure of" individual researchers. App. to Pet. for Cert. in No. 83–1075, p. 27a. This conclusion is supported by the record.[23] The Director reasonably concluded that an ob-

---

[22] During the congressional inquiries into MKULTRA, then Director of Central Intelligence Turner notified the 80 institutions at which MKULTRA research had been conducted. Many of these institutions had not previously been advised of their involvement; Director Turner notified them as part of "a course of action [designed to] lead to the identification of unwitting experimental subjects." *Id.*, at 92a, n. 1. As a result of inquiries into the MKULTRA progam, many of these institutions disclosed their involvement to the public. Others advised the Agency that they had no objection to public disclosure. Director Turner disclosed the names of these institutions; he did not disclose the names of any institutions that objected to disclosure. See n. 7, *supra*.

[23] For example, an affidavit filed by an Agency operations officer familiar with MKULTRA stated that disclosure of the institutions at which MKULTRA research was performed would pose "a threat of damage to existing intelligence-related arrangements with the institutions or exposure of past relationships with the institutions." App. 27.

server who is knowledgeable about a particular intelligence research project, like MKULTRA, could, upon learning that research was performed at a certain institution, often deduce the identities of the individual researchers who are protected "intelligence sources." The FOIA does not require disclosure under such circumstances.

Respondents contend that because the Agency has already revealed the names of many of the institutions at which MKULTRA research was performed, the Agency is somehow estopped from withholding the names of others. This suggestion overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to "send a message" to allies or adversaries.[24] Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against *unauthorized* disclosures.

The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process. Here Admiral Turner, as Director, decided that the benefits of disclosing the identities of institutions that had no objection to disclosure outweighed the costs

---

[24] Admiral Turner provided one well-known example of this phenomenon: "[D]uring the Cuban missile crisis, President Kennedy decided to release a great deal of sensitive intelligence information concerning Soviet missile installations in Cuba. It was clear, at that time, that the Soviets had to be told publicly that the United States Government had precise information on the extent of the Soviet threat in order to justify the strong countermeasures then taken by our Government." App. to Pet. for Cert. in No. 83–1075, p. 90a.

of doing so. But Congress, in § 102(d)(3), entrusted this discretionary authority to the Director, and the fact that Admiral Turner made that determination in 1978 does not bind his successors to make the same determination, in a different context, with respect to institutions requesting that their identities not be disclosed. See, *e. g.*, *Salisbury* v. *United States*, 223 U. S. App. D. C. 243, 248, 690 F. 2d 966, 971 (1982).

V

We hold that the Director of Central Intelligence properly invoked § 102(d)(3) of the National Security Act of 1947 to withhold disclosure of the identities of the individual MKULTRA researchers as protected "intelligence sources." We also hold that the FOIA does not require the Director to disclose the institutional affiliations of the exempt researchers in light of the record which supports the Agency's determination that such disclosure would lead to an unacceptable risk of disclosing the sources' identities.

Accordingly, we reverse that part of the judgment of the Court of Appeals regarding the disclosure of the individual researchers and affirm that part of the judgment pertaining to disclosure of the researchers' institutional affiliations.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the result.

To give meaning to the term "intelligence source" as it is used in § 102(d)(3) of the National Security Act of 1947, the Court today correctly concludes that the very narrow definition offered by the Court of Appeals is incorrect.[1] That the

[1] The Court of Appeals defined an "intelligence source" as "a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." 206 U. S. App. D. C. 157, 166, 642 F. 2d 562, 571 (1980) *(Sims I)*.

Court of Appeals erred does not, however, compel the conclusion that the Agency's sweeping alternative definition is in fact the correct one.[2] The Court nonetheless simply adopts wholesale the Agency's definition of "intelligence source." That definition is mandated neither by the language or legislative history of any congressional Act, nor by legitimate policy considerations, and it in fact thwarts congressional efforts to balance the public's interest in information and the Government's need for secrecy. I therefore decline to join the opinion of the Court.

I

The Freedom of Information Act (FOIA or Act) established a broad mandate for disclosure of governmental information by requiring that all materials be made public "unless explicitly allowed to be kept secret by one of the exemptions . . . ." S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965). The Act requires courts to review *de novo* agency claims of exemption, and it places on the agency the burden of defending its withholding of information. 5 U. S. C. § 552(a)(4)(B). Congress, it is clear, sought to assure that the Government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure.

Two of these few exceptions are at issue in this case. The first, on which the Court focuses, is Exemption 3, which exempts information "specifically exempted from disclosure by statute," if the statute affords the agency no discretion on disclosure, § 552(b)(3)(A), establishes particular criteria for withholding the information, § 552(b)(3)(B), or refers to the particular types of material to be withheld, *ibid.* The Court

[2] The Court today defines an "intelligence source" as one that "provides, or is engaged to provide, information . . . related to the Agency's intelligence function," *ante*, at 177, and holds also that the Director may withhold, under this definition, information that might enable an observer to discover the identity of such a source. *Ante*, at 178.

quite rightly identifies § 102(d)(3) of the National Security Act as a statutory exemption of the kind to which Exemption 3 refers; that section places with the Director of Central Intelligence the responsibility for "protecting intelligence sources and methods from unauthorized disclosure."

A second exemption, known as Exemption 1, covers matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U. S. C. § 552(b)(1). This latter Exemption gives to the Executive Branch the authority to define material that will not be disclosed, subject of course to congressional amendment of the Exemption. Agency decisions to withhold are subject to *de novo* review in the courts, which must ascertain whether documents are correctly classified, both substantively and procedurally.

Exemption 1 is the keystone of a congressional scheme that balances deference to the Executive's interest in maintaining secrecy with continued judicial and congressional oversight. In the past, Congress has taken affirmative steps to make clear the importance of this oversight. See n. 5, *infra*. Exemption 1 allows the Government to protect from the scrutiny of this Nation's enemies classes of information that warrant protection, as long as the Government proceeds through a publicly issued, congressionally scrutinized, and judicially enforced executive order. See Hearing on Executive Order on Security Classification before the Subcommittee of the Committee on Government Operations of the House of Representatives, 97th Cong., 2d Sess. (1982) (Hearing).

Exemption 1 thus plays a crucial role in the protection of Central Intelligence Agency information. That the Court does not mention this Exemption even once, in the course of its lengthy analysis on the *policy* reasons for broadly inter-

preting the "intelligence source" provision, is extraordinary. By focusing myopically on the single statutory provision on which the Agency has chosen to rely in asserting its secrecy right, the Court rewards the Agency's decision not to invoke Exemption 1 in these cases.[3] Of course, the Agency may fairly assert any possible ground for decision, and it has no duty to select that which is narrowest. But the Court, intent to assure that important information is protected, today plays into the Agency's hands by stretching the "intelligence source" exception beyond its natural limit; it does so while simply ignoring the fact that the information sought could properly have been withheld on other grounds—on which the Agency chose not to rely. The cost of acceding to the Agency's litigation strategy, rather than undertaking a thorough analysis of the entire statutory scheme, is to mangle, seriously, a carefully crafted statutory scheme.

II

I turn, then, to consider in light of this statutory framework the Court's analysis of Exemption 3. After concluding that Exemption 3 incorporates § 102(d)(3) as a withholding provision, the Court sets out to define the term "intelligence source." First, it looks to the "plain meaning" of the phrase and concludes that an "intelligence source" is self-evidently the same as an "information source." *Ante*, at 169–170. Second, the Court looks to the legislative history. Pulling

---

[3] Indeed, these cases present a curious example of the Government's litigation strategy. Despite the repeated urging of the District Court, the Agency steadfastly refused to invoke Exemption 1 to withhold the information at issue. The lists of names of MKULTRA researchers were in fact once classified under an Executive Order and were therefore within the potential scope of Exemption 1, but the Agency elected to declassify them. See 479 F. Supp. 84, 88 (DC 1979). The District Court went so far as to postpone the effective date of its disclosure order, so the Agency could "act on the possibility of classifying the names of institutions and researchers which would otherwise be disclosable," *ibid.*, and thereby withhold the information under Exemption 1. The Agency refused to do so, however.

together pieces of testimony from congressional hearings on the need to establish a centralized agency to gather information, it concludes that Congress knew that the Agency would collect information from diverse sources, and that "Congress was plainly alert to the need for maintaining confidentiality" so as not to lose covert sources of information. *Ante*, at 172; see also Brief for Petitioners in No. 83–1075, pp. 18–21. Third, the Court chastises the Court of Appeals for adopting a "crabbed" reading of the statute and explains how, as a policy matter, the "forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission." *Ante*, at 175; see also Brief for Petitioners in No. 83–1075, p. 31. The Court offers examples of highly sensitive information that, under the lower court's reading, might be disclosed. See *ante*, at 176–177; see also Brief for Petitioners in No. 83–1075, pp. 34–37.

Before this Court, the Agency argued against the lower court's definition of "intelligence source," substituted its own sweeping offering, and then recounted a litany of national security nightmares that would surely befall this Nation under any lesser standard; today the Court simply buys this analysis. But the Court thereby ignores several important facts. First, the holding today is not compelled by the language of the statute, nor by the legislative history on which the Court relies. Second, the Court of Appeals' definition is not the sole alternative to the one adopted by the Court today. Third, as noted, *supra*, other broad exemptions to FOIA exist, and a holding that this Exemption 3 exception does not apply here would in no way pose the risk of broad disclosure the Agency suggests. The Court's reliance on the Nation's national security interests is simply misplaced given that the "intelligence source" exemption in the National Security Act is far from the Agency's exclusive, or most potent, resource for keeping probing eyes from secret documents. In its haste to adopt the Agency's sweeping defini-

tion, the Court completely bypasses a considerably more rational definition that comports at least as well with the statutory language and legislative history, and that maintains the congressionally imposed limits on the Agency's exercise of discretion in this area.

To my mind, the phrase "intelligence source" refers only to sources who provide information either on an express or implied promise of confidentiality, and the exemption protects such information and material that would lead to disclosure of such information. This reading is amply supported by the language of the statute and its history.

First, I find reliance on "plain meaning" wholly inappropriate. The heart of the issue is whether the term "intelligence source" connotes that which is confidential or clandestine, and the answer is far from obvious. The term is readily susceptible of many interpretations, and in the past the Government itself has defined the term far less broadly than it now does before this Court. In testimony before the House Subcommittee on Government Operations on President Reagan's Exemption 1 Executive Order, Steven Garfinkel, Director of the Information Security Oversight Office, explained that the term "intelligence source" is narrow and does not encompass even all confidential sources of information:

> "[C]ertain of these sources are not 'intelligence sources.' They are not involved in intelligence agencies or in intelligence work. They happen to be sources of information received by these agencies in confidence." Hearing, at 204.

The current administration's definition of the term "intelligence source" as used in its Executive Order does not, of course, control our interpretation of a longstanding statute. But the fact that the same administration has read the phrase in different ways for different purposes certainly undercuts the Court's argument that the phrase has any single and readily apparent definition.

"[P]lain meaning, like beauty, is sometimes in the eye of the beholder," *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 737 (1985), and in an instance such as this one, in which the term at issue carries with it more than one plausible meaning, it is simply inappropriate to select a single reading and label it the "plain meaning." The Court, like the Government, argues that the statute does not say "confidential source," as it might were its scope limited to sources who have received an implied or express promise of confidentiality. See *ante*, at 169, and n. 13; Brief for Petitioners in No. 83–1075, p. 16. However, the statute also does not say "information source" as it might were it meant to define the class of material that the Court identifies. I therefore reject the Court's basic premise that the language at issue necessarily has but a single, obvious interpretation.

Nor does the legislative history suggest anything other than a congressional desire to protect those individuals who might either be harmed or silenced should their identities or assistance become known. The congressional hearings quoted by the Court, and by the Government in its brief, focus on Congress' concern about the "deadly peril" faced by intelligence sources if their identities were revealed, and about the possibility that those sources would "'close up like a clam'" without protection. See *ante*, at 172; Brief for Petitioners in No. 83–1075, p. 20. These concerns are fully addressed by preventing disclosure of the identities of sources who might face peril, or cease providing information, if their identities were known, and of other information that might lead an observer to identify such sources. That, to my mind, is the start and finish of the exemption for an "intelligence source"—one who contributes information on an implicit understanding or explicit assurance of confidentiality, as well as information that could lead to such a source.[4]

---

[4] The fact that Congress established an Agency to collect information from anywhere it could does not mean that it sought through the phrase "intelligence source" to keep secret everything the Agency did in this

This reading of the "intelligence source" language also fits comfortably within the statutory scheme as a whole, as the Court's reading does not. I focus, at the outset, on the recent history of FOIA Exemption 1 and particularly on the way in which recent events reflect Congress' ongoing effort to constrain agency discretion of the kind endorsed today. The scope of Exemption 1 is defined by the Executive, and its breadth therefore quite naturally fluctuates over time. For example, at the time this FOIA action was begun, Executive Order 12065, promulgated by President Carter, was in effect. That Order established three levels of secrecy—top secret, secret, and confidential—the lowest of which, "confidential," was "applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security." 3 CFR 191 (1979).

The Order also listed categories of information that could be considered for classification, including "military plans, weapons, or operations," "foreign government information," and "intelligence activities [and] sources." *Id.*, at 193. As it is now, nondisclosure premised on Exemption 1 was subject to judicial review. A court reviewing an Agency claim to withholding under Exemption 1 was required to determine *de novo* whether the document was properly classified and whether it substantively met the criteria in the Executive Order. If the claim was that the document or information in it contained military plans, for example, a court was required to determine whether the document was classified, whether it in fact contained such information *and* whether disclosure of the document reasonably could be expected to cause at least identifiable damage to national security. The burden was on the Agency to make this showing. At one time, this

---

regard. Far from it, as the Court and the Agency both acknowledge, the early congressional expressions of concern about secrecy all focused on the need to maintain the anonymity of persons who would provide information only on an assurance of confidentiality.

Court believed that the Judiciary was not qualified to undertake this task. See *EPA* v. *Mink*, 410 U. S. 73 (1973), discussed in n. 5, *infra*. Congress, however, disagreed, overruling both a decision of this Court and a Presidential veto to make clear that precisely this sort of judicial role is essential if the balance that Congress believed ought to be struck between disclosure and national security is to be struck in practice.[5]

Today's decision enables the Agency to avoid making the showing required under the carefully crafted balance embodied in Exemption 1 and thereby thwarts Congress' effort to limit the Agency's discretion. The Court identifies two categories of information—the identity of individuals or entities, whether or not confidential, that contribute material related

---

[5] In *EPA* v. *Mink*, 410 U. S. 73 (1973), the Court held that when an agency relied on Exemption 1, which at the time covered matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," 5 U. S. C. § 552(b)(1) (1970 ed.), a reviewing court could affirm the decision not to disclose on the basis of an agency affidavit stating that the document had been duly classified pursuant to executive order. The Court held that *in camera* inspection of the documents was neither authorized nor permitted because "Congress chose to follow the Executive's determination in these matters." 410 U. S., at 81.

Shortly thereafter, Congress overrode a Presidential veto and amended the Act with the express purpose of overuling the *Mink* decision. Exemption 1 was modified to exempt only matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order." 5 U. S. C. § 552(b)(1). In addition, Congress amended the judicial review language to provide that "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U. S. C. § 552(a)(4)(B). The legislative history unequivocally establishes that *in camera* review would often be necessary and appropriate. See S. Rep. No. 93–1200, p. 9 (1974).

to Agency information gathering, and material that might enable an observer to discover the identity of such a "source"—and rules that all such information is *per se* subject to withholding as long as it is related to the Agency's "intelligence function." The Agency need not even assert that disclosure will conceivably affect national security, much less that it reasonably could be expected to cause at least identifiable damage. It need not classify the information, much less demonstrate that it has properly been classified. Similarly, no court may review whether the source had, or would have had, any interest in confidentiality, or whether disclosure of the information would have any effect on national security. No court may consider whether the information is properly classified, or whether it fits the categories of the Executive Order. By choosing to litigate under Exemption 3, and by receiving this Court's blessing, the Agency has cleverly evaded all these carefully imposed congressional requirements.[6]

If the class thus freed from judicial review were carefully defined, this result conceivably could make sense. It could

---

[6] The current Executive Order moves Exemption 1 a step closer to Exemption 3, given the manner in which the Court interprets the National Security Act exemption. Like its predecessor, the Order establishes three classification levels, but unlike the prior Order, the "confidential" classification no longer requires a reasonable possibility of *identifiable* damage. Instead, the label "confidential" now shall be applied to "information the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Exec. Order No. 12356, 3 CFR 166 (1983). In addition, the new Order not only lists "intelligence sources" as a category subject to classification, but it also creates a presumption that such information is confidential. This presumption shifts from the Agency the burden of proving the possible consequence to national security of disclosure. As a result, if the Agency defines "intelligence source" under the Executive Order as broadly as the Court defines the term in § 102(d)(3), the Agency need make but a limited showing to a court to invoke Exemption 1 for that material. In light of this new Order, the Court's avid concern for the national security consequences of a narrower definition of the term is quite puzzling.

mean that Congress had decided to slice out from all the Agency's possible documents a class of material that may always be protected, no matter what the scope of the existing executive order. But the class that the Court defines is boundless. It is difficult to conceive of anything the Central Intelligence Agency might have within its many files that might not disclose or enable an observer to discover something about where the Agency gathers information. Indeed, even newspapers and public libraries, road maps and telephone books appear to fall within the definition adopted by the Court today. The result is to cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be detrimental to national security, and to rid the Agency of the burden of making individualized showings of compliance with an executive order. Perhaps the Court believes all Agency documents should be susceptible to withholding in this way. But Congress, it must be recalled, expressed strong disagreement by passing, and then amending, Exemption 1. In light of the Court's ruling, the Agency may nonetheless circumvent the procedure Congress has developed and thereby undermine this explicit effort to keep from the Agency broad and unreviewable discretion over an expansive class of information.

III

The Court today reads its own concerns into the single phrase, "intelligence source." To justify its expansive reading of these two words in the National Security Act the Court explains that the Agency must be wary, protect itself, and not allow observers to learn either of its information resources *or of the topics of its interest.* "Disclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources," *ante,* at 176, the Court observes, and the "intelligence source"

exemption must bear the weight of that concern as well. That the Court points to no legislator or witness before Congress who expressed a concern for protecting such information through this provision is irrelevant to the Court. That each of the examples the Court offers of material that might disclose a topic of interest, and that should not be disclosed, could be protected through other existing statutory provisions, is of no moment.[7] That the public already knows all about the MKULTRA project at issue in this case, except for the names of the researchers, and therefore that the Court's concern about disclosure of the Agency's "topics of interest" argument is not appropriate to this case, is of no consequence. And finally, that the Agency now has virtually unlimited discretion to label certain information "secret," in contravention of Congress' explicit efforts to confine the Agency's discretion both substantively and procedurally, is of no importance. Instead, simply because the Court can think of information that it believes should not be disclosed, and that might otherwise not fall within this exemption, the Court undertakes the task of interpreting the exemption to cover that information. I cannot imagine the canon of statutory construction upon which this reasoning is based.

---

[7] For example, the Court suggests that disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal "could thwart the Agency's efforts to exploit its value as a source of intelligence information." *Ante*, at 177; see Brief for Petitioners in No. 83–1075, p. 36. Assuming this method of obtaining information is not protected by Exemption 1, through an executive order, it would surely be protected through Exemption 3's incorporation of § 102(d)(3) of the National Security Act. That provision, in addition to protecting "intelligence sources," also protects "intelligence methods," and surely encompasses covert means of obtaining information, the disclosure of which might close access to certain kinds of information. Similarly, the fact that some unsuspecting individuals provide valuable intelligence information must be protected, see *ante*, at 176; Brief for Petitioners in No. 83–1075, p. 39, n. 15, but again, because it is a covert means of obtaining information, not because the "source" of that information needs or expects confidentiality.

Congress gave to the Agency considerable discretion to decide for itself whether the topics of its interest should remain secret, and through Exemption 1 it provided the Executive with the means to protect such information. If the Agency decides to classify the identities of nonconfidential contributors of information so as not to reveal the subject matter or kinds of interests it is pursuing, it may seek an Exemption 1 right to withhold. Under Congress' scheme, that is properly a decision for the Executive. It is not a decision for this Court. Congress has elsewhere identified particular types of information that it believes may be withheld regardless of the existence of an executive order, such as the identities of Agency employees, or, recently, the contents of Agency operational files. See 50 U. S. C. § 403g (exempting from disclosure requirements the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency); Central Intelligence Agency Information Act, Pub. L. 98–477, § 701(a), 98 Stat. 2209, 50 U. S. C. § 431 (1982 ed., Supp. III) (exempting the Agency's operational files from disclosure under FOIA). Each of these categorical exemptions reflects a congressional judgment that as to certain information, the public interest will always tip in favor of nondisclosure. In these cases, we have absolutely no indication that Congress has ever determined that the broad range of information that will hereinafter be enshrouded in secrecy should be inherently and necessarily confidential. Nevertheless, today the Court reaches out to substitute its own policy judgments for those of Congress.

IV

To my mind, the language and legislative history of § 102(d)(3), along with the policy concerns expressed by the Agency, support only an exemption for sources who provide information based on an implicit or explicit promise of confidentiality and information leading to disclosure of such sources. That reading of the "intelligence source" exemption poses no threat that sources will "clam up" for fear of

exposure, while at the same time it avoids an injection into the statutory scheme of the additional concerns of the Members of this Court. The Court of Appeals, however, ordered the release of even more material than I believe should be disclosed. Accordingly, I would reverse and remand this case for reconsideration in light of what I deem to be the proper definition of the term "intelligence source."

Syllabus

KERR-McGEE CORP. *v.* NAVAJO TRIBE OF INDIANS ET AL.

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

No. 84–68. Argued February 25, 1985—Decided April 16, 1985

The Tribal Council of respondent Navajo Tribe enacted ordinances imposing taxes on the value of leasehold interests in tribal lands and on receipts from the sale of property produced or extracted or the sale of services within those lands. Petitioner, a mineral lessee on the Navajo Reservation, brought an action in Federal District Court, claiming that the taxes were invalid without approval of the Secretary of the Interior (Secretary). The District Court agreed and enjoined the Tribe from enforcing the tax laws against petitioner. The Court of Appeals reversed, holding that no federal statute or principle of law mandated approval by the Secretary.

Held: The Secretary's approval of the taxes in question is not required. Pp. 198–201.

(a) While § 16 of the Indian Reorganization Act of 1934 requires a tribal constitution written under the Act to be approved by the Secretary, the Act does not require the constitution to condition the power to tax on the Secretary's approval. In any event, the Act does not govern tribes, like the Navajo, that declined to accept its provisions. And there is nothing to indicate that Congress intended to recognize as legitimate only those tribal taxes authorized by constitutions written under the Act. Pp. 198–199.

(b) Nor does the Indian Mineral Leasing Act of 1938 require the Secretary's approval of the Navajo taxes. While § 4 of the Act subjects mineral leases issued under the Act to regulations promulgated by the Secretary, the regulations have not required that tribal taxes on mineral production be submitted for his approval. In enacting § 4, Congress could properly make a distinction between a tribe acting as a commercial partner in selling the right to use its land for mineral production and acting as a sovereign in imposing taxes on activities within its jurisdiction. And even assuming that the Secretary could review tribal taxes on mineral production, it does not follow that he must do so. Pp. 199–200.

(c) Nor do statutes requiring the Secretary's supervision in other contexts indicate that Congress has limited the Navajo Tribal Council's authority to tax non-Indians. The power to tax members and non-

members of a tribe alike is an essential attribute of the tribal self-government that the Federal Government is committed to promote. Pp. 200–201.

731 F. 2d 597, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Alvin H. Shrago argued the cause and filed briefs for petitioner.

Elizabeth Bernstein argued the cause and filed a brief for respondents.

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 Habicht,* and *John A. Bryson.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Navajo Tribe of Indians may tax business activities conducted on its land without first obtaining the approval of the Secretary of the Interior.

I

In 1978, the Navajo Tribal Council, the governing body of the Navajo Tribe of Indians, enacted two ordinances impos-

*Briefs of *amici curiae* urging reversal were filed for Arizona Public Service Co. et al. by *Robert B. Hoffman;* for Peabody Coal Co. by *Jeffrey B. Smith;* for Phillips Petroleum Co. et al. by *Alan L. Sullivan* and *Clark R. Nielsen;* for the Salt River Project Agricultural Improvement and Power District by *Frederick J. Martone;* and for Texaco, Inc., by *Bruce Douglas Black.*

Briefs of *amici curiae* urging affirmance were filed for the Association on American Indian Affairs, Inc., et al. by *Arthur Lazarus, Jr.,* and *W. Richard West, Jr.;* and for the Shoshone Indian Tribe Reservation, Wyoming, et al. by *Reid Peyton Chambers, Loftus E. Becker, Jr., Thomas W. Fredericks,* and *Peter C. Chestnut.*

F. Browning Pipestem filed a brief for the Sac and Fox Tribe of Indians of Oklahoma as *amicus curiae.*

ing taxes known as the Possessory Interest Tax and the Business Activity Tax. The Possessory Interest Tax is measured by the value of leasehold interests in tribal lands; the tax rate is 3% of the value of those interests. The Business Activity Tax is assessed on receipts from the sale of property produced or extracted within the Navajo Nation, and from the sale of services within the nation; a tax rate of 5% is applied after subtracting a standard deduction and specified expenses. The tax laws apply to both Navajo and non-Indian businesses, with dissatisfied taxpayers enjoying the right of appeal to the Navajo Tax Commission and the Navajo Court of Appeals.

The Navajo Tribe, uncertain whether federal approval was required, submitted the two tax laws to the Bureau of Indian Affairs of the Department of the Interior. The Bureau informed the Tribe that no federal statute or regulation required the Department of the Interior to approve or disapprove the taxes.

Before any taxes were collected, petitioner, a substantial mineral lessee on the Navajo Reservation, brought this action seeking to invalidate the taxes. Petitioner claimed in the United States District Court for the District of Arizona that the Navajo taxes were invalid without approval of the Secretary of the Interior. The District Court agreed and permanently enjoined the Tribe from enforcing its tax laws against petitioner.

The United States Court of Appeals for the Ninth Circuit reversed. 731 F. 2d 597 (1984). Relying on *Southland Royalty Co.* v. *Navajo Tribe of Indians*, 715 F. 2d 486 (CA10 1983), it held that no federal statute or principle of law mandated Secretarial approval.[1]

We granted certiorari. 469 U. S. 879 (1984). We affirm.

---

[1] The Ninth Circuit rejected petitioner's other contentions, which included Commerce Clause and contractual challenges to the two taxes. Petitioner has not sought review of this aspect of the Court of Appeals' judgment.

II

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), we held that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.*, at 137. Congress, of course, may erect "checkpoints that must be cleared before a tribal tax can take effect." *Id.*, at 155. The issue in this case is whether Congress has enacted legislation requiring Secretarial approval of Navajo tax laws.

Petitioner suggests that the Indian Reorganization Act of 1934 (IRA or Act), 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, is such a law. Section 16 of the IRA authorizes any tribe on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior. 25 U. S. C. § 476. The Act, however, does not provide that a tribal constitution must condition the power to tax on Secretarial approval. Indeed, the terms of the IRA do not govern tribes, like the Navajo, which declined to accept its provisions. 25 U. S. C. § 478.

Many tribal constitutions written under the IRA in the 1930's called for Secretarial approval of tax laws affecting non-Indians. See, *e. g.*, Constitution and Bylaws of the Rosebud Sioux Tribe of South Dakota, Art. 4, § 1(h) (1935). But there were exceptions to this practice. For example, the 1937 Constitution and By-laws of the Saginaw Chippewa Indian Tribe of Michigan authorized the Tribal Council, without Secretarial approval, to "create and maintain a tribal council fund by . . . levying taxes or assessments against members or nonmembers." Art. 6, § 1*(g)*. Thus the most that can be said about this period of constitution writing is that the Bureau of Indian Affairs, in assisting the drafting of tribal constitutions, had a policy of including provisions for Secretarial approval; but that policy was not mandated by Congress.

Nor do we agree that Congress intended to recognize as legitimate only those tribal taxes authorized by constitutions

written under the IRA.[2] Long before the IRA was enacted, the Senate Judiciary Committee acknowledged the validity of a tax imposed by the Chickasaw Nation on non-Indians. See S. Rep. No. 698, 45th Cong., 3d Sess., 1–2 (1879). And in 1934, the Solicitor of the Department of the Interior published a formal opinion stating that a tribe possesses "the power of taxation [which] may be exercised over members of the tribe and over nonmembers." *Powers of Indian Tribes*, 55 I. D. 14, 46. The 73d Congress, in passing the IRA to advance tribal self-government, see *Williams* v. *Lee*, 358 U. S. 217, 220 (1959), did nothing to limit the established, pre-existing power of the Navajos to levy taxes.

Some tribes that adopted constitutions in the early years of the IRA may be dependent on the Government in a way that the Navajos are not. However, such tribes are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval. See, *e. g.*, Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians, Art. 8, § 1(r) (1975).

Petitioner also argues that the Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U. S. C. § 396a *et seq.*, requires Secretarial approval of Navajo tax laws. Sections 1 through 3 of the 1938 Act establish procedures for leasing oil and gas interests on tribal lands. And § 4 provides that "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to the [Act] shall be subject to the rules and regulations promulgated by the Secretary of the Interior." 25 U. S. C. § 396d. Under this grant of authority, the Secretary has issued comprehensive regulations governing the operation of oil and gas leases. See 25 CFR pt. 211 (1984). The Secretary, however, does not demand that

---

[2] For example, in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152–154 (1980), we sustained taxes imposed on nonmembers by the Colville and Lummi Tribes even though the Tribes were not organized under the IRA.

tribal laws taxing mineral production be submitted for his approval.

Petitioner contends that the Secretary's decision not to review such tax laws is inconsistent with the statute. In *Merrion*, we emphasized the difference between a tribe's "role as commercial partner," and its "role as sovereign." 455 U. S., at 145–146. The tribe acts as a commercial partner when it agrees to sell the right to the use of its land for mineral production, but the tribe acts as a sovereign when it imposes a tax on economic activities within its jurisdiction. *Id.*, at 146; cf. *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204, 206–208 (1983). Plainly Congress, in passing § 4 of the 1938 Act, could make this same distinction.

Even assuming that the Secretary could review tribal laws taxing mineral production, it does not follow that he must do so. We are not inclined to impose upon the Secretary a duty that he has determined is not needed to satisfy the 1938 Act's basic purpose—to maximize tribal revenues from reservation lands. See S. Rep. No. 985, 75th Cong., 1st Sess., 2–3 (1937). Thus, in light of our obligation to "tread lightly in the absence of clear indications of legislative intent," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 60 (1978), we will not interpret a grant of authority to regulate leasing operations as a command to the Secretary to review every tribal tax relating to mineral production.[3]

Finally, we do not believe that statutes requiring Secretarial supervision in other contexts, see, *e. g.*, 25 U. S. C. §§ 81, 311–321, reveal that Congress has limited the Navajo Tribal Council's authority to tax non-Indians. As we noted in *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324 (1983), the Federal Government is "firmly committed to the

[3] Section 2 of the 1938 Act provides a limited exemption for tribes organized under the IRA. 25 U. S. C. § 396b. Because we conclude that the 1938 Act does not require the Secretary to review tribal taxes, however, the Navajo Tribe's decision not to accept the IRA is irrelevant.

goal of promoting tribal self-government." *Id.*, at 334–335; see, *e. g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.* The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. See President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).

III

The Navajo Government has been called "probably the most elaborate" among tribes. H. R. Rep. No. 78, 91st Cong., 1st Sess., 8 (1969). The legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question.[4] See, *e. g.*, 25 U. S. C. §§ 635(b), 637, 638. We agree with the Court of Appeals that neither Congress nor the Navajos have found it necessary to subject the Tribal Council's tax laws to review by the Secretary of the Interior; accordingly, the judgment is

Affirmed.

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

---

[4] The Tribal Council has 88 members who are elected every four years. There are approximately 79,000 registered tribal voters, and 69% of these persons voted in the last tribal election in 1982.

ALLIS-CHALMERS CORP. *v.* LUECK

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 83–1748. Argued January 16, 1985—Decided April 16, 1985

The bad-faith handling of an insurance claim, including a claim under a disability insurance plan included in a collective-bargaining agreement, is a tort under Wisconsin law. Petitioner and a labor union, of which respondent employee of petitioner is a member, are parties to a collective-bargaining agreement that incorporates a self-funded disability plan administered by an insurance company and providing benefits for nonoccupational injuries to employees. The agreement establishes a disability grievance procedure that culminates in final and binding arbitration. Respondent, after suffering a nonoccupational injury, entered into a dispute over the manner in which petitioner and the insurer handled his disability claim. Rather than utilizing the grievance procedure, respondent brought a tort suit against petitioner and the insurer in a Wisconsin state court, alleging bad faith in the handling of his claim and seeking damages. The trial court ruled in favor of petitioner and the insurer, holding that respondent had stated a claim under § 301 of the Labor Management Relations Act, which provides that suits for violations of collective-bargaining agreements may be brought in federal district court. In the alternative, if the claim were deemed to arise under state law rather than § 301, it was pre-empted by federal labor law. The Wisconsin Court of Appeals affirmed. The Wisconsin Supreme Court reversed, holding that the claim did not arise under § 301 as constituting a violation of a labor contract but was a tort claim of bad faith. The court reasoned that under Wisconsin law the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim, and that although a breach of duty is imposed as a consequence of the relationship established by contract, it is independent from that contract.

Held: When resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective-bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law. Here, respondent's claim should have been dismissed for failure to make use of the grievance procedure or as pre-empted by § 301. The right asserted by respondent is rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under § 301. Unless federal law governs that claim, the meaning of the disability-benefit provisions of the collective-bargaining agree-

ment would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. Pre-emption is also necessary to preserve the central role of arbitration in the resolution of labor disputes. Pp. 208–221.

116 Wis. 2d 559, 342 N. W. 2d 699, reversed.

BLACKMUN, 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 case.

Theophil C. Kammholz argued the cause for petitioner. With him on the briefs were *Richard H. Schnadig* and *Stanley R. Strauss.*

Gerald S. Boisits, by appointment of the Court, 469 U. S. 978, argued the cause for respondent. With him on the brief were *Kurt A. Frank* and *James E. Kenny.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The Wisconsin courts have made the bad-faith handling of an insurance claim a tort under state law. Those courts have gone further and have applied this tort to the handling of a claim under a disability plan included in a collective-bargaining agreement. The question before us is whether, in the latter case, the state tort claim is pre-empted by the national labor laws.

I

A

Respondent Roderick S. Lueck began working for petitioner Allis-Chalmers Corporation in February 1975. He is a member of Local 248 of the United Automobile, Aero-

*Briefs as *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Andrew M. Kramer, Willis J. Goldsmith,* and *Stephen A. Bokat;* and for the American Federation of Labor and Congress of Industrial Organizations by *Laurence Gold.*

Bronson C. La Follette, Attorney General of Wisconsin, *Charles D. Hoornstra,* Assistant Attorney General, and *Michael A. Lilly,* Attorney General of Hawaii, filed a brief for the State of Wisconsin et al. as *amici curiae* urging affirmance.

space and Agricultural Implement Workers of America. Allis-Chalmers and Local 248 are parties to a collective-bargaining agreement. The agreement incorporates by reference a separately negotiated group health and disability plan fully funded by Allis-Chalmers but administered by Aetna Life & Casualty Company. The plan provides that disability benefits are available for nonoccupational illness and injury to all employees, such as petitioner, who are represented by the union.

The collective-bargaining agreement also establishes a four-step grievance procedure for an employee's contract grievance. This procedure culminates in final and binding arbitration if the union chooses to pursue the grievance that far. App. 18–29. A separate letter of understanding that binds the parties creates a special three-part grievance procedure for disability grievances. *Id.*, at 43–44. The letter establishes a Joint Plant Insurance Committee composed of two representatives designated by the union and two designated by the employer. *Id.*, at 43. The Committee has the authority to resolve all disputes involving "any insurance-related issues that may arise from provisions of the [Collective-Bargaining] Agreement." *Ibid.* An employee having an insurance-related complaint is to address it first to the Supervisor of Employee Relations. If the complaint is rejected or otherwise remains unresolved, the employee then may bring the dispute before the Insurance Committee. If the Committee does not resolve the matter, the employee may bring it to arbitration in the manner established under the collective-bargaining agreement. As indicated, that agreement permits the union or the employer to request that a grievance be submitted to final and binding arbitration before a neutral arbitrator agreed upon by the parties.[1]

[1] The letter of understanding states:

"Questions within the [Joint Plant Insurance] Committee's scope shall be referred to it, and shall not be processed in the first three steps of

In July 1981, respondent Lueck suffered a nonoccupational back injury while carrying a pig to a friend's house for a pig roast. He notified Allis-Chalmers of his injury, as required by the claims-processing procedure, and subsequently filed a disability claim with Aetna, also in accordance with the established procedure. After evaluating physicians' reports submitted by Lueck, Aetna approved the claim. Lueck began to receive disability benefits effective from July 20, 1981, the day he filed his claim with Aetna.

According to Lueck, however, Allis-Chalmers periodically would order Aetna to cut off his payments, either without reason, or because he failed to appear for a doctor's appointment, or because he required hospitalization for unrelated reasons. After each termination, Lueck would question the action or supply additional information, and the benefits would be restored. In addition, according to Lueck, Allis-Chalmers repeatedly requested that he be reexamined by different doctors, so that Lueck believed that he was being harassed. All of Lueck's claims were eventually paid, although, allegedly, not until he began this litigation.[2]

---

the grievance procedure . . . , but may be presented for arbitration in the established manner once they have been discussed and have not been resolved." App. 43.

The Supreme Court of Wisconsin, *Lueck* v. *Aetna Life Ins. Co.*, 116 Wis. 2d 559, 564, 342 N. W. 2d 699, 701–702 (1984), correctly assumed that this provision required that disputes within the Committee's scope be resolved exclusively through arbitration. See *Vaca* v. *Sipes*, 386 U. S. 171, 184 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 652–653 (1965). The use of the permissive "may" is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures. *Id.*, at 658–659.

[2] Lueck asserts that ultimately he was given disability payments for a period up to March 12, 1982. We find no specific record evidence of this fact. An affidavit dated February 22, 1982, submitted by Allis-Chalmers, states that Lueck received payments from July 20, 1981, to January 15, 1982. App. to Pet. for Cert. 33. The complaint was filed on January 18.

B

Lueck never attempted to grieve his dispute concerning the manner in which his disability claim was handled by Allis-Chalmers and Aetna. Instead, on January 18, 1982, he filed suit against both of them in the Circuit Court of Milwaukee County, Wis., alleging that they "intentionally, contemptuously, and repeatedly failed" to make disability payments under the negotiated disability plan, without a reasonable basis for withholding the payments. App. 4. This breached their duty "to act in good faith and deal fairly with [Lueck's] disability claims." *Id.*, at 3. Lueck alleged that as a result of these bad-faith actions he incurred debts, emotional distress, physical impairment, and pain and suffering. He sought both compensatory and punitive damages. *Id.*, at 4.

Ruling on cross-motions for summary judgment, the trial court ruled in favor of Allis-Chalmers and Aetna. The court held that Lueck stated a claim under § 301 of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185(a), and that, in the alternative, if his claim "were deemed to arise under state law instead of Section 301," it was "preempted by federal labor law." App. to Pet. for Cert. 26–27. The Wisconsin Court of Appeals, in a decision "[n]ot recommended for publication in the official reports," *id.*, at 25, affirmed the judgment in favor of Aetna on the ground that it owed no fiduciary duty to deal in good faith with Lueck's claim. The court agreed with the Circuit Court that federal law pre-empted the claim against Allis-Chalmers.[3]

---

[3] In particular, the Court of Appeals found that since Allis-Chalmers' conduct arguably constituted an unfair labor practice under § 8(a)(5) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(5), that section pre-empted the bad-faith claim under the reasoning of *Farmer* v. *Carpenters*, 430 U. S. 290 (1977). The court did not reach the question whether § 301 of the LMRA also pre-empted the claim.

The Supreme Court of Wisconsin, with one justice dissenting, reversed. *Lueck* v. *Aetna Life Ins. Co.*, 116 Wis. 2d 559, 342 N. W. 2d 699 (1984). The court held, first, that the suit did not arise under § 301 of the LMRA, and therefore was not subject to dismissal for failure to exhaust the arbitration procedures established in the collective-bargaining agreement. The court reasoned that a § 301 suit arose out of a violation of a labor contract, and that the claim here was a tort claim of bad faith. Under Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach-of-contract claim: though a breach of duty exists as a consequence of the relationship established by contract, it is independent of that contract. Therefore, it said, the violation of the labor contract was "irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim." *Id.*, at 566, 342 N. W. 2d, at 703. The action, thus, was not a § 301 suit.

The court went on to address the question whether the state-law claims nevertheless were pre-empted by §§ 8(a)(5) and (d) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, 29 U. S. C. §§ 158(a)(5) and (d). Applying the standard for determining NLRA pre-emption as enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244–245 (1959), and *Farmer* v. *Carpenters*, 430 U. S. 290, 296–297 (1977), the court determined that the claims were not pre-empted. It found that the administration of disability-claim procedures under a collective-bargaining agreement is a matter only of peripheral concern to federal labor law, since payment of a disability claim is not a central aspect of labor relations. On the other hand, the court observed, the bad-faith insurance tort is of substantial significance to the State of Wisconsin, which has assumed a longstanding responsibility for assuring the prompt payment of disability claims. Permitting the state action to proceed would not have an adverse impact on the effective adminis-

tration of national labor policy, since the courts will make no determination as to whether the labor agreement has been breached.

Finally, the court found that Aetna could be liable to Lueck for bad-faith administration of his disability claim since it was an agent of Allis-Chalmers for the purpose of administering claims. It thus reversed the appellate court's judgment and remanded the case for a determination whether Aetna played any role in the processing of Lueck's disability claim. Aetna has not sought review of that part of the judgment. We granted certiorari, 469 U. S. 815 (1984), to determine whether § 301 of the Labor Management Relations Act pre-empts a state-law tort action for bad-faith delay in making disability-benefit payments due under a collective-bargaining agreement.

II

Congress' power to pre-empt state law is derived from the Supremacy Clause of Art. VI of the Federal Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). Congressional power to legislate in the area of labor relations, of course, is long established. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). Congress, however, has never exercised authority to occupy the entire field in the area of labor legislation.[4] Thus the question whether a certain state action is pre-empted by federal law is one of congressional intent. "'The purpose of Congress is the ultimate touchstone.'" *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963).

Congress did not state explicitly whether and to what extent it intended § 301 of the LMRA to pre-empt state law.

---

[4] "We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289 (1971). See also *Brown* v. *Hotel and Restaurant Employees*, 468 U. S. 491 (1984); *Garner* v. *Teamsters*, 346 U. S. 485, 488 (1953).

In such instances courts sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone* v. *White Motor Corp.*, 435 U. S., at 504. The question posed here is whether this particular Wisconsin tort, as applied, would frustrate the federal labor-contract scheme established in § 301.

III

A

Section 301 of the LMRA states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." 29 U. S. C. § 185(a).

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.*, at 456. That seminal case understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.[5]

The pre-emptive effect of § 301 was first analyzed in *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 103 (1962), where the Court stated that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." The Court concluded that "in enacting § 301 Congress intended doc-

---

[5] In *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), the Court held that state courts had concurrent jurisdiction over § 301 claims.

trines of federal labor law uniformly to prevail over inconsistent local rules." *Id.*, at 104.

The *Lucas Flour* Court specified why the meaning given to terms in collective-bargaining agreements must be determined by federal law:

> "[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." *Id.*, at 103–104 (footnote omitted).

For those reasons the Court in *Lucas Flour* held that a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law.

B

If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. These poli-

cies require that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." *Bowen* v. *United States Postal Service*, 459 U. S. 212, 224–225 (1983). The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in *Lucas Flour* would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims "from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200 (1962).

Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress,

in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.[6] Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.[7]

---

[6] This is not to suggest that courts may not need to consider other factors in determining whether a state rule is pre-empted by § 7 or § 8 of the NLRA. See Cox, Recent Developments in Federal Labor Law Pre-emption, 41 Ohio St. L. J. 277, 294–300 (1980). The NLRA pre-empts state laws that "'upset the balance of power between labor and management expressed in our national labor policy.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 146 (1976), quoting *Teamsters* v. *Morton*, 377 U. S. 252, 260 (1964). See *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S. 519 (1979). Thus pre-emption under § 7 or § 8 involves considerations related to but distinct from those at issue here. Nor do we need to discuss the different kinds of questions posed by pre-emption necessary to protect the jurisdiction of the National Labor Relations Board. See *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 101, n. 9 (1962).

The parties have not briefed the question whether this tort suit would be pre-empted by the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* Because we hold that this claim is pre-empted under § 301, there is no occasion to address the separate question of pre-emption by ERISA. See 29 U. S. C. § 1144(b)(2)(B).

[7] Analogously, in *Malone* v. *White Motor Corp.*, 435 U. S. 497 (1978), the Court rejected the view that a right established in a state pension statute was pre-empted by the NLRA simply because the NLRA empowered the parties to a collective-bargaining agreement to come to a private agreement about the subject of the state law:

"There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and

Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. Cf. *Malone* v. *White Motor Corp.*, 435 U. S., at 504–505 (NLRA pre-emption).[8] Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted.

IV

A

The Wisconsin Supreme Court asserted that the tort claim is independent of any contract claim.[9] While the nature of

---

working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." *Id.*, at 504–505.

[8] In *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), the Court found that the NLRA conferred rights "on employees collectively to foster the processes of bargaining," *id.*, at 51, and distinguished such rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other.

[9] 116 Wis. 2d, at 565, 342 N. W. 2d, at 702. The Wisconsin court alternatively suggested that the tort claim was not pre-empted because the existence of a breach of contract, if relevant, "would constitute only a minor aspect of the controversy." *Id.*, at 570, 342 N. W. 2d, at 705. The court then applied the labor law pre-emption doctrine established in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and concluded that since only minor aspects of the controversy were within the jurisdiction of the NLRB, *Garmon* pre-emption did not apply. 116 Wis. 2d, at 570–571, 342 N. W. 2d, at 705. The court's pre-emption discussion thus concerned whether the tort claim should be pre-empted in order to protect

the state tort is a matter of state law, the question whether the Wisconsin tort is sufficiently independent of federal contract interpretation to avoid pre-emption is, of course, a question of federal law. Though the Wisconsin court held that the "specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim," 116 Wis. 2d, at 566, 342 N. W. 2d, at 703, upon analysis it appears that the court based this statement not solely on its unassailable understanding of the state tort, but also on assumptions about the scope of the contract provision which it had no authority to make under state law.

The Wisconsin court attempted to demonstrate, by a proffered example, the way in which a bad-faith tort claim could be unrelated to any contract claim. It noted that an insurer ultimately could pay a claim as required under a contract, but still cause injury through "unreasonably delaying payment" of the claim. *Id.*, at 574, 342 N. W. 2d, at 707. In such a situation, the court reasoned, the state tort claim would be adjudicated without reaching questions of contract interpretation. *Ibid.* The court evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement, in this case the right to receive benefit payments for nonoccupational injuries.

---

the NLRB's primary jurisdiction over unfair labor practice charges.

In addressing only the question of the necessity of protecting the Board's jurisdiction, the court "confuse[d] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Brown* v. *Hotel and Restaurant Employees*, 468 U. S., at 502. So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail. 468 U. S., at 502–503.

Thus, the court reasoned, the good-faith behavior mandated in the labor agreement was independent of the good-faith behavior required by state insurance law because "[g]ood faith in the labor agreement context means [only] that parties must abide by the specific terms of the labor agreement." *Id.*, at 569, 342 N. W. 2d, at 704.

If this is all there is to the independence of the state tort action, that independence does not suffice to avoid the pre-emptive effect of § 301. The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision.

The Wisconsin court's assumption that the parties contracted only for the payment of insurance benefits, and that questions about the manner in which the payments were made are outside the contract is, moreover, highly suspect.[10] There is no reason to assume that the labor contract as interpreted by the arbitrator would not provide such relief. On its face, the agreement allows the Joint Plant Insurance Committee to resolve disputes involving "*any* insurance-related issues that may arise" (emphasis added), App. 43, and hardly suggests that only disputes involving the right to receive benefits were addressed in the contract. And if the arbitrator ruled that the labor agreement did *not* provide

---

[10] This assumption also was relied on by respondent's counsel during oral argument. Thus, counsel acknowledged that if the contract allowed the arbitrator to provide relief for bad-faith payment of benefits, respondent would have been required to make use of the arbitration procedure and the federal law of contracts to obtain relief. Tr. of Oral Arg. 25. Counsel argued that, under state law, respondent was entitled to recover in tort only because "I'm going for something that . . . the contract does not provide for. The contract provides for payment of disability benefits. That's it. . . . [I]f the insurance company continued to sporadically make payments, Mr. Lueck wouldn't be able to do anything under the contract because he wouldn't have a grievance." *Id.*, at 35.

such relief expressly or by implication, that too should end the dispute, for under Wisconsin law there is nothing that suggests that it is not within the power of the parties to determine what would constitute "reasonable" performance of their obligations under an insurance contract. In sum, the Wisconsin court's statement that the tort was independent from a contract claim apparently was intended to mean no more than that the implied duty to act in good faith is different from the explicit contractual duty to pay. Since the extent of either duty ultimately depends upon the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law.

B

The conclusion that the Wisconsin court meant by "independent" that the tort is unrelated to an explicit provision of the contract is buttressed by analysis of the genesis and operation of the state tort. Under Wisconsin law, the tort intrinsically relates to the nature and existence of the contract. *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1, 13–16, 235 N. W. 413, 414–415 (1931). Thus the tort exists for breach of a "duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract," the scope of which, crucially, is "ascertained from a consideration of the contract itself." *Id.*, at 16, 235 N. W., at 415. In *Hilker*, the court specifically noted:

> "Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto. In order to understand what is meant by bad faith a comprehension of one's duty is generally necessary, and we have concluded that we can best indicate the circumstances under which the insurer may become liable to the insured . . . by giving with some particularity our conception of the duty which the written contract of insurance imposes upon the carrier." *Id.*, at 13, 235 N. W., at 414.

The duties imposed and rights established through the state tort thus derive from the rights and obligations established by the contract. In *Anderson* v. *Continental Ins. Co.*, 85 Wis. 2d 675, 689, 271 N. W. 2d 368, 375–376 (1978), which established that in Wisconsin an insured may assert a cause of action in tort against an insurer for the bad-faith refusal to honor the insured's claim, the court stated that the tort duty was derived from the implied covenant of good faith and fair dealing found in every contract. It relied for that proposition on the Restatement (Second) of Contracts § 205 (1981), as well as on the adoption of the Restatement's position in *Gruenberg* v. *Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P. 2d 1032, 1038 (1973). The *Gruenberg* court explicitly stated that the breach sounded in both tort and contract, and there is no indication in Wisconsin law that the tort is anything more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under Wisconsin law. *Anderson* v. *Continental Ins. Co.*, 85 Wis. 2d, at 686–687, 271 N. W. 2d, at 374.[11] Therefore, under Wisconsin law it appears that the parties to an insurance contract are free to bargain about what "reasonable" performance of their contract obligation entails. That being so, this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law.

---

[11] See also *Kranzush* v. *Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 64, 307 N. W. 2d 256, 261 (1981) ("The insured's right to be treated fairly . . . is rooted in the contract of insurance to which he and the insurer are parties"). Given the tort's genesis in contract law, this result is not surprising. "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205, Comment *a*, p. 100 (1981). Questions of good-faith performance thus necessarily are related to the application of terms of the contractual agreement.

We pass no judgment on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances.

Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation. The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner. Similarly, the question whether Allis-Chalmers required Lueck to be examined by an inordinate number of physicians evidently depends in part upon the parties' understanding concerning the medical evidence required to support a benefit claim.[12] These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may choose to define the tort as "independent" of any contract question.[13] Congress has mandated that federal law govern

---

[12] Here, for example, record evidence suggests that Allis-Chalmers, which ultimately was responsible for the benefit payments, and Aetna, which made the payments to claimants, had developed a complex system of overlapping procedures to determine continuing eligibility to receive benefits. The manner in which claims were verified by physicians, and the procedures for canceling benefits, were also apparently established through the practice of the parties. See Deposition of Karen Smaglik 17–23, 28–30; Deposition of A. J. Abplanalp 5–15. Had this case gone to trial, a central factual question would have been whether the manner in which Lueck's claim was processed and verified had departed substantially from the standard manner of processing such claims under the contract. That question, of course, necessarily involves contract interpretation.

[13] Prior Wisconsin cases had stated that the existence of a breach of contract cannot be irrelevant to the existence of a tortious breach of duty created by the contract. In the principal Wisconsin case, the court determined that there must be a breach of contract which is not even "fairly debatable" before a tort claim could be made. *Anderson* v. *Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N. W. 2d 368, 376 (1978). If a claim is denied in the "absence of a reasonable basis" and with "knowledge or reckless disregard of a reasonable basis," the denial is actionable in tort. *Id.*, at 693, 271 N. W. 2d, at 377.

Even if the Wisconsin Supreme Court in *Lueck* announced a change in the nature of the tort, the derivation of the tort in contract law would still

the meaning given contract terms. Since the state tort purports to give life to these terms in a different environment, it is pre-empted.

C

A final reason for holding that Congress intended § 301 to pre-empt this kind of derivative tort claim is that only that result preserves the central role of arbitration in our "system of industrial self-government." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). If respondent had brought a contract claim under § 301, he would have had to attempt to take the claim through the arbitration procedure established in the collective-bargaining agreement before bringing suit in court. Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*. See 369 U. S., at 105. The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is pre-empted, their federal right to decide who is to resolve contract disputes will be lost.

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be

---

require a court to evaluate the nature of the contractual relationship in order to assess liability. For purposes of federal labor law, the tort is not sufficiently independent of questions of contract interpretation to avoid the pre-emptive effect of § 301.

brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 653 (1965), as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

V

The right that Lueck asserts is rooted in contract, and the bad-faith claim he brings could have been pleaded as a contract claim under § 301. Unless federal law governs that claim, the meaning of the health and disability-benefit provisions of the labor agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted. The requirements of § 301 as understood in *Lucas Flour* cannot vary with the name appended to a particular cause of action.

It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether this suit also would have been pre-empted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis. We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see *Avco Corp.* v. *Aero Lodge 735*, 390 U. S. 557 (1968), or dismissed as pre-empted by federal labor-contract law. This complaint should have been dis-

missed for failure to make use of the grievance procedure established in the collective-bargaining agreement, *Republic Steel Corp.* v. *Maddox*, 379 U. S., at 652, or dismissed as pre-empted by § 301. The judgment of the Wisconsin Supreme Court therefore is reversed.

It is so ordered.

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

HUNTER ET AL. *v.* UNDERWOOD ET AL.

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

No. 84–76. Argued February 26, 1985—Decided April 16, 1985

Article VIII, § 182, of the Alabama Constitution of 1901 provides for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude." Appellees, one of whom is black and the other white, were disenfranchised by County Registrars under § 182 because each had been convicted of the misdemeanor of presenting a worthless check, determined by the Registrars to be a crime involving moral turpitude. Appellees brought an action in Federal District Court for declaratory and injunctive relief. The case was tried on a claim, *inter alia*, that the misdemeanors encompassed within § 182 were intentionally adopted to disenfranchise blacks on account of race and that their inclusion in § 182 has had the intended effect. The District Court found that disenfranchisement of blacks was a major purpose for the Convention at which the Alabama Constitution of 1901 was adopted, but that there was no showing that § 182 was based upon racism, and that proof of an impermissible motive for § 182 would not warrant its invalidation in face of the permissible motive of disenfranchising those convicted of crimes. The Court of Appeals reversed, holding that under the evidence discriminatory intent was a motivating factor in adopting § 182, that there could be no finding of a permissible intent, that accordingly it would not have been adopted in the absence of the racially discriminatory motivation, and that the section as applied to misdemeanants violated the Fourteenth Amendment. The court also implicitly found the evidence of discriminatory impact indisputable.

Held: Section 182 violates the Equal Protection Clause of the Fourteenth Amendment. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252. That § 182 may have been adopted to discriminate against poor whites as well as against blacks would not render nugatory the purpose to discriminate against blacks, it being clear that the latter was a "but-for" motivation for adopting § 182. There is no evidence that the disenfranchisement of those convicted of crimes involving moral turpitude was a motivating purpose of the 1901 Convention. Events occurring since § 182 was adopted cannot validate the section. Nor can the Tenth Amendment save legislation prohibited by the Fourteenth Amendment. And the implicit authorization in § 2 of the Fourteenth

Amendment to deny the vote to citizens "for participation in rebellion, or other crime," does not except § 182 from the operation of the Equal Protection Clause. Pp. 227–233.

730 F. 2d 614, affirmed.

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

James S. Ward, Special Assistant Attorney of Alabama, argued the cause and filed a brief for appellants.

Edward Still argued the cause for appellees. With him on the brief were *Neil Bradley*, *Laughlin McDonald*, and *Christopher Coates*.†

JUSTICE REHNQUIST delivered the opinion of the Court.

We are required in this case to decide the constitutionality of Art. VIII, § 182, of the Alabama Constitution of 1901, which provides for the disenfranchisement of persons convicted of, among other offenses, "any crime . . . involving moral turpitude."* Appellees Carmen Edwards, a black,

---

†Briefs of *amici curiae* urging affirmance were filed for the National Association for the Advancement of Colored People et al. by *Samuel Rabinove* and *Richard T. Foltin;* and for NAACP Legal Defense and Educational Fund, Inc. by *Julius Chambers* and *Lani Guinier*.

*Section 182 of the Alabama Constitution of 1901 provides:

"The following persons shall be disqualified both from registering, and from voting, namely:

"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to

and Victor Underwood, a white, have been blocked from the voter rolls pursuant to § 182 by the Boards of Registrars for Montgomery and Jefferson Counties, respectively, because they each have been convicted of presenting a worthless check. In determining that the misdemeanor of presenting a worthless check is a crime involving moral turpitude, the Registrars relied on opinions of the Alabama Attorney General.

Edwards and Underwood sued the Montgomery and Jefferson Boards of Registrars under 42 U. S. C. §§ 1981 and 1983 for a declaration invalidating § 182 as applied to persons convicted of crimes not punishable by imprisonment in the state penitentiary (misdemeanors) and an injunction against its future application to such persons. After extensive proceedings not relevant here, the District Court certified a plaintiff class of persons who have been purged from the voting rolls or barred from registering to vote in Alabama solely because of a misdemeanor conviction and a defendant class of all members of the 67 Alabama County Boards of Registrars. The case proceeded to trial on two causes of action, including a claim that the misdemeanors encompassed within § 182 were intentionally adopted to disenfranchise blacks on account of their race and that their inclusion in § 182 has had the intended effect. For the purposes of this claim, the District Court treated appellee Edwards as the representative of a subclass of black members of the plaintiff class.

In a memorandum opinion, the District Court found that disenfranchisement of blacks was a major purpose for the convention at which the Alabama Constitution of 1901 was adopted, but that there had not been a showing that "the provisions disenfranchising those convicted of crimes [were] based upon the racism present at the constitutional convention." The court also reasoned that under this Court's deci-

---

make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

sion in *Palmer* v. *Thompson*, 403 U. S. 217 (1971), proof of an impermissible motive for the provision would not warrant its invalidation in face of the permissible motive of "governing exercise of the franchise by those convicted of crimes," which the court apparently found evident on the face of § 182. App. E to Juris. Statement E–5—E–7.

On appeal, the Court of Appeals for the Eleventh Circuit reversed. 730 F. 2d 614 (1984). It held that the proper approach to the Fourteenth Amendment discrimination claim was established in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270, and n. 21 (1977), and *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 287 (1977):

> "To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of section 182. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered." 730 F. 2d, at 617.

Following this approach, the court first determined that the District Court's finding of a lack of discriminatory intent in the adoption of § 182 was clearly erroneous. After thoroughly reviewing the evidence, the court found that discriminatory intent *was* a motivating factor. It next determined from the evidence that there could be no finding that there was a competing permissible intent for the enactment of § 182. Accordingly, it concluded that § 182 would not have been enacted in absence of the racially discriminatory motivation, and it held that the section as applied to misdemeanants violated the Fourteenth Amendment. It directed the District Court to issue an injunction ordering appellants to register on the voter rolls members of the plaintiff class who so request and who otherwise qualify. We noted probable jurisdiction, 469 U. S. 878 (1984), and we affirm.

The predecessor to § 182 was Art. VIII, § 3, of the Alabama Constitution of 1875, which denied persons "convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary" the right to register, vote or hold public office. These offenses were largely, if not entirely, felonies. The drafters of § 182, which was adopted by the 1901 convention, expanded the list of enumerated crimes substantially to include the following:

> "treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, [and] crime against nature."

The drafters retained the general felony provision—"any crime punishable by imprisonment in the penitentiary"—but also added a new catchall provision covering "any . . . crime involving moral turpitude." This latter phrase is not defined, but it was subsequently interpreted by the Alabama Supreme Court to mean an act that is "'immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute fixes, the moral turpitude.'" *Pippin* v. *State*, 197 Ala. 613, 616, 73 So. 340, 342 (1916) (quoting *Fort* v. *Brinkley*, 87 Ark. 400, 112 S. W. 1084 (1908)).

The enumerated crimes contain within them many misdemeanors. If a specific crime does not fall within one of the enumerated offenses, the Alabama Boards of Registrars consult Alabama case law or, in absence of a court precedent, opinions of the Alabama Attorney General to determine whether it is covered by § 182. 730 F. 2d, at 616, n. 2. Various minor nonfelony offenses such as presenting a worthless check and petty larceny fall within the sweep of § 182, while

more serious nonfelony offenses such as second-degree manslaughter, assault on a police officer, mailing pornography, and aiding the escape of a misdemeanant do not because they are neither enumerated in § 182 nor considered crimes involving moral turpitude. *Id.*, at 620, n. 13. It is alleged, and the Court of Appeals found, that the crimes selected for inclusion in § 182 were believed by the delegates to be more frequently committed by blacks.

Section 182 on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes or a crime falling within one of the catchall provisions. Appellee Edwards nonetheless claims that the provision has had a racially discriminatory impact. The District Court made no finding on this claim, but the Court of Appeals implicitly found the evidence of discriminatory impact indisputable:

> "The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses." 730 F. 2d, at 620.

So far as we can tell the impact of the provision has not been contested, and we can find no evidence in the record below or in the briefs and oral argument in this Court that would undermine this finding by the Court of Appeals.

Presented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment:

> "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose

is required to show a violation of the Equal Protection Clause." 429 U. S., at 264–265.

See *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor. See *Mt. Healthy*, 429 U. S., at 287.

Proving the motivation behind official action is often a problematic undertaking. See *Rogers* v. *Lodge*, 458 U. S. 613 (1982). When we move from an examination of a board of county commissioners such as was involved in *Rogers* to a body the size of the Alabama Constitutional Convention of 1901, the difficulties in determining the actual motivations of the various legislators that produced a given decision increase. With respect to Congress, the Court said in *United States* v. *O'Brien*, 391 U. S. 367, 383–384 (1968) (footnote omitted):

> "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

But the sort of difficulties of which the Court spoke in *O'Brien* do not obtain in this case. Although understandably no "eyewitnesses" to the 1901 proceedings testified, testi-

mony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. See S. Hackney, Populism to Progressivism in Alabama 147 (1969); C. Vann Woodward, Origins of the New South, 1877–1913, pp. 321–322 (1971). The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:

> "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).

Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.

As already noted, the District Court nonetheless found that the crimes provision in § 182 was not enacted out of racial animus, only to have the Court of Appeals set aside this finding. In doing so, the Court of Appeals applied the clearly-erroneous standard of review required by Federal Rule of Civil Procedure 52(a), see *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982), but was "left with a firm and definite impression of error . . . with respect to the issue of intent." 730 F. 2d, at 620. The evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians. Having reviewed this evidence, we are persuaded that the Court of Appeals was correct in its assessment. That court's opinion presents a thorough analysis of the evidence and demonstrates conclusively that § 182 was enacted with the intent of disenfranchising blacks. We see little purpose in repeating that factual

analysis here. At oral argument in this Court appellants' counsel essentially conceded this point, stating: "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182; that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that." Tr. of Oral Arg. 6.

In their brief to this Court, appellants maintain on the basis of their expert's testimony that the real purpose behind § 182 was to disenfranchise poor whites as well as blacks. The Southern Democrats, in their view, sought in this way to stem the resurgence of Populism which threatened their power:

> "Q. The aim of the 1901 Constitution Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites; is that not correct?
>
> "A. Yes, sir.
>
> "Q. The idea was to prevent blacks from becoming a swing vote and thereby powerful and useful to some group of whites such as Republicans?
>
> "A. Yes, sir, that's correct.
>
> "Q. The phrase that is quite often used in the Convention is to, on the one hand limit the franchise to [the] intelligent and virtuous, and on the other hand to disenfranchise those [referred] to as 'corrupt and ignorant,' or sometimes referred to as the ignorant and vicious?
>
> "A. That's right.
>
> "Q. Was that not interpreted by the people at that Constitutional Convention to mean that they wanted to disenfranchise practically all of the blacks and disenfranchise those people who were lower class whites?
>
> "A. That's correct."
>
> . . . . .
>
> "Q. Near the end of the Convention, John Knox did make a speech to the Convention in which he summa-

rized the work of the Convention, and in that speech is it not correct that he said that the provisions of the Suffrage Article would have a disproportionate impact on blacks, but he disputed that that would be [a] violation of the Fifteenth Amendment?

"A. Yes, sir, that is true. Repeatedly through the debates, the delegates say that they are interested in disfranchising blacks and not interested in disfranchising whites. And in fact, they go out of their way to make that point. . . . But the point that I am trying to make is that this is really speaking to the galleries, that it is attempting to say to the white electorate that must ratify this constitution what it is necessary for that white electorate to be convinced of in order to get them to vote for it, and not merely echoing what a great many delegates say. . . . [I]n general, the delegates aggressively say that they are not interested in disfranchising any whites. I think falsely, but that's what they say.

"Q. So they were simply trying to overplay the extent to which they wanted to disenfranchise blacks, but that they did desire to disenfranchise practically all of the blacks?

"A. Oh, absolutely, certainly." Cross-examination of Dr. J. Mills Thornton, 4 Record 73–74, 80–81.

Even were we to accept this explanation as correct, it hardly saves § 182 from invalidity. The explanation concedes both that discrimination against blacks, as well as against poor whites, was a motivating factor for the provision and that § 182 certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation.

Citing *Palmer* v. *Thompson*, 403 U. S., at 224, and *Michael M.* v. *Superior Court of Sonoma County*, 450 U. S. 464, 472, n. 7 (1981) (plurality opinion), appellants make the further argument that the existence of a permissible motive for § 182, namely, the disenfranchisement of poor

whites, trumps any proof of a parallel impermissible motive. Whether or not intentional disenfranchisement of poor whites would qualify as a "permissible motive" within the meaning of *Palmer* and *Michael M.*, it is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis. Under the view that the Court of Appeals could properly take of the evidence, an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a "but-for" motivation for the enactment of § 182.

Appellants contend that the State has a legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude, and that § 182 should be sustained on that ground. The Court of Appeals convincingly demonstrated that such a purpose simply was not a motivating factor of the 1901 convention. In addition to the general catchall phrase "crimes involving moral turpitude" the suffrage committee selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks:

> "Most of the proposals disqualified persons committing any one of a long list of petty as well as serious crimes which the Negro, and to a lesser extent the poor whites, most often committed. . . . Most of the crimes contained in the report of the suffrage committee came from an ordinance by John Fielding Burns, a Black Belt planter. The crimes he listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes." M. McMillan, Constitutional Development in Alabama, 1798–1901, p. 275, and n. 76 (1955) (quoted in testimony by appellees' expert).

At oral argument in this Court, appellants' counsel suggested that, regardless of the original purpose of § 182,

events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes—felonies and moral turpitude misdemeanors—are acceptable bases for denying the franchise. Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.

Finally, appellants contend that the State is authorized by the Tenth Amendment and § 2 of the Fourteenth Amendment to deny the franchise to persons who commit misdemeanors involving moral turpitude. For the reasons we have stated, the enactment of § 182 violated the Fourteenth Amendment, and the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment. The single remaining question is whether § 182 is excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the "other crime" provision of § 2 of that Amendment. Without again considering the implicit authorization of § 2 to deny the vote to citizens "for participation in rebellion, or other crime," see *Richardson* v. *Ramirez*, 418 U. S. 24 (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson* v. *Ramirez*, *supra*, suggests the contrary.

The judgment of the Court of Appeals is

Affirmed.

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

WEBB *v.* COUNTY BOARD OF EDUCATION OF DYER COUNTY, TENNESSEE, ET AL.

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

No. 83–1360. Argued October 29, 1984—Decided April 17, 1985

After respondent Board of Education of Dyer County, Tennessee, terminated petitioner's employment as a schoolteacher in 1974, he retained counsel to represent him in administrative proceedings before the Board. Petitioner contended, *inter alia*, that his discharge was racially motivated and that his constitutional rights had been violated. In 1978, the Board ultimately decided to adhere to its decision. In 1979, petitioner instituted this action in Federal District Court, seeking relief under various civil rights statutes, including 42 U. S. C. § 1983. The case was subsequently settled in 1981 by the entry of a consent order awarding petitioner damages and other relief, and reserving the matter of an award of attorney's fees for future resolution by the parties or by the court. After negotiations proved unsuccessful, petitioner filed a motion for an award of fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which provides that "[i]n any action or proceeding to enforce" certain statutes, including § 1983, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The District Court awarded a fee, but rejected petitioner's contention that it should cover services performed by counsel in the administrative proceedings. The Court of Appeals affirmed.

Held:

1. Petitioner is not entitled to a fee award for counsel's services during the Board hearings on the theory that they were "proceeding[s] to enforce" § 1983 within the meaning of § 1988. The reasoning in *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54—which held that a provision of Title VII of the Civil Rights Act of 1964 authorized fees for counsel's work performed pursuing a state administrative remedy—is not applicable since the statute involved in *Carey* expressly required the claimaint to pursue state administrative remedies before commencing proceedings in a federal forum, whereas there is no comparable requirement in § 1983. Cf. *Smith* v. *Robinson*, 468 U. S. 992. The Board proceedings here simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII. Pp. 240–241.

2. Nor is petitioner entitled to recover on the theory that the time spent by counsel in the Board proceedings was "reasonably expended" in preparation for the court action and therefore compensable under the rationale of *Hensley* v. *Eckerhart*, 461 U. S. 424. The Court in *Hensley* emphasized that the amount to be awarded under § 1988 necessarily depends on the facts of each case, and that the exercise of discretion by the district court must be respected. The time that is compensable under § 1988 is that "reasonably expended *on the litigation.*" *Id.*, at 433 (emphasis added). In this case, there is no difficulty in identifying the dividing line between the administrative proceedings and the judicial proceeding. Petitioner did not suggest that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement. Thus the District Court's decision to deny any fees for time spent between 1974 and 1979 pursuing optional administrative remedies was well within the range of reasonable discretion. Pp. 241–244.

715 F. 2d 254, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 244. MARSHALL, J., took no part in the consideration or decision of the case.

Charles Stephen Ralston argued the cause for petitioner. With him on the briefs were *Jack Greenberg*, *Julius LeVonne Chambers*, *Deborah Fins*, *Gail J. Wright*, and *Richard H. Dinkins*.

S. Russell Headrick argued the cause for respondents. With him on the briefs was *Thomas R. Prewitt, Sr.**

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988, authorizes a court to award a reasonable attorney's fee to the prevailing party in "any action or proceeding" to enforce certain statutes, including

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

42 U. S. C. § 1983.[1] Petitioner was represented by counsel in local administrative proceedings and in a subsequent § 1983 action challenging the termination of his employment as a public school teacher. He ultimately prevailed and was awarded attorney's fees for the time his lawyer spent on the judicial proceedings, but denied fees for the time spent in proceedings before the local School Board. The question presented is whether the District Court correctly excluded the time spent pursuing optional administrative proceedings from the calculation of a "reasonable fee" for the prevailing party.

In the spring of 1974 respondent Dyer County Board of Education, terminated the employment of petitioner, who was a black elementary school teacher with tenure. Petitioner retained counsel to assist him in demonstrating that his discharge was unjustified and to obtain appropriate relief.

A Tennessee statute provides that public school teachers may only be dismissed for specific causes, and guarantees a hearing on charges warranting dismissal.[2] Petitioner sought and eventually obtained a series of hearings before the Board at which his counsel presented testimony supporting his claim that the dismissal was unjustified. Because the Board had not provided him with written charges or a pretermination hearing, and because there was reason to believe

---

[1] In relevant part, § 1988 provides:

"In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[2] Tenn. Code Ann. § 49–5–511(a) (1983) ("No teacher shall be dismissed . . . except as provided in this part. . . . The causes for which a teacher may be dismissed are as follows: incompetence, inefficiency, neglect of duty, unprofessional conduct, and insubordination"); § 49–5–512 ("A teacher, having received notice of charges against him, may . . . demand a hearing before the board").

that the Board's action was racially motivated,[3] petitioner also claimed that his constitutional rights had been violated. Negotiations with the Board continued until the summer of 1978 when the Board finally decided to adhere to its decision to dismiss the petitioner.

On August 13, 1979, the petitioner commenced this action in the United States District for the Western District of Tennessee. He alleged that the Board action was unconstitutional and that various civil rights statutes, 42 U. S. C. §§ 1981, 1982, 1983, 1985, afforded him a basis for monetary and equitable relief against the respondent Board and various individual defendants associated with his dismissal.[4] The respondents filed an answer to the complaint, a motion to dismiss or for summary judgment, and certain discovery requests to which the petitioner responded. App. 21–29, 48. In March 1981, the petitioner filed with the District Court a partial record of the administrative proceedings. *Id.*, at 30–31.

On October 14, 1981, the case was settled by the entry of a consent order awarding the petitioner $15,400 in damages and dismissing the action with prejudice.[5] Under the consent decree, the Board also agreed to reinstate the petitioner and treat him as having resigned on the day of dismissal. Adverse comments were to be removed from his employment file. The matter of an award of attorney's fees was reserved for future resolution by the parties or by the court.

---

[3] The petitioner contended that he had been discharged, in part, because of the complaints of white parents about his administration of corporal punishment to their children. He claimed that no other teacher in Dyer County engaging in such activities had ever been reprimanded, and that he had been singled out for punishment because of his race. App. 8–9.

[4] Specifically, the petitioner sought reinstatement, backpay, and $1 million in damages. On behalf of a class consisting of all black teachers and black applicants for teaching positions, the petitioner also sought monetary and equitable relief against the Board's allegedly discriminatory employment practices. *Id.*, at 14–17.

[5] *Id.*, at 32–34.

During subsequent negotiations, the Board conceded that the petitioner was a "prevailing party" entitled to an award of attorney's fees, but the parties could not agree on the amount of the award. After the negotiations proved unsuccessful, petitioner filed a motion for an award of fees under 42 U. S. C. § 1988. The motion was supported by an affidavit containing an itemized description of the time spent by the petitioner's counsel on the matter from April 5, 1974, through September 11, 1981.[6] The affidavit also set forth the attorney's professional qualifications and his regular charges during the period involved.[7] The petitioner requested a total fee of $21,165, based on an hourly rate of $120 and including an upward adjustment of 25% "in light of the peculiar difficulties involved in this particular kind of case and the unusual nature of the hours involved in the Board proceedings." App. 56.

Respondents, on the other hand, took the position that a reasonable fee would not exceed $5,000. They objected to the hourly rate,[8] to certain miscellaneous, unrecorded hours, and to the request for an upward adjustment of 25%. In

---

[6] *Id.*, at 39–55. The time schedule submitted by the petitioner was a reconstruction of the hours his counsel spent on the matter. Tr. of Fee Hearing 10. Contemporaneously recorded time sheets are the preferred practice. See *Hensley* v. *Eckerhart*, 461 U. S. 424, 441 (1983) (BURGER, C. J., concurring). The schedule detailed a "total" of 141.1 hours of which 82.8 hours are specifically attributable to the administrative proceedings which finally terminated in August 1978. The balance of 58.3 hours has been treated by the parties and the courts below as having been spent in connection with the action in federal court.

[7] Counsel's affidavit stated his regular hourly charges for routine commercial work were $60 in 1974–1976, $90 in 1977–1979, $105 in 1980, and $120 in 1981. App. 55. Two expert witnesses testified for the petitioner that the request of $120 per hour for 141.1 hours was reasonable. Tr. of Fee Hearing 3–23, 30–46.

[8] The respondent's three experts offered varying opinions on the reasonable hourly fee which was said to be between $50 and $100 for the administrative hearings and between $60 and $100 for the court proceedings. See App. 63–72; Tr. of Fee Hearing 108–114.

addition, the respondents contended that the petitioner was not entitled to receive a fee for services performed by counsel in the administrative proceedings.

The District Court awarded a fee of $9,734.38 plus expenses. In making that award, the District Court accepted respondents' position that the time spent in the School Board proceedings should be excluded, but otherwise resolved all issues in petitioner's favor.[9] The Court of Appeals affirmed. 715 F. 2d 254 (CA6 1983).[10] Because of an apparent conflict in federal authority on the availability of attorney's fees under § 1988 for time spent in state administrative proceedings prior to the filing of a federal civil rights action,[11] we granted certiorari. 466 U. S. 935 (1984).

The petitioner argues that he is entitled to a fee award for the services of his counsel during the School Board hearings

---

[9] In calculating the fee, the District Court applied an hourly rate of $125 to the 58.3 hours that were not recorded as having been spent on the administrative proceedings. The court allowed the 25% upward adjustment sought by the petitioner even though he did not prevail on the class action allegations in his complaint and received only a small portion of the damages sought. The court also awarded $625 (5 hours) for the time spent litigating the fee application.

[10] The respondents unsuccessfully challenged the District Court's calculations on appeal. 715 F. 2d, at 259–260. Although the District Court rendered the award without the guidance of this Court's decisions in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), and *Blum* v. *Stenson*, 465 U. S. 886 (1984), the respondents did not file a petition for certiorari from the adverse decision of the Court of Appeals, and our review of the District Court's calculations consequently is limited to its denial of fees for the time spent on the hearings before the School Board.

[11] Compare *Ciechon* v. *City of Chicago*, 686 F. 2d 511, 524–525 (CA7 1982), with 715 F. 2d 254 (CA6 1983) (case below), *Horacek* v. *Thone*, 710 F. 2d 496, 499–500 (CA8 1983), *Latino Project, Inc.* v. *City of Camden*, 701 F. 2d 262, 264–265 (CA3 1983), *Estes* v. *Tuscaloosa County*, 696 F. 2d 898, 900 (CA11 1983) *(per curiam)*, *Redd* v. *Lambert*, 674 F. 2d 1032, 1036–1037 (CA5 1982), and *Blow* v. *Lascaris*, 668 F. 2d 670, 671 (CA2) *(per curiam)*, cert. denied, 459 U. S. 914 (1982). See also *Bartholomew* v. *Watson*, 665 F. 2d 910, 912–914 (CA9 1982); *Brown* v. *Bathke*, 588 F. 2d 634, 638 (CA8 1978).

on either of two theories: (1) that those hearings were "proceeding[s] to enforce a provision of [§ 1983]" within the meaning of § 1988; or (2) that the time was "reasonably expended" in preparation for the court action and therefore compensable under the rationale of *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983). We consider each of these theories.

I

The relevant language in § 1988[12] is similar to language in § 706(k) of Title VII of the Civil Rights Act of 1964, which authorizes an award of attorney's fees in "any action or proceeding" under that Title.[13] In *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), we held that § 706(k) authorizes fees for work performed pursuing a state administrative remedy "to which the complainant was referred pursuant to the provisions of Title VII." *Id.*, at 71. The petitioner argues that the reasoning in *Carey* supports a comparable award for the services performed in the School Board proceedings in this case.

Carey, however, arose under a statute that expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum.[14] There is no comparable requirement in § 1983, and therefore the reasoning in *Carey* is not applicable to this case. As we noted in *Smith* v. *Robinson*, 468 U. S. 992 (1984):

---

[12] See n. 1, *supra*.

[13] 78 Stat. 261, 42 U. S. C. § 2000e–5(k) ("In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs . . .").

[14] As we explained in *Carey:*

"It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief." 447 U. S., at 65.

> "The difference between *Carey* and this case is that in *Carey* the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982)." *Id.*, at 1011, n. 14.

Because § 1983 stands "as an independent avenue of relief" and petitioner "could go straight to court to assert it," *ibid.*, the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.

Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983,[15] and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory.[16]

II

In *Hensley* v. *Eckerhart*, *supra*, at 424, we discussed the method to be employed by the district court in determining

---

[15] Of course, competent counsel will be motivated by the interests of the client to pursue state administrative remedies when they are available and counsel believes that they may prove successful. We cannot assume that an attorney would advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees for work performed in the state administrative forum.

[16] This interpretation of § 1988 is consistent with the numerous references in its legislative history to promoting the enforcement of the civil rights statutes "in suits," "through the courts" and by "judicial process." See, *e. g.*, S. Rep. No. 94–1011, pp. 2, 6 (1976); H. R. Rep. No. 94–1558, p. 1 (1976). Cf. *Burnett* v. *Grattan*, 468 U. S. 42, 50 (1984) ("[T]he dominant characteristic of civil rights actions" is that "they belong in court").

the amount of an attorney's fee award to the prevailing party in a civil rights action covered by § 1988. At the outset, we emphasized that the amount to be awarded necessarily depends "on the facts of each case," 461 U. S., at 429, and that the exercise of discretion by the district court must be respected, *id.*, at 432. We explained that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, at 433. We also observed that the party seeking an award of fees has the burden of submitting "evidence supporting the hours worked and rates claimed." *Ibid.*

In this case, the petitioner contends that all of the hours spent by his attorney in the School Board proceedings were "reasonably expended" to enforce the rights protected by § 1983. More specifically, since witnesses were examined and opposing arguments considered and refuted in those proceedings, the work was analogous to discovery, investigation, and research that are part of any litigated proceeding, and therefore should be compensable as though the work was performed after the lawsuit was actually filed. "In sum," petitioner concludes, "*Hensley* requires that fees for work done from the onset of an attorney-client relationship be awarded if that work was reasonably related to the enforcement of federal civil rights unless the hours spent would not, in the exercise of normal billing judgment, be 'properly billed to one's *client*.'" Brief for Petitioner 19 (quoting *Hensley* v. *Eckerhart*, 461 U. S., at 434).

The Court's opinion in *Hensley* does not sweep so broadly. The time that is compensable under § 1988 is that "reasonably expended *on the litigation*." *Id.*, at 433 (emphasis added). When the attorney's fee is allowed "as part of the costs"—to use the language of the statute—it is difficult to treat time spent years before the complaint was filed as having been "expended on the litigation" or to be fairly comprehended as "part of the costs" of the civil rights action.

Of course, some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed "on the litigation." Most obvious examples are the drafting of the initial pleadings and the work associated with the development of the theory of the case.[17] In this case, however, neither the trial judge nor the parties had any difficulty identifying the dividing line between the administrative proceeding and the judicial proceeding. The five years of work before August 1979 were easily separated from the two years of work thereafter.[18] The petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement. The question argued below was whether the time spent on the administrative work during the years before August 1979 should be included in its entirety or excluded in its entirety. On this record, the District Court correctly held that all of the administrative work was not compensable.[19]

---

[17] See also Fed. Rule Civ. Proc. 27 (providing a procedure for preserving testimony before the bringing of a federal cause of action).

[18] Indeed, in the 11 months between the late summer of 1978, when the adverse decision in the administrative proceeding became final, and the summer of 1979, when the petitioner brought this civil rights action, less than one-quarter hour was spent by counsel on the case—to write a letter renewing a previous settlement offer. App. 47.

[19] JUSTICE BRENNAN suggests that the petitioner's filing of the transcript of the administrative hearings in the record of the civil rights action might justify an award of attorney's fees, in part, because that transcript substituted for the affidavits the petitioner would have had to file in response to the motion for summary judgment. *Post*, at 255. That motion, however, was filed only by three of the individual defendants, and addressed a statute of limitations defense. App. 27. On this record, we find no indication that the 82.8 hours spent in the administrative proceeding were in any way equivalent to the time that would have been spent preparing the affidavits necessary to respond to this summary judgment motion, or that any part of the administrative record was necessary for that purpose. Moreover, the District Court judge's decision on all other

"We reemphasize that the district court has discretion in determining the amount of a fee award."[20] *Id.*, at 437. When such an award is appealed, the reviewing court must evaluate its reasonableness with appropriate deference. Considering the governing legal principles, the petitioner's burden of establishing his entitlement to the requested fee, and the evidence and arguments presented below, we conclude that the District Court's decision to deny any fees for time spent pursuing optional administrative remedies was well within the range of reasonable discretion.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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

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

The Court concludes today that attorney's fees for work in optional state administrative proceedings are not "automatically" awardable to a prevailing civil rights litigant under 42 U. S. C. § 1988, but that fees may be awarded for a "discrete

---

fee questions was extremely favorable to the petitioner, and it is quite probable that this decision was influenced by counsel's extensive experience representing petitioner before the School Board. A remand would only serve to prolong "what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee." *Hensley* v. *Eckerhart*, 461 U. S., at 442 (BRENNAN, J., concurring in part and dissenting in part).

[20] We also reemphasize that the district court's consideration of a fee petition "should not result in a second major litigation." *Hensley* v. *Eckerhart*, *supra*, at 437. The District Court Judge in this case quite properly admonished the parties to limit adversary hostilities and to avoid excessive cross-examination of fee witnesses. *E. g.*, Tr. of Fee Hearing 141.

portion" of such work to the extent that it was "useful and of a type ordinarily necessary" to the successful outcome of the subsequent litigation. *Ante*, at 241, 243. I agree with these conclusions but write separately on two counts. First, it is important in light of the American Rule and the confusion among lower courts that we identify with precision the reason why such awards *ever* may be authorized pursuant to § 1988.[1] Second, I disagree with the Court's conclusion that the petitioner in this case presented insufficient evidence to justify a District Court award of fees for a "discrete portion" of his work at the state level. The District Court did not consider the evidentiary merits of this issue, holding instead as a matter of law that § 1988 bars prevailing plaintiffs from recovering fees for work in optional administrative proceedings. App. to Pet. for Cert. 40a. Because the Court rejects this reasoning, the judgment below should be reversed and the case should be remanded for consideration whether and to what extent Webb is entitled to additional fees under the standards announced today.

I

A

Although the Court decides that prevailing civil rights litigants may recover fees for "discrete" work in optional administrative proceedings, it does not seek to refute the arguments advanced by the respondents and the courts below that the language and policies of § 1988 affirmatively bar awards of such fees. The question of § 1988's intended breadth arises in a variety of contexts, and lower courts have divided over the proper analysis to apply in considering fee requests for work beyond the four corners of civil rights

---

[1] This Court repeatedly has held that, with several narrow exceptions, the American Rule bars recovery of attorney's fees in the absence of an express statutory authorization. See, *e. g.*, *Summit Valley Industries, Inc.* v. *Carpenters*, 456 U. S. 717, 721 (1982); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975).

litigation. See *ante*, at 239, n. 11. I believe that § 1988 should be viewed as prescribing two threshold requirements for recovery of fees for work in a proceeding collateral to a successful civil rights action: first, the collateral proceeding must have been an "action or proceeding" within the meaning of § 1988; and second, the work in the collateral proceeding must have demonstrably contributed "to enforce[ment of] a provision" of the civil rights laws.[2] The proper application of this analytic framework supports the Court's conclusion that § 1988 authorizes limited awards of fees for work performed in optional state administrative proceedings.

With respect to the first requirement, our decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), compels the conclusion that a state administrative hearing may be a "proceeding" within the meaning of § 1988. We held in *Carey* that state administrative proceedings fall within the definition of an "action or proceeding" as that phrase is used in the Title VII fee provision, § 706(k) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5(k). 447 U. S., at 61–66. We reasoned there that "[i]t cannot be assumed that the words 'or proceeding' . . . are mere surplusage," and that "Congress' use of the broadly inclusive disjunctive phrase 'action or proceeding'" demonstrated an intent to permit fees for work beyond the litigation itself. *Id.*, at 61. This reasoning applies squarely to § 1988, which employs precisely the same phraseology as the Title VII fee provision. The relevant Committee Reports emphasize Congress' intent to pattern § 1988 after the Title VII fee provision,[3] and they

[2] Section 1988 provides in relevant part that "[i]n any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[3] See, *e. g.*, S. Rep. No. 94–1011, pp. 4, 6 (1976) (Title VII cases provide "appropriate standards" for applying § 1988); H. R. Rep. No. 94–1558, p. 8 (1976). See also *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 70, n. 9 (1980).

include citations to Title VII cases in which fees were awarded for work in administrative proceedings.[4] The respondents argue that § 1988's use of the phrase "or proceeding" could have been intended merely to refer to certain federal-court matters that are not technically "actions," such as bankruptcy proceedings. Brief for Respondents 11. This argument presumably could be made about the Title VII fee provision as well; in either case, such a parsimonious construction would not accord with Congress' general intent for "the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S. Rep. No. 94–1011, p. 3 (1976).

As the Court emphasizes today, there is an important distinction between Title VII cases and § 1983 cases that is relevant to the extent to which fees for collateral proceedings may be authorized: Title VII is governed by an administrative exhaustion requirement, while § 1983 generally is not. *Ante*, at 240–241; see also *Smith* v. *Robinson*, 468 U. S. 992, 1011, n. 14 (1984).[5] The issue of exhaustion does not bear on the definition of the phrase "action or proceeding," however,

---

[4] In emphasizing that the phrase "prevailing party" was "not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," for example, the House Report cited approvingly to *Parker* v. *Matthews*, 411 F. Supp. 1059 (DC 1976), aff'd *sub nom. Parker* v. *Califano*, 182 U. S. App. D. C. 322, 561 F. 2d 320 (1977). See H. R. Rep. No. 94–1558, at 7. The plaintiff in *Parker* had unsuccessfully pursued her administrative remedies before filing an action in federal court. Shortly after the complaint was filed, the agency reversed itself and the case was settled. The District Court awarded fees for both the administrative and court proceedings. 411 F. Supp., at 1065–1066.

[5] See generally *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). Exceptions include a limited exhaustion requirement for adult prisoners that may be imposed at the discretion of the court, see 42 U. S. C. § 1997e; *Patsy* v. *Florida Board of Regents*, *supra*, at 507–512, and the rule that defendants in civil or administrative enforcement proceedings generally may not avoid those proceedings by filing a § 1983 action in federal court, see, *e. g.*, *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975).

but cuts instead to § 1988's second threshold requirement: fees may be awarded only if the action or proceeding was pursued "to enforce a provision" of the civil rights laws. See n. 2, *supra*. Where Congress requires resort to administrative remedies as a predicate to invoking judicial remedies, the administrative remedies obviously are integral "to enforce[ment of] a provision" of the civil rights laws. That is precisely the point of *Carey*. See 447 U. S., at 63, 65.

Although § 1983 generally does not require exhaustion of state remedies, prevailing litigants nevertheless may be able to demonstrate that ancillary state proceedings played a critical role in "enforc[ing] a provision" of the civil rights laws. For example, courts sometimes choose to make ancillary proceedings a part of the civil rights litigation. Federal courts occasionally have exercised their discretion to abstain and have required litigants to clarify state-law issues in state forums before proceeding with the federal actions.[6] Similarly, resort to state administrative proceedings might be necessary in developing and implementing a remedial plan to comply with a federal court's injunction in a complex civil rights case.[7] Reliance on these collateral proceedings may frequently accord with Congress' general intent for courts to "'use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws.'" S. Rep. No. 94–1011, at 3, n. 1. Where a court incorporates such proceedings as part of the adjudicatory or remedial scheme, surely they function demonstrably "to enforce a provision" of the civil rights laws within the meaning of § 1988. If we adopted the respondents' definition of the term "or proceeding," however, and concluded that the term

---

[6] See, *e. g.*, *Harrison* v. *NAACP*, 360 U. S. 167 (1959); *Bartholomew* v. *Watson*, 665 F. 2d 910 (CA9 1982); *Neal* v. *Brim*, 506 F. 2d 6, 9–11 (CA5 1975); *Blouin* v. *Dembitz*, 489 F. 2d 488, 491–492 (CA2 1973).

[7] See, *e. g.*, *Bond* v. *Stanton*, 630 F. 2d 1231, 1233 (CA7 1980) (participation in state agency's development of remedial plan); *Northcross* v. *Board of Education*, 611 F. 2d 624, 637 (CA6 1979), cert. denied, 447 U. S. 911 (1980).

includes only bankruptcy and certain other federal-court cases not technically "actions" and normally touching only tangentially on civil rights, such reliance on ancillary state proceedings would be severely undermined. As the Ninth Circuit reasoned in *Bartholomew* v. *Watson*, 665 F. 2d 910, 913 (1982), a case holding that fees incurred in state court pursuant to *Pullman* abstention are recoverable under § 1988, a contrary rule "would encourage forum shopping and interfere with efficient allocation of issues and cases between the state and federal systems."[8] The legislative history of § 1988 cannot be read as supporting such an anomolous result.

Where the decision to pursue administrative proceedings rests solely with the plaintiff, it cannot be presumed that the proceedings are integrally related to the enforcement of federal civil rights. As the Court observes, school board hearings should not "automatically" be viewed as part of the § 1983 remedial scheme. *Ante*, at 241. Nothing in the logic of *Carey*, *Smith*, or our other cases, however, compels the contrary conclusion that *all* fees for such proceedings "automatically" be excluded. Once it is recognized that state administrative proceedings *may* fall within the rubric "action or proceeding" in appropriate circumstances, courts must strike a necessarily uneasy balance between two arguably conflicting considerations. On the one hand, Congress clearly intended to enable civil rights litigants to proceed expeditiously to court, and time spent in optional state proceedings may therefore frequently be unnecessary to vindication of civil rights claims. On the other hand, if a successful litigant can demonstrate that the fruits of an antecedent

---

[8] The court in *Bartholomew* also observed that under the contrary rule "[p]laintiffs seeking relief under section 1983 would be compelled to oppose any move from federal court, despite the fact that an initial determination of certain matters by the state court might simplify or even moot the federal action because of the loss of the right to claim attorney's fees under section 1988. A plaintiff's attorney would be penalized if some of his client's section 1983 claims were disposed of in a state forum. The ability to obtain counsel would therefore suffer." 665 F. 2d, at 913.

administrative proceeding contributed directly to the successful outcome in federal court and obviated the need for comparable work in the federal action, there is nothing in the language or policies of § 1988 that would justify penalizing him for not having gone straight into court. A contrary rule would provide an unwise incentive for every potential litigant to commence a federal action at the earliest possible moment in order to steer himself into § 1988's safe harbor.

There is certainly nothing in § 1988 that limits fee awards to work performed after the complaint is filed in court. For example, it is settled that a prevailing party may recover fees for time spent before the formal commencement of the litigation on such matters as attorney-client interviews, investigation of the facts of the case, research on the viability of potential legal claims, drafting of the complaint and accompanying documents, and preparation for dealing with expected preliminary motions and discovery requests. 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 16.02[2][b], p. 16–15 (1984). This time is "reasonably expended on the litigation," *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983), in part because careful prefiling investigation of the facts and law is required by the ethical rules of our profession,[9] the Federal Rules of Civil Procedure,[10] and the realities of civil rights litigation.[11] This sort of preparatory

[9] See, *e. g.*, ABA Model Code of Professional Responsibility EC 7–4, EC 7–25, DR 7–102(A), DR 2–109(A) (1980); ABA Model Rules of Professional Conduct, Rule 3.1 (1983).

[10] See, *e. g.*, Fed. Rule Civ. Proc. 11 (attorney's signature constitutes a certification that the "pleading, motion, or other paper" is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"). See also Advisory Committee Note to Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 723 (1982 ed., Supp. I). Cf. Fed. Rule Civ. Proc. 27 (mechanism for deposing witnesses prior to initiation of action).

[11] In *Burnett* v. *Grattan*, 468 U. S. 42, 50–51 (1984), we recently observed:

"Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his in-

work, along with discovery that typically occurs after litigation commences, may often be accomplished in the course of administrative proceedings that precede litigation. Taking testimony at an administrative hearing may reduce or eliminate the need for interviewing and deposing witnesses later after suit is filed, and negotiation with administrative officials may narrow disputes and sharpen issues in the very same way as settlement discussions held after the litigation begins. Once it is decided that *any* time spent before the filing of a complaint is compensable, there is no reason to draw artificial distinctions based on whether the time was spent preparing directly for the litigation or instead in an administrative proceeding that contributed and led directly to litigation.[12]

A rule requiring potential plaintiffs *absolutely* to bypass administrative proceedings if they wished to become eligible for attorney's fees would create skewed incentives that Con-

---

jury. He must obtain counsel or prepare to proceed *pro se*. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules . . . . At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery."

[12] See, *e. g.*, *Ciechon* v. *Chicago*, 686 F. 2d 511, 525 (CA7 1982) (sustaining award of fees for administrative work because "[t]he interest served by encouraging vigorous representation at an administrative proceeding" in the § 1983 context "is the same interest as that . . . in the Title VII scheme of enforcement"); *Brown* v. *Bathke*, 588 F. 2d 634, 638 (CA8 1978) ("The awarding of attorney's fees to a prevailing party in a civil rights action for work done in other proceedings lies in the sound discretion of the federal district court"; partial award sustained). Cf. *Natural Resources Defense Council, Inc.* v. *EPA*, 703 F. 2d 700, 713 (CA3 1983) (interpreting Equal Access to Justice Act as permitting recovery of fees incurred in obtaining information through the Freedom of Information Act even though "that route to information is not conventional discovery"; FOIA work "may well have been more expeditious than conventional discovery"); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F. 2d 760, 767 (CA7 1982) (awarding fees for administrative proceeding not required by Title VII, because proceeding "contributed to the ultimate termination of the Title VII action"), cert. denied, 461 U. S. 956 (1983).

gress could not possibly have intended. The Committee Reports to § 1988 emphasize that plaintiffs should not be denied fees for work that enables them to prevail short of full-blown litigation of their federal claims and that thereby "help[s] to lessen docket congestion."[13] It is at least debatable whether administrative proceedings may sometimes offer a swifter and cheaper means of sharpening issues and discovering relevant evidence than litigation in federal court. Moreover, although notions of comity properly have not led Congress or the courts to impose an exhaustion requirement, surely it can be conceded that prior administrative proceedings may sometimes enhance federal-court resolution of civil rights disputes.[14] Unless we are willing to conclude that Congress not only intended not to *require* reliance on state administrative proceedings, but positively to *discourage* resort to such proceedings in all circumstances in the § 1983 context, reasonable standards for limited recovery of fees should be fashioned.[15]

---

[13] H. R. Rep. No. 94–1558, at 7 ("A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion"). See also *id.*, at 4, n. 7 (if constitutional claim is substantial and arises out of "common nucleus of operative fact" with nonconstitutional claims, courts may award fees even though relief is obtained solely on nonconstitutional grounds); S. Rep. No. 94–1011, at 5 ("[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

[14] See generally *Patsy* v. *Florida Board of Regents*, 457 U. S., at 513 ("[T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them"); *id.*, at 516–517 (O'CONNOR, J., concurring); *id.*, at 517–518 (WHITE, J., concurring in part); *id.*, at 519, 532–536 (POWELL, J., dissenting).

[15] *Carey* supports rather than detracts from this analysis. Under Title VII, complainants may commence actions in federal court 240 days after they initiate state proceedings. A strict construction of the statute would suggest that fees be awarded only for the first 240 days of a state proceeding, for after that there is nothing preventing a suit in federal court. As we noted in *Carey*, however, "[i]t is doubtful that the systems of many

B

This analysis leads me to concur with the Court's conclusion that fees may be recovered for administrative work that is "useful and of a type ordinarily necessary" to successful civil rights litigation. *Ante*, at 243. A standard for determining what is useful and necessary should encompass three factors. First, a court must conclude that the claimed portions of administrative work were independently reasonable.[16] Second, the court must find that the administrative work, or some "discrete" portion of it, *ibid.*, significantly contributed to the success of the federal-court outcome and eliminated the need for work that otherwise would have been required in connection with the litigation.[17] Finally, fees should be awarded only to the extent that the administrative work was equally or more cost-effective than the comparable work that would have been required during the course of liti-

---

States could provide complete relief within 240 days," 447 U. S., at 66, n. 6; the state proceedings in that case, for example, took three years. We nevertheless held that fees were properly awarded past the point of exhaustion, noting that "[t]he existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible." *Ibid.* This sort of pragmatic approach should govern our analysis where civil rights plaintiffs have not been required to resort to state procedures for any length of time.

[16] The party requesting fees for such work must submit evidence documenting the hours claimed, and if the documentation is inadequate, or the claimed hours appear "excessive, redundant, or otherwise unnecessary," the court should reduce the award accordingly. Cf. *Hensley* v. *Eckerhart*, 461 U. S. 424, 433–434 (1983); *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401–402, 641 F. 2d 880, 891–892 (1980) (en banc). See generally 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 16.02[5], pp. 16–29 to 16–36 (1984).

[17] This requirement is consistent with the policy against awarding fees for redundant or unnecessary work, see n. 16, *supra;* as Congress has not required exhaustion of administrative remedies, fees for administrative work should not be awarded to the extent that work in litigation subsequently covered the same ground.

gation. A 1-day administrative hearing eliciting testimony that eliminates the need for three days of depositions is something to be encouraged and rewarded, but if instead that hearing took three days and produced the same information as could have been obtained during one day of depositions, the claimant should not recover for more than the one day it would have taken to conduct the depositions. In these as in all § 1988 matters, the district court must have a broad "zone of discretion" in resolving disputes. *Hensley* v. *Eckerhart*, 461 U. S., at 442 (BRENNAN, J., concurring in part and dissenting in part). Mathematical precision is impossible, and it should be enough if the court "has articulated a fair explanation" for its award after reviewing the request and the supporting documentation and applying its own experience and common sense. *Id.*, at 455.

II

The District Court in this case held as a matter of law that § 1988 bars recovery of all fees associated with optional state administrative proceedings. App. to Pet. for Cert. 33a–40a. Today the Court rejects such an absolute prohibition and holds instead that fees may be awarded in the informed discretion of a district court if the work was "useful" and substituted for work at the judicial stage that would have been "ordinarily necessary" to a successful outcome. *Ante*, at 243. I believe this conclusion requires a reversal and remand so that the District Court may apply the correct legal rule and exercise its informed discretion regarding Webb's possible entitlement to additional fees.

Webb's fee application and supporting evidence amply establish a prima facie entitlement to fees for at least some portion of the administrative work under the standards discussed above. First, Webb's application specified in detail the work performed in the course of the administrative proceedings, and along with the supporting affidavits and testimony would enable the District Court to make an informed

decision regarding the independent reasonableness of this work.

Second, Webb made a strong showing that the fruits of the administrative proceedings eliminated the need for extensive discovery after the complaint was filed and significantly contributed to the settlement of the federal litigation. During the Board proceedings, Webb's attorney was able to elicit substantial testimony from administrators, teachers, and students supporting Webb's allegation that he had been fired from his teaching job for racially discriminatory reasons.[18] With this record in hand, Webb's counsel had to devote virtually no time to discovery after litigation commenced. After motions to dismiss and for summary judgment were filed against Webb, he sought to meet his burden of "set[ting] forth specific facts showing that there [was] a genuine issue for trial," Fed. Rule Civ. Proc. 56(e), by filing a transcript of the administrative hearings along with a supporting brief in opposition. Thereafter, the parties reached a full settlement while the motions were under advisement and several weeks

---

[18] Webb was discharged for allegedly unprofessional conduct and insubordination, without further specification of the charges. He contended that he had been dismissed as a result of white parents' complaints about his paddling of their children. See App. 8–9. At the hearings, Webb's counsel elicited testimony that paddling was a widely used and accepted means of discipline at Newborne Elementary School. Tr. 72, 99–100, 102–103, 113, 118, 122–123, 126, attached to Affidavit of Avon N. Williams, Jr., Record Doc. No. 73. School administrators, teachers, and students testified that Webb did not paddle students any more harshly than did other teachers, that Webb disciplined black and white students in an even-handed manner, and that prior to Webb's dismissal no other teacher ever had been reprimanded or disciplined for paddling students. *Id.*, at 73–74, 78, 81, 83–84, 86, 113, 119, 123–124, 126, 150. There was significant testimony that, in the recent wake of desegregation, a number of white students misbehaved in Webb's classroom, that school administrators did not assist Webb or other black teachers in maintaining classroom order, and that the administrators did not support Webb when white parents complained about Webb's disciplining of their children. *Id.*, at 29–30, 66, 77–78, 162, 208.

before trial was scheduled to commence. As several experienced civil rights attorneys testified at the fee hearing, a "substantial part" of the administrative work therefore appears to have obviated the need for Webb to rely on interrogatories, depositions, extensive affidavits, and other discovery devices that unquestionably would have been compensable under § 1988.[19] The testimony elicited by Webb's counsel during the administrative proceedings presumptively contributed to the settlement; as a matter of common sense, a defendant is not likely to settle a case prior to a ruling on its motion for summary judgment and only weeks before the scheduled commencement of trial if the plaintiff has not developed and presented a credible case.[20]

---

[19] "You can look at the time spent on a matter such as this as to the discovery aspects, the prefiling investigation which there inevitably was in this case and which there almost always is where you have administrative proceedings that take place.

"Facts are discovered, positions taken, parties respond whether it is by one demand letter or a demand for a hearing, which is then held, and the parties state their positions regardless of the result, that is, part of the factual basis for the complaint and ultimately for the trial. So one could safely make the statement that at least a substantial part of that ground would not have to be plowed in actually litigating the case." Tr. of Fee Hearing 13–14.

See also *id.*, at 8 (hours spent in administrative hearings were reasonable), 21 (hearings "part of the discovery process which leads to hopefully a settlement or, at least, enables you to foreshorten the formal discovery in federal court"), 41 (hearings were "essential" and "intrinsic" to success in litigation), 45 (hearings were "just part and parcel of the entire package of the case"). The defense counsel himself acknowledged that "after the complaint was filed no affirmative act of any kind was performed by counsel for the Plaintiff before settlement was made, that is, no discovery was taken . . . ." *Id.*, at 19.

[20] With respect to the effect that the administrative discovery had on settlement, one veteran civil rights litigator testified: "I don't think one would have occurred without the other. I think there is a record made. I think good counsel for the Defendant in the case obviously has access to that and is able to weigh, as perhaps a public body in the emotion of the moment can weigh, the risk of continued litigation as opposed to settlement and advise his client taking into account all the usual factors,

Finally, with the information about counsel's services and the administrative transcripts before it, and given its general familiarity with federal discovery practices, the District Court would be able to exercise its sound discretion in determining whether and to what extent the fruits of the administrative work could have been obtained more expeditiously through standard discovery and to adjust any award accordingly.

At the very least, Webb would therefore appear to have established a prima facie entitlement to fees for the "discrete" portion of his counsel's work relating to the Board hearings that were transcribed and relied upon in litigating and settling this action. Notwithstanding this showing, the Court today affirms the denial of *all* fees associated with the administrative proceedings. The Court reasons that "[t]he question argued below was whether the time spent on the administrative work . . . should be included in its entirety or excluded in its entirety." *Ante*, at 243. I agree that the respondents consistently have argued that this time should be "excluded in its entirety" and that the courts below accepted this proposition as a matter of law, but I have been unable to find anything in the record suggesting that Webb himself argued for such an all-or-nothing resolution. Similarly, the Court chastises Webb for his failure to make a "suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." *Ibid.* Webb's counsel, however, submitted an affidavit detailing his services and presented substantial testimony that the administrative work in its entirety was "useful" and "necessary" to the outcome of the litigation, and I fail to see how this case differs from any in which a district court is required

---

what it is going to cost you to litigate and so forth. And I think that is one of the bases upon which competent counsel are going to look at to see what happened down below, in effect." *Id.*, at 16–17.

to exercise its discretion in sorting out the useful from the superfluous, the necessary from the unnecessary, and the reasonable from the unreasonable. It is precisely because this sorting process is required that evaluation of fee petitions is committed to the sound discretion of the district courts.[21] Many meritorious fee petitions contain requests for time or rates that the district court may decide are excessive, and it is up to the court to make appropriate adjustments. Surely the submission of a good-faith petition requiring downward adjustment does not bar *all* recovery on the grounds that the claimant did not include a hierarchy of "next-best" requests or presumptively desired no recovery if he could not receive his petitioned amount "in its entirety."[22]

---

[21] See, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 902, n. 19 (1984) ("[D]istrict court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness"); *Hensley* v. *Eckerhart*, 461 U. S., at 433–437 (especially 437, district court "necessarily has discretion in making this equitable judgment"); *id.*, at 443 (BRENNAN, J., concurring in part and dissenting in part); H. R. Rep. No. 94–1558, at 8 (Congress intended to "leav[e] the matter to the discretion of the judge").

[22] The Court also notes that several years elapsed between the administrative hearings and the ultimate settlement of the federal litigation, and observes that "it is difficult to treat time spent years before the complaint was filed as having been 'expended on the litigation.'" *Ante*, at 242. I agree with the Court that the passage of time may be one factor to be considered in deciding whether a portion of administrative work served "to enforce a provision" of the civil rights laws; as the elapsed time increases, it is more likely that administrative proceedings were pursued for other reasons and were not integrally related to the litigation itself. Reliance on this factor in the case before us is misplaced, however. The Board's final evidentiary hearing was held in April 1978, and the complaint was not filed until August 1979. The delay appears to have resulted from at least two factors that were beyond Webb's control: first, the Board's long delay in rendering a final decision, and second, the Board's delay in responding to Webb's precomplaint settlement attempts. See App. 46–47 (summary of professional services). Another two years passed before the litigation was settled, but again much of that time appears to have been consumed by settlement discussions. *Id.*, at 50–54. Given that the inquiry is whether any of the fruits of the administrative proceeding were "useful" and eliminated the need for other work that would have been "necessary" in the federal

The Court reasons, however, that "the district court's consideration of a fee petition 'should not result in a second major litigation,'" *ante*, at 244, n. 20, quoting *Hensley* v. *Eckerhart*, 461 U. S., at 437, and it concludes that the District Court's decision in this case "was well within the range of reasonable discretion," *ante*, at 244. With all respect, the Court's reasoning escapes me. I have previously argued that the district courts should enjoy a broad "zone of discretion" in awarding fees and that appellate deference accordingly should approach its zenith in this context. *Hensley* v. *Eckerhart*, 461 U. S., at 442 (concurring in part and dissenting in part). Such deference is appropriate, however, only where "a district court has articulated a fair explanation for its fee award in a given case." *Id.*, at 455. Here the District Court denied all fees for the administrative work *solely* on the premise that such awards are forbidden *as a matter of law*. App. to Pet. for Cert. 40a. Today the Court has rejected this reasoning, concluding instead that claimants are *not* barred from such recovery as a matter of law and that they may recover appropriate fees pursuant to the standards freshly coined in the Court's opinion. I would have thought the logical conclusion would be that the District Court could not have properly exercised its discretion given that it proceeded on an erroneous legal premise. It is not our mission to exercise the district courts' discretion for them or to conduct *de novo* evaluation of fee petitions; these are matters appropriately left to remand. See *Hensley* v. *Eckerhart*, *supra*, at 437 (remanding for application of proper

---

action, the relevance of the Court's emphasis on a readily discernable "dividing line" between these proceedings is not immediately apparent. *Ante*, at 243. A petitioner's entitlement to partial administrative fees should not turn in any way on whether the respondents were able to drag matters out or on whether the parties reasonably attempted to reach a settlement before going into court. Here again, it makes no sense to create incentives compelling potential litigants to get into court at the earliest opportunity without attempting to resolve a controversy through other means.

standards) (discretion "appropriate[ly]" lies in district court "in view of district court's superior understanding of the litigation"). Where a civil rights litigant has successfully persuaded this Court to grant certiorari to resolve an important and unsettled issue of § 1988 fees entitlement, convinced us that the sole ground relied on by the courts below was erroneous, and submitted a fee request that may justify a further award by the District Court in the *proper* exercise of its discretion, I am at a loss why the Court should refuse to remand out of "deference" to the District Court's errors or a desire to discourage further litigation however meritorious the claim for fees may be.[23] Such legerdemain squares neither with the legislative policies behind § 1988[24] nor with the policies of fairness that undergird our legal system.

---

[23] And to the extent that the fee request did not precisely track the standards newly set forth in today's opinion, it is inappropriate to penalize Webb for his lack of prescience.

[24] The purpose of § 1988 is to "promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H. R. Rep. No. 94–1558, at 9. See also S. Rep. No. 94–1011, at 2 ("[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain"). These goals are not likely to be advanced if plaintiffs who successfully appeal erroneous interpretations of § 1988 are denied the opportunity to benefit from the application of the correct standards.

WILSON ET AL. *v.* GARCIA

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

No. 83–2146. Argued January 14, 1985—Decided April 17, 1985

Respondent brought an action in Federal District Court under 42 U. S. C. § 1983 against petitioners, a New Mexico State Police officer and the Chief of the State Police, seeking damages for deprivation of respondent's constitutional rights allegedly caused by an unlawful arrest and brutal beating by the officer. The complaint was filed two years and nine months after the claim purportedly arose. Petitioners moved to dismiss on the ground that the action was barred by the 2-year statute of limitations of the New Mexico Tort Claims Act. The District Court denied the motion, holding that the New Mexico statute providing a 4-year limitations period for "all other actions not herein otherwise provided for" applied to § 1983 actions brought in the State. On an interlocutory appeal, the Court of Appeals affirmed the denial of the motion to dismiss, but held that the appropriate statute of limitations for § 1983 actions brought in New Mexico was the New Mexico statute providing a 3-year limitations period for personal injury actions.

Held: Section 1983 claims are best characterized as personal injury actions, and hence the Court of Appeals correctly applied the 3-year statute of limitations applicable to such actions. Pp. 266–280.

(a) Federal rather than state law governs the characterization of a § 1983 claim for statute of limitations purposes. This conclusion is supported by the federal interest in uniformity and the interest in having firmly defined, easily applied rules. The language of 42 U. S. C. § 1988 that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable," directs that the matter of characterization should be treated as a federal question. Only the length of the limitations period, and related questions of tolling and application, are to be governed by state law. This interpretation is also supported by the instruction in § 1988 that state law shall only apply "so far as the same is not inconsistent with" federal law. Pp. 268–271.

(b) A simple, broad characterization of all § 1983 claims for statute of limitation purposes, rather than differing evaluations depending upon the varying factual circumstances and legal theories presented in each case, best fits the statute's remedial purposes. The statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in

uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored such a simple approach. Pp. 271–275.

(c) In this case, the characterization of the § 1983 claim as a personal injury action for statute of limitations purposes is supported by the nature of the § 1983 remedy and by the federal interest in ensuring that the borrowed limitations period not discriminate against the federal civil rights remedy. The characterization of all § 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983. Pp. 276–279.

731 F. 2d 640, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 280. POWELL, J., took no part in the consideration or decision of the case.

Bruce Hall argued the cause for petitioners. With him on the briefs were *Diane Fisher* and *Ben M. Allen.*

Steven G. Farber, by appointment of the Court, 469 U. S. 1069, argued the cause for respondent. With him on the brief was *Richard Rosenstock.**

JUSTICE STEVENS delivered the opinion of the Court.

In this case we must determine the most appropriate state statute of limitations to apply to claims enforceable under § 1 of the Civil Rights Act of 1871,[1] which is codified in its present form as 42 U. S. C. § 1983.

**Robert H. Macy* filed a brief for Oklahoma County as *amicus curiae* urging reversal.

[1] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." 17 Stat. 13.

On January 28, 1982, respondent brought this § 1983 action in the United States District Court for the District of New Mexico seeking "money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and for the personal injuries he suffered which were caused by the acts and omissions of the [petitioners] acting under color of law." App. 4. The complaint alleged that on April 27, 1979, petitioner Wilson, a New Mexico State Police officer, unlawfully arrested the respondent, "brutally and viciously" beat him, and sprayed his face with tear gas; that petitioner Vigil, the Chief of the New Mexico State Police, had notice of Officer Wilson's allegedly "violent propensities," and had failed to reprimand him for committing other unprovoked attacks on citizens; and that Vigil's training and supervision of Wilson was seriously deficient. *Id.*, at 6–7.

The respondent's complaint was filed two years and nine months after the claim purportedly arose. Petitioners moved to dismiss on the ground that the action was barred by the 2-year statute of limitations contained in § 41–4–15(A) of the New Mexico Tort Claims Act.[2] The petitioners' motion was supported by a decision of the New Mexico Supreme Court which squarely held that the Tort Claims Act provides "the most closely analogous state cause of action"[3] to § 1983, and that its 2-year statute of limitations is therefore appli-

---

[2] That section provides:

"Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death . . . ." N. M. Stat. Ann. § 41–4–15(A) (1978).

[3] "Under New Mexico law, the most closely analogous state cause of action is provided for by the New Mexico Tort Claims Act under [§ 41–4–12]. The statute of limitations applicable to a cause of action under Section 41–4–12 is set forth in [§ 41–4–15(A)]. Under Section 41–4–15, the action must be commenced within two years after the occurrence which results in the injury." *DeVargas* v. *New Mexico*, 97 N. M. 563, 564, 642 P. 2d 166, 167 (1982).

cable to actions commenced under § 1983 in the state courts. *DeVargas* v. *New Mexico*, 97 N. M. 563, 642 P. 2d 166 (1982). In addition to the 2-year statute of limitations in the Tort Claims Act, two other New Mexico statutes conceivably could apply to § 1983 claims: § 37–1–8, which provides a 3-year limitation period for actions "for an injury to the person or reputation of any person";[4] and § 37–1–4, which provides a 4-year limitation period for "all other actions not herein otherwise provided for."[5] If either of these longer statutes applies to the respondent's § 1983 claim, the complaint was timely filed.

In ruling on the petitioners' motion to dismiss, the District Court concluded that the New Mexico Supreme Court's decision in *DeVargas* was not controlling because "the characterization of the nature of the right being vindicated under § 1983 is a matter of federal, rather than state, law."[6] After reviewing various approaches to the question, the District Court concluded that "§ 1983 actions are best characterized as actions based on statute."[7] Because there is no specific New Mexico statute of limitations governing such claims, the District Court held that § 37–1–4, the residual 4-year statute, applied to § 1983 actions brought in New Mexico. The court denied the petitioners' motion to dismiss and certified an interlocutory appeal under 28 U. S. C. § 1292(b).[8]

---

[4] N. M. Stat. Ann. § 37–1–8 (1978) ("Actions . . . for an injury to the person or reputation of any person [must be brought] within three years").

[5] N. M. Stat. Ann. § 37–1–4 (1978) ("all other actions not herein otherwise provided for and specified [must be brought] within four years").

[6] App. to Pet. for Cert. 42.

[7] *Id.*, at 43–44.

[8] That section provides:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its

The Court of Appeals for the Tenth Circuit accepted the appeal. App. 2. After argument before a three-judge panel, the case was set for reargument before the entire court. In a unanimous en banc opinion, the Court of Appeals affirmed the District Court's order denying the motion to dismiss the complaint. 731 F. 2d 640 (1984).

The Court of Appeals' reasoning was slightly different from the District Court's. It agreed that the characterization of a § 1983 claim is a matter of federal law, and that the New Mexico Supreme Court's decision in *DeVargas* was therefore not conclusive on the question. 731 F. 2d, at 643, 651, n. 5. The opinion reviewed the varying approaches of the United States Courts of Appeals,[9] and concluded that even though § 1983 actions encompass a wide variety of fact situations and legal theories, "[a]ll of the federal values at issue in selecting a limitations period for section 1983 claims are best served by articulating one uniform characterization describing the essential nature underlying all such claims." *Id.*, at 650. Distilling the essence of the § 1983 cause of action, the court held that every claim enforceable under the statute is, in reality, "an action for injury to personal rights," and that "[h]enceforth, all § 1983 claims in [the] circuit will be uniformly so characterized for statute of limitations purposes." *Id.*, at 651. Accordingly, the appropriate statute of limitations for § 1983 actions brought in New Mexico was the 3-year statute applicable to personal injury actions.[10] It followed that the respondent had filed his complaint in time.

---

discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . ."

[9] 731 F. 2d, at 643–648.

[10] On the same day that it filed the en banc opinion in this case, the Court of Appeals issued en banc opinions adopting the appropriate statute of limitations for § 1983 claims brought in Kansas, Utah, and Colorado. *Hamilton* v. *City of Overland Park*, 730 F. 2d 613 (CA10 1984) (applying 2-year Kansas statute governing actions for "injuries to the rights of another"), cert. pending, No. 83–2131; *Mismash* v. *Murray City*, 730 F. 2d 1366 (CA10 1984) (applying 4-year Utah statute for actions not limited by a

The Court of Appeals acknowledged that its holding is at odds with the New Mexico Supreme Court's decision in *DeVargas*. It also commented on the extensive conflict in the Federal Courts of Appeals: "the courts vary widely in the methods by which they characterize a section 1983 action, and in the criteria by which they evaluate the applicability of a particular state statute of limitations to a particular claim. The actual process used to select an appropriate state statute varies from circuit to circuit and sometimes from panel to panel." 731 F. 2d, at 643. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon* v. *Fumero Soto*, 462 U. S. 650, 667 (1983) (REHNQUIST, J., dissenting). Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari. 469 U. S. 815 (1984). We find the reasoning in the Court of Appeals' opinion persuasive, and affirm.

I

The Reconstruction Civil Rights Acts do not contain a specific statute of limitations governing § 1983 actions [11]—"a void which is commonplace in federal statutory law." *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483 (1980). When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal

---

specific statute of limitations), cert. pending, No. 83–2140; *McKay* v. *Hammock*, 730 F. 2d 1367 (CA10 1984) (applying 3-year Colorado statute governing "[a]ll other actions of every kind for which no other period of limitation is provided by law"). The court also held that its new approach to borrowing statutes of limitations in § 1983 actions would not be applied retroactively to bar "plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced." *Jackson* v. *City of Bloomfield*, 731 F. 2d 652, 655 (CA10 1984).

[11] See *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914).

law or policy to do so.[12] In 42 U. S. C. § 1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts.

The language of § 1988,[13] directs the courts to follow "a three-step process" in determining the rules of decision applicable to civil rights claims:

> "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U. S. C. § 1988.] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' *Ibid.*" *Burnett* v. *Grattan*, 468 U. S. 42, 47–48 (1984).

---

[12] See, *e. g.*, *Runyon* v. *McCrary*, 427 U. S. 160, 180–182 (1976); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704 (1966); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397–398 (1906); *McClaine* v. *Rankin*, 197 U. S. 154, 158 (1905); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895).

[13] Title 42 U. S. C. § 1988 provides, in relevant part:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, 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 ciminal 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 . . . ."

This case principally involves the second step in the process: the selection of "the most appropriate," [14] or "the most analogous" [15] state statute of limitations to apply to this § 1983 claim.

In order to determine the most "most appropriate" or "most analogous" New Mexico statute to apply to the respondent's claim, we must answer three questions. We must first consider whether state law or federal law governs the characterization of a § 1983 claim for statute of limitations purposes. If federal law applies, we must next decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. Finally, we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle. Although the text of neither § 1983 nor § 1988 provides a pellucid answer to any of these questions, all three parts of the inquiry are, in final analysis, questions of statutory construction.

II

Our identification of the correct source of law properly begins with the text of § 1988.[16] Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law—the second step in the process—should not be undertaken before principles of federal law are exhausted. The characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of § 1988

---

[14] *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975).

[15] *Board of Regents* v. *Tomanio*, 446 U. S. 478, 488 (1980).

[16] See n. 13, *supra*.

directs that the matter of characterization should be treated as a federal question. Only the length of the limitations period, and closely related questions of tolling and application,[17] are to be governed by state law.

This interpretation is also supported by Congress' third instruction in § 1988: state law shall only apply "so far as the same is not inconsistent with" federal law. This requirement emphasizes "the predominance of the federal interest" in the borrowing process, taken as a whole. *Burnett* v. *Grattan*, 468 U. S., at 48.[18] Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as "a federal rule responsive to the need whenever a federal right is impaired." *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 240 (1969). The importation of the policies and purposes of the States on matters of civil rights is not the primary office of the borrowing provision in § 1988; rather, the statute is designed to assure that neutral rules of decision will be available to enforce the civil rights actions, among them § 1983. Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.

In borrowing statutes of limitations for other federal claims,[19] this Court has generally recognized that the problem

---

[17] "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S., at 464; see also *Chardon* v. *Fumero Soto*, 462 U. S. 650, 657 (1983); *Board of Regents* v. *Tomanio*, 446 U. S., at 484.

[18] Cf. *Occidental Life Insurance Co.* v. *EEOC*, 432 U. S. 355, 367 (1977) ("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").

[19] The problem we address today often arose in treble-damages litigation under the antitrust laws before Congress enacted a federal statute of limitations. 69 Stat. 283, 15 U. S. C. § 15b. The question whether antitrust

of characterization "is ultimately a question of federal law." *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 706 (1966) (§ 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185).[20] In *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), for example, we recently declined to apply a state statute of limitations when we were convinced that a federal statute of limitations for another cause of action better reflected the balance that Congress would have preferred between the substantive policies underlying the federal claim and the policies of repose.[21] So here, the federal interest in uniformity and the interest in having "firmly defined, easily applied rules," see *Chardon*, 462 U. S., at 667 (REHNQUIST, J., dissenting), support the conclusion that Congress intended the characterization of § 1983 to be measured by federal rather than state standards.[22] The Court of Appeals was

---

claims were more analogous to penal claims or to claims arising in tort, contract, or on a statute, was treated as a matter of federal law by the better reasoned authority. See, *e. g.*, *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 83 (CA2), cert. denied, 368 U. S. 821 (1961); *Fulton* v. *Loew's, Inc.*, 114 F. Supp. 676, 678–682 (Kan. 1953); *Electric Theater Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 941–942, (WD Mo. 1953); *Wolf Sales Co.* v. *Rudolf Wurlitzer Co.*, 105 F. Supp. 506, 509 (Colo. 1952).

[20] See also 383 U. S., at 709 (WHITE, J., dissenting) ("[T]he cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law. Rather, state law is applied only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires").

[21] "Nevertheless, 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." *DelCostello* v. *Teamsters*, 462 U. S., at 171–172. Cf. *Board of Regents* v. *Tomanio*, 446 U. S., at 488 ("[T]his Court has . . . 'borrowed' what *it considered to be* the most analogous state statute of limitations to bar tardily commenced proceedings") (emphasis added).

[22] The weight of federal authority is consistent with this view. See, *e. g.*, 731 F. 2d, at 643, 651, n. 5 (opinion below); *McNutt* v. *Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F. 2d 676, 679 (CA4

therefore correct in concluding that it was not bound by the New Mexico Supreme Court's holding in *DeVargas*.

III

A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.

The borrowing of statutes of limitations for § 1983 claims serves these policies of repose. Of course, the application of *any* statute of limitations would promote repose. By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action. However, when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463–464 (1975).

Thus, in considering whether all § 1983 claims should be characterized in the same way for limitations purposes, it is useful to recall that § 1983 provides "a uniquely federal rem-

---

1983) (§ 1981); *Pauk* v. *Board of Trustees of the City University of N. Y.*, 654 F. 2d 856, 865–866, and n. 6 (CA2 1981) (§ 1983), cert. denied, 455 U. S. 1000 (1982); *Clark* v. *Musick*, 623 F. 2d 89, 91 (CA9 1980) (§ 1983); *Williams* v. *Walsh*, 558 F. 2d 667, 672 (CA2 1977) (§ 1983); *Beard* v. *Stephens*, 372 F. 2d 685, 688 (CA5 1967); but see *Kosikowski* v. *Bourne*, 659 F. 2d 105, 108 (CA9 1981) (§ 1983). To the extent that federal courts have, on occasion, deferred to a State's characterization of § 1983 for statute of limitations purposes, they have done so as a matter of preference or comity—not obligation.

edy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972). The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language."[23] Because the § 1983 remedy is one that can "override certain kinds of state laws," *Monroe* v. *Pape*, 365 U. S. 167, 173 (1961), and is, in all events, "supplementary to any remedy any State might have," *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963), it can have no precise counterpart in state law. *Monroe* v. *Pape*, 365 U. S., at 196, n. 5 (Harlan, J., concurring). Therefore, it is "the purest coincidence," *ibid.*, when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.[24]

In this light, practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983.[25] Almost every § 1983 claim can be favorably analogized to more than one of the ancient

---

[23] *United States* v. *Price*, 383 U. S. 787, 801 (1966); cf. *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971).

[24] For this reason the adoption of one analogy rather than another will often be somewhat arbitrary; in such a case, the losing party may "infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly." 731 F. 2d, at 650.

[25] A comprehensive annotation in a publication that is popular with the practicing bar concludes that there is "uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations in § 1983 suits." Annot., 45 A. L. R. Fed. 548, 554 (1979). See also Biehler, Limiting the Right to Sue, 33 Drake L. Rev. 1 (1983); Comment, 1976 Ariz. State L. J. 97; Notes, 26 Wayne L. Rev. 61 (1979).

common-law forms of action, each of which may be governed by a different statute of limitations. In the case before us, for example, the respondent alleges that he was injured by a New Mexico State Police officer who used excessive force to carry out an unlawful arrest. This § 1983 claim is arguably analogous to distinct state tort claims for false arrest, assault and battery, or personal injuries. Moreover, the claim could also be characterized as one arising under a statute, or as governed by the special New Mexico statute authorizing recovery against the State for the torts of its agents.

A catalog of other constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights,[26] discharge or demotion without procedural due process,[27] mistreatment of schoolchildren,[28] deliberate indifference to the medical needs of prison inmates,[29] the seizure of chattels without advance notice or sufficient opportunity to be heard[30]—to identify only a few.[31] If the choice of the statute

---

[26] *E. g.*, *Burnett* v. *Grattan*, 468 U. S. 42 (1984).

[27] *E. g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532 (1985); *Bishop* v. *Wood*, 426 U. S. 341 (1976).

[28] *E. g.*, *Ingraham* v. *Wright*, 430 U. S. 651 (1977).

[29] *E. g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976).

[30] *E. g.*, *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982); *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149 (1978).

[31] JUSTICE BLACKMUN has summarized a few of the other causes of action that have been alleged under § 1983:

"In the First Amendment area, § 1983 was relied on for a challenge to state laws that required loyalty oaths, or prevented the wearing of armbands in protest of our policy in Vietnam. It was also used to restrain prosecutions under Louisiana's Subversive Activities and Communist Control Law. It was utilized by the NAACP to establish that organization's authority to advise Negroes of their legal rights. It was used to challenge bans on lawyer advertising and spending limitations on the public education activities of charities. . . . The case establishing that a welfare recipient has a right to notice and a hearing before his benefits are terminated was a § 1983 case. Along the same line, § 1983 cases have confirmed the due process rights of

of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same State,[32] and multiple periods of limitations would often apply to the same case.[33] There is no reason to believe

---

recipients of utility service [and] of employees entitled under state law to seek redress for unlawful discharge . . . . Section 1983 has been used to challenge mandatory maternity leave policies and state restrictions on social security benefits. The list includes challenges to state restrictions on the right to vote, from poll taxes and white primaries to unequal apportionment schemes. It includes a challenge to unequal age limitations for males and females on the sale of beer, and on limitations on the right to marry the person of one's choice. And it includes successful efforts by mental patients and by prisoners to achieve First Amendment freedoms . . . and due process rights while within institutional walls." Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, Madison Lecture delivered at New York University School of Law, Nov. 14, 1984 (to be published in 60 N. Y. U. L. Rev. 1, 19–20 (1985) (footnotes omitted)).

[32] For example, compare *McGhee* v. *Ogburn*, 707 F. 2d 1312, 1313 (CA11 1983) (2-year Florida statute), with *Williams* v. *Rhoden*, 629 F. 2d 1099, 1104 (CA5 1980) (4-year Florida statute); *Hines* v. *Board of Education of Covington, Ky.*, 667 F. 2d 564, 565 (CA6 1982) (1-year Kentucky statute), with *Garner* v. *Stephens*, 460 F. 2d 1144, 1148 (CA6 1972) (5-year Kentucky statute); and *Whatley* v. *Department of Education*, 673 F. 2d 873, 877 (CA5 1982) (20-year Georgia statute), with *Wooten* v. *Sanders*, 572 F. 2d 500, 501 (CA5 1978) (2-year Georgia statute).

[33] For example, in *Polite* v. *Diehl*, 507 F. 2d 119 (CA3 1974) (en banc), the plaintiff alleged that police officers unlawfully arrested him, beat him and sprayed him with mace, coerced him into pleading guilty to various offenses, and had his automobile towed away. The court held that a 1-year false arrest statute of limitations applied to the arrest claim, a 2-year personal injuries statute applied to the beating and coerced-plea claims, and a 6-year statute for actions seeking the recovery of goods applied to the towing claim. See also *Chambers* v. *Omaha Public School District*, 536 F. 2d 222, 227 (CA8 1976); *Beard* v. *Stephens*, 372 F. 2d 685, 689–690 (CA5 1967).

that Congress would have sanctioned this interpretation of its statute.

When § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace. The simplicity of the admonition in § 1988 is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.[34]

Although the need for national uniformity "has not been held to warrant the displacement of state statutes of limitations for civil rights actions," *Board of Regents* v. *Tomanio*, 446 U. S., at 489, uniformity within each State is entirely consistent with the borrowing principle contained in § 1988.[35] We conclude that the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.

---

[34] On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

[35] The Second and the Ninth Circuits emphasized the importance of uniformity in adopting a uniform characterization of § 1983 claims as claims arising on a statute. See *Pauk* v. *Board of Trustees of the City University of N. Y.*, 654 F. 2d, at 866; *Clark* v. *Musick*, 623 F. 2d, at 92; *Smith* v. *Cremins*, 308 F. 2d 187, 190 (CA9 1962). See also *Garmon* v. *Foust*, 668 F. 2d 400 (CA8) (en banc), cert. denied, 456 U. S. 998 (1982).

IV

After exhaustively reviewing the different ways that § 1983 claims have been characterized in every Federal Circuit, the Court of Appeals concluded that the tort action for the recovery of damages for personal injuries is the best alternative available. 731 F. 2d, at 650–651. We agree that this choice is supported by the nature of the § 1983 remedy, and by the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal civil rights remedy.

The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Briscoe* v. *LaHue*, 460 U. S. 325, 336–340 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents:

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong, 1st Sess., 374 (1871) (remarks of Rep. Lowe).[36]

[36] See also Cong. Globe, 42d Cong., 1st Sess., 321 (1871) (remarks of Rep. Stoughton); 332 (Rep. Hoar); 369–370 (Rep. Monroe); 389 (Rep. Elliott); 412–413 (Rep. E. Roberts); 428 (Rep. Beatty); 436–440 (Rep. Cobb); 516–517 (Rep. Shellabarger); 606 (Sen. Pool); 654 (Sen. Osborn); 691 (Sen. Edmunds).

By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.

The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983, *Monroe* v. *Pape*, 365 U. S., at 187, and in identifying the immunities available to defendants, *Briscoe* v. *LaHue*, 460 U. S., at 330; *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981); *Pierson* v. *Ray*, 386 U. S. 547, 553–557 (1967). As we have noted, however, the § 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty.

Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract. The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment[37] that unequivocally recognizes the equal status of every "*person*" subject to the jurisdiction of any of the several States. The Constitution's command is that all "*persons*" shall be accorded the full privileges of citizenship; no *person* shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

---

[37] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

Relying on the language of the statute, the Court of Appeals for the Fourth Circuit has succinctly explained why this analogy is persuasive:

> "In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'" *Almond* v. *Kent*, 459 F. 2d 200, 204 (1972).[38]

Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights.

The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many States. Section 1983, of course, is a statute, but it only provides a remedy and does not itself create any substantive rights. *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 617–618 (1979). Although a few § 1983 claims are based on statutory rights, *Maine* v. *Thiboutot*, 448 U. S. 1, 4–8 (1980), most involve much more. The rights enforceable under § 1983 include those guaranteed by the Federal Government in the Fourteenth Amendment: that every person within the United States is entitled to equal protection of the laws and to those "fundamental principles of liberty and justice" that are contained in the Bill of Rights and "lie at the base of all our civil and political institutions."[39] These guarantees of

---

[38] See also *McCausland* v. *Mason County Board of Education*, 649 F. 2d 278, 279 (CA4), cert. denied, 454 U. S. 1098 (1981). Cf. *Runyon* v. *McCrary*, 427 U. S. 160, 179–182 (1976) (affirming Court of Appeals' reliance on statute of limitations for "personal injuries" actions in 42 U. S. C. § 1981 claim).

[39] *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926); *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932); *Duncan* v. *Louisiana*, 391 U. S. 145, 148 (1968).

liberty are among the rights possessed by every individual in a civilized society, and not privileges extended to the people by the legislature.[40]

Finally, we are satisfied that Congress would not have characterized § 1983 as providing a cause of action analogous to state remedies for wrongs committed by public officials. It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place.[41] Congress therefore intended that the remedy provided in § 1983 be independently enforceable whether or not it duplicates a parallel state remedy. *Monroe* v. *Pape*, 365 U. S., at 173. The characterization of all § 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983. General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today,[42] and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

---

[40] "It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, person, and property. But we are not compelled to rest upon this inherent and undeniable right to protect our citizens. The Constitution of the United States contains an express grant of power coupled with an imperative injunction for its exercise." Cong. Globe, 42d Cong., 1st Sess., 322 (1871) (Rep. Stoughton). See also *id.*, at 339 (Rep. Kelley); 367–368 (Rep. Sheldon); 382 (Rep. Hawley); 475–476 (Rep. Dawes); 482 (Rep. Wilson); 691 (Sen. Edmunds).

[41] See *supra*, at 276–277. Also see the legislative history related in *Patsy* v. *Board of Regents*, 457 U. S. 496, 503–505 (1982); *Mitchum* v. *Foster*, 407 U. S. 225, 240–242 (1972); *McNeese* v. *Board of Education*, 373 U. S. 668, 671–672 (1963); *Monroe* v. *Pape*, 365 U. S. 167, 172–180 (1961); *id.*, at 196, and n. 5 (Harlan, J., concurring).

[42] See National Center for State Courts, State Court Caseload Statistics National Database, 1985.

V

In view of our holding that § 1983 claims are best characterized as personal injury actions, the Court of Appeals correctly applied the 3-year statute of limitations governing actions "for an injury to the person or reputation of any person." N. M. Stat. Ann. § 37–1–8 (1978). The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

JUSTICE O'CONNOR, dissenting.

Citing "practical considerations," the Court today decides to jettison a rule of venerable application and adopt instead one "simple, broad characterization of all § 1983 claims." *Ante*, at 272. Characterization of § 1983 claims is, I agree, a matter of federal law. But I see no justification, given our longstanding interpretation of 42 U. S. C. § 1988 and Congress' awareness of it, for abandoning the rule that courts must identify and apply the statute of limitations of the state claim most closely analogous to the particular § 1983 claim. In declaring that all § 1983 claims, regardless of differences in their essential characteristics, shall be considered most closely analogous to one narrow class of tort, the Court, though purporting to conform to the letter of § 1988, abandons the policies § 1988 embodies. I respectfully dissent.

I

The rule that a federal court adjudicating rights under § 1983 will adopt the state statute of limitations of the most closely analogous state-law claim traces its lineage to *M'Cluny* v. *Silliman*, 3 Pet. 270 (1830), *Campbell* v. *Haverhill*, 155 U. S. 610 (1895), and *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914). These opinions held that where "Congress . . . could have, by specific provision, prescribed a limitation, but no specific provision [was] adduced," *O'Sullivan* v. *Felix*,

supra, at 322, "Congress . . . intended to subject such action to the general laws of the State applicable to actions of a similar nature" and "intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction," *Campbell* v. *Haverhill*, *supra*, at 616. With respect to the borrowing of state law in § 1983 claims, Congress explicitly provided that, absent a suitable federal law provision,

> "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held . . . shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U. S. C. § 1988.

This Court has consistently interpreted § 1988 as instructing that the rule applicable to the analogous state claim shall furnish the rule of decision "so far as the same is not inconsistent with the Constitution and the laws of the United States." *Ibid.* See, *e. g.*, *Board of Regents* v. *Tomanio*, 446 U. S. 478 (1980); *Robertson* v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975). Cf. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966).

In *Johnson* v. *Railway Express Agency*, *supra*, the Court described the policies behind Congress' decision to borrow the most appropriate state limitations period:

> "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 prosecution of stale ones. . . . 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 . . . on the prosecution of a closely analogous claim." 421 U. S., at 463–464.

See also *Board of Regents* v. *Tomanio*, *supra*; *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828) (Story, J.) (statutes of limitations guard against "stale demands, after the true state of the transaction may have been forgotten"). Plainly the legislative judgment to which this Court has traditionally deferred is not some purely arbitrary imposition of a conveniently uniform time limit. For example, a legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose. See *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979); *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 426–427 (1965). See, *e. g.*, 42 Pa. Cons. Stat. Ann. (Purdon, vol. covering §§ 101–1700, 1981), pp. xvi–xvii (limitations periods revised "to conform to the modern principle that claims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations, so as to bring them to trial . . . before memories have faded").

Despite vocal criticism of the "confusion" created by individualized statutes of limitations, most Federal Courts of Appeals and state courts have continued the settled practice of seeking appropriate factual analogies for each genus of § 1983 claim. See, *e. g.*, *Gashgai* v. *Leibowitz*, 703 F. 2d 10 (CA1 1983); *McClam* v. *Barry*, 225 U. S. App. D. C. 124, 697 F. 2d 366 (1983), overruled on other grounds, *Brown* v. *United States*, 239 U. S. App. D. C. 345, 742 F. 2d 1498 (1984); *Blake* v. *Katter*, 693 F. 2d 677 (CA7 1982); *White* v. *United Parcel Service*, 692 F. 2d 1 (CA5 1982); *Kilgore* v. *City of Mansfield, Ohio*, 679 F. 2d 632 (CA6 1982); *Polite* v. *Diehl*, 507 F. 2d 119 (CA3 1974) (en banc); *Miller* v. *City of Overland Park*, 231 Kan. 557, 646 P. 2d 1114 (1982); *Sena School Bus Co.* v. *Santa Fe Board of Education*, 677 P. 2d 639 (N. M. App. 1984); *Arquette* v. *Hancock*, 656 S. W. 2d 627 (Tex. App. 1983); *Moore* v. *McComsey*, 313 Pa. Super.

264, 459 A. 2d 841 (1983); *Leese* v. *Doe*, 182 N. J. Super. 318, 440 A. 2d 1166 (1981). As these courts have recognized:

> "The variety of possible claims that might be brought under section 1983 is unlimited, ranging from simple police brutality to school desegregation cases. To impose one statute of limitations for actions so diverse would be to disregard the unanimous judgments of the states that periods of limitations should vary with the subject matter of the claim. While the present system of reference to these many state limits is not perfect in operation, it surely preserves some of the judgments that have been made about what appropriate periods of limitation should be for causes of action diverse in nature." Note, Choice of Law Under Section 1983, 37 U. Chi. L. Rev. 494, 504 (1970).

II

The majority concedes that "[b]y adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Ante*, at 271. Yet the Court posits, without any serious attempt at explanation, that a § 1983 claim differs so fundamentally from a state-law cause of action that "any analogies to those causes of action are bound to be imperfect." *Ante*, at 272. The only fundamental differences the Court identifies—§ 1983's "uniqueness," its "high purposes," its "supplementary" nature—in no way explain the determination that a single inflexible analogy should govern what the Court concedes is the "wide diversity" of claims the § 1983 remedy embraces. *Ante*, at 275.

Thus with hardly a backward look, the majority leaves behind a century of precedent. See, *e. g.*, *Campbell* v. *Haverhill*, 155 U. S. 610 (1895). Inspired by "the federal interests in uniformity, certainty, and the minimization of unnecessary

litigation," the Court suddenly discovers that § 1988 "is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims." *Ante*, at 275. This fact, of course, escaped the drafters of the Civil Rights Acts, who referred the courts only to general state-law principles. Groping to discern what the 42d Congress would have done had it "expressly focused on the issue decided today," the Court "believes" that "the 42d Congress . . . would have characterized § 1983 as conferring a general remedy for injuries to personal rights." *Ante*, at 278.

The Court's all-purpose analogy is appealing; after all, every compensable injury, whether to constitutional or statutory rights, through violence, deception, or broken promises, to the person's pocketbook, person, or dignity, might plausibly be described as a "personal injury." But so sweeping an analogy is no analogy at all. In all candor, the Court has perceived a need for uniformity and has simply seized the opportunity to legislate it. The Court takes this step even though a number of bills proposed to recent Congresses to standardize § 1983 limitations periods have failed of enactment, see, *e. g.*, S. 436, 99th Cong., 1st Sess. (1985); S. 1983, 96th Cong., 1st Sess. (1979); H. R. 12874, 94th Cong., 2d Sess. (1976), a fact that the Court would normally interpret as a persuasive indication that Congress does not agree that concerns for uniformity dictate a unitary rule. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 565 (1980) ("[C]aution must temper judicial creativity in the face of . . . legislative silence"); *Robertson* v. *Wegmann*, 436 U. S., at 593, and n. 11; *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S., at 704.

As well as co-opting federal legislation, the Court's decision effectively forecloses legislative creativity on the part of the States. Were a State now to formulate a detailed statutory scheme setting individualized limitations periods for various § 1983 claims, drawing upon policies regarding the timeliness of suits for assault, libel, written contract, employment dis-

putes, and so on, the Supremacy Clause would dictate that the blunt instrument announced today must supersede such legislative fine-tuning. Presumably, today's decision would pre-empt such legislation even if the State's limitations period in a given case were *more* generous than the tort rule that the Court today mandates invariably shall apply. In the case of *Blake* v. *Katter*, 693 F. 2d 677 (CA7 1982), for example, a plaintiff who claimed deprivation of liberty through false arrest enjoyed the benefit of Indiana's generous 5-year statute for claims against public officials. The same plaintiff would now find his § 1983 cause of action foreclosed by the comparatively meager 2-year statute governing injuries to the person. *Id.*, at 679–680.

In exchange for the accrued, collective wisdom of many legislatures, *Bell* v. *Morrison*, 1 Pet., at 360, the Court gains only a half measure of uniformity. The Court has heretofore wisely disavowed uniformity as a value not warranting "displacement of state statutes of limitations for civil rights actions." See *Board of Regents* v. *Tomanio*, 446 U. S., at 489; *Robertson* v. *Wegmann*, *supra*, at 584–585, and n. 11. True, the Court's decision means that all § 1983 claims in a given State must be brought within a single set period. Yet even the promise of uniformity within each State is illusory. In achieving statewide symmetry among civil rights claims the Court creates fresh problems of asymmetry that are of far greater moment to the local practitioner. Any lawyer knows that § 1983 claims do not occur in splendid isolation; they are usually joined with claims under state tort or contract law arising out of the same facts. In the end, today's decision saves neither judges nor local practitioners any headaches, since for 150 years characterization of the state law claims with reference to the relevant facts has been a routine prerequisite to establishing the applicable statute of limitations. As one state high court noted:

> "We do not believe that it was the intent of Congress in enacting § 1983 to establish a cause of action with a

different statute of limitations than that provided by the state for common law or state statutory action on the identical set of facts." *Miller* v. *City of Overland Park*, 231 Kan., at 560–562, 646 P. 2d, at 1116–1118.

Accord, *Campbell* v. *Haverhill*, 155 U. S., at 616. Such will be the inevitable result of the Court's decision. For example, under the newly revised Pennsylvania statutory scheme at issue in today's companion case, *Springfield Township School District* v. *Knoll*, *post*, p. 288, a state law claim for libel or slander will be stale in one year, 42 Pa. Cons. Stat. § 5523(1)(1982), but a § 1983 claim based on the same facts can still be filed after two years, § 5524(2). More puzzling still, a § 1983 claim for violation of constitutional rights arising out of a breach of contract will be foreclosed in two years but its state law counterpart based on the identical breach will remain fresh and litigable at six years. § 5527(2). This sort of half-baked uniformity is a poor substitute for the careful selection of the appropriate state law analogy.

Today's decision does not so much resolve confusion as banish it to the lower courts. The Court's new analogy lacks any magical power to conjure uniformity where diversity is the natural order. In fact, the rule the Court adopts failed in application literally before the ink of the Tenth Circuit's decision was dry. The decision of the Court of Appeals for the Tenth Circuit in this case, affirmed today, was only one of four handed down on the same day in a valiant attempt to fix limitations periods for the entire Tenth Circuit. Kansas law conveniently supplied a 2-year statute for "injury to the rights of another," see *Hamilton* v. *City of Overland Park*, 730 F. 2d 613 (1984); but Utah law contained no such provision, see *Mismash* v. *Murray City*, 730 F. 2d 1366 (1984) (selecting Utah's 4-year residuary statute, absent any statute for personal injury). Colorado law defied the newly minted rule by supplying not one but *two* periods that govern various injuries to personal rights. *McKay* v. *Hammock*, 730 F. 2d 1367 (1984). The Tenth Circuit resolved its dilemma by

declaring both limitations periods "irrelevant" and instead selecting Colorado's 3-year residuary statute. *Id.*, at 1370. As these cases demonstrate, there is no guarantee state law will obligingly supply a limitations period to match an abstract analogy that may have little relevance to the forum State's limitations scheme.

As Professor Mishkin remarked regarding federal choice-of-law rules, often "the call for 'uniformity'" is not so much grounded in any practical necessity as in a "desire for symmetry of abstract legal principles and a revolt against the complexities of a federated system." 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, 813 (1957). See also Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 539–540 (1954) (we must have "the wit not to be deluded by little-minded assumptions about the value of uniformity and symmetrical organization charts," *id.*, at 542). Though the task of characterization is admittedly not "uncomplicated," *ante*, at 275, it is nevertheless a routine feature of state procedural law, a task that is handled daily by the same judges, lawyers, and litigants as rely on § 1983, often in the same actions. It was Congress' choice in 1866, when it incorporated by reference "the common law, as modified . . . by . . . the statutes of the [forum] State," to forgo legislating a simplistic rule and to entrust judges with the task of integrating a federal remedy into a federal system.

Therefore, I would reverse the Court of Appeals' scholarly but ultimately flawed attempt to impose a single state limitations period for all § 1983 claims. Because I would apply the statute of limitations New Mexico applies to state claims directly analogous to the operative facts of this case, I respectfully dissent.

SPRINGFIELD TOWNSHIP SCHOOL DISTRICT ET AL. *v.* KNOLL

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

No. 82–1889. Argued January 14, 1985—Decided April 17, 1985

Respondent filed suit in Federal District Court on April 21, 1981, under 42 U. S. C. § 1983, alleging that petitioner School District, in August 1979, May 1980, and December 1980, had discriminated against her on the basis of sex in failing to promote her to an administrative position. The court dismissed the § 1983 claim because it was not brought within the 6-month limitations period under the Pennsylvania statute applicable to actions against a government official for acts done in the execution of his office. The Court of Appeals reversed, holding that the 6-year "residuary" provision of the Pennsylvania limitations scheme was applicable.

Held: The Court of Appeals' judgment is vacated, and the case is remanded for further consideration in the light of the decision in *Wilson* v. *Garcia*, *ante*, p. 261, that all § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person.

699 F. 2d 137, vacated and remanded.

Charles Potash argued the cause for petitioners. With him on the brief was *Harris F. Goldich*.

Robert H. Chanin argued the cause for respondent. With him on the brief were *Michael H. Gottesman*, *Robert M. Weinberg*, and *Jeremiah A. Collins*.*

PER CURIAM.

On April 21, 1981, respondent commenced this action alleging, in part, that the petitioner School District discriminated

---

*A brief for the State of Pennsylvania et al. as *amici curiae* urging reversal was filed by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Andrew S. Gordon* and *Allen C. Warshaw*, Senior Deputy Attorneys General, and by the Attorneys General of their respective States as follows: *Michael A. Lilly* of Hawaii, *Robert T. Stephan* of Kansas, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Gregory H. Smith* of New Hampshire, *Rufus L. Edmisten* of North Carolina, and *Anthony Celebrezze* of Ohio.

against her on the basis of sex in failing to promote her to an administrative position. She sought equitable and compensatory relief under 42 U. S. C. § 1983 for the alleged acts of discrimination which occurred in August 1979, May 1980, and September 1980.

The District Court dismissed the § 1983 claim because it was not brought within the 6-month limitations period which applies to

> "[a]n action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter." 42 Pa. Cons. Stat. § 5522(b)(1) (1982).

The Court of Appeals reversed, holding that the "application of the six-month limitations period would be inconsistent with the policies and legislative history underlying § 1983" and that "the six-year residuary provision of the limitations scheme should govern this dispute." 699 F. 2d 137, 139 (CA3 1983). We granted certiorari, 468 U. S. 1204 (1984), and heard argument.

The judgment of the Court of Appeals is now vacated, and the case is remanded for further consideration in light of our decision in *Wilson* v. *Garcia*, *ante*, p. 261, in which we have held that all § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person.

It is so ordered.

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

TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* SECRETARY OF LABOR

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

No. 83–1935. Argued March 25, 1985—Decided April 23, 1985

Petitioner Foundation is a nonprofit religious organization that derives its income largely from the operation of commercial businesses staffed by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits. The Secretary of Labor filed an action in Federal District Court against the Foundation and petitioner officers thereof, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act (Act). The District Court held that the Foundation was an "enterprise" within the meaning of 29 U. S. C. § 203(r), which defines that term as "the related activities performed . . . by any person or persons for a common business purpose," that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, and that under the "economic reality" test of employment the associates were "employees" of the Foundation protected by the Act. The court rejected petitioners' arguments that application of the Act to the Foundation violated the Free Exercise and Establishment Clauses of the First Amendment. The Court of Appeals affirmed as to liability.

Held:

1. The Foundation's businesses constitute an "enterprise" within the meaning of the Act and are not beyond the Act's reach because of the Foundation's religious character. This Court has consistently construed the Act liberally in recognition that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency. The Act contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations, and the Labor Department has consistently interpreted the Act to reach such businesses. And this interpretation is supported by the legislative history. Pp. 295–299.

2. The Foundation's associates are "employees" within the meaning of the Act, because they work in contemplation of compensation. *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, distinguished. The fact that

the associates themselves protest coverage under the Act is not dispositive, since the test of employment under the Act is one of "economic reality." And the fact that the compensation is primarily in the form of benefits rather than cash is immaterial in this context, such benefits simply being wages in another form. Pp. 299–303.

3. Application of the Act to the Foundation does not infringe on rights protected by the Religion Clauses of the First Amendment. The Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. Here, since the Act does not require the payment of cash wages and the associates received wages in the form of benefits in exchange for working in the Foundation's businesses, application of the Act works little or no change in the associates' situation; they may simply continue to be paid in the form of benefits. But even if they were paid in cash and their religious beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent them from voluntarily returning the amounts to the Foundation. And since the Act's recordkeeping requirements apply only to commercial activities undertaken with a "business purpose," they would have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations. Pp. 303–306.

722 F. 2d 397, affirmed.

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

Roy Gean, Jr., argued the cause for petitioners. With him on the briefs was *Roy Gean III*.

Charles Fried argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Michael W. McConnell*, *Karen I. Ward*, *Sandra Lord*, and *Barbara J. Johnson*.*

JUSTICE WHITE delivered the opinion of the Court.

The threshold question in this case is whether the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, apply to workers engaged in the com-

---

**Burt Neuborne* and *Charles S. Sims* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

mercial activities of a religious foundation, regardless of whether those workers consider themselves "employees." A secondary question is whether application of the Act in this context violates the Religion Clauses of the First Amendment.

I

The Tony and Susan Alamo Foundation is a nonprofit religious organization incorporated under the laws of California. Among its primary purposes, as stated in its Articles of Incorporation, are to "establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity."[1] The Foundation does not solicit contributions from the public. It derives its income largely from the operation of a number of commercial businesses, which include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy.[2] These activities have been supervised by petitioners Tony and Susan Alamo, president and secretary-treasurer of the Foundation, respectively.[3] The businesses are staffed largely by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.

---

[1] App. to Brief for Petitioners 2.

[2] The District Court found that the Foundation operates 4 businesses in California, 30 businesses in Arkansas, 3 businesses in Tennessee, and a motel in Tempe, Arizona. See 567 F. Supp. 556, 559–561 (WD Ark. 1983). The Foundation also receives income from the donations of its associates. *Id.*, at 562.

[3] Susan Alamo was named as a defendant and as a petitioner in this Court, but died after the suit was filed.

In 1977, the Secretary of Labor filed an action against the Foundation, the Alamos, and Larry La Roche, who was then the Foundation's vice president, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act, 29 U. S. C. §§ 206(b), 207(a), 211(c), 215(a)(2), (a)(5), with respect to approximately 300 associates.[4] The United States District Court for the Western District of Arkansas held that the Foundation was an "enterprise" within the meaning of 29 U. S. C. § 203(r), which defines that term as "the related activities performed . . . by any person or persons for a common business purpose." 567 F. Supp. 556 (1983). The District Court found that despite the Foundation's incorporation as a nonprofit religious organization, its businesses were "engaged in ordinary commercial activities in competition with other commercial businesses." *Id.*, at 573.

The District Court further ruled that the associates who worked in these businesses were "employees" of the Alamos and of the Foundation within the meaning of the Act. The associates who had testified at trial had vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons. Nevertheless, the District Court found that the associates were "entirely dependent upon the Foundation for long periods." Although they did not expect compensation in the form of ordinary wages, the District Court found, they did expect the Foundation to provide them "food, shelter, clothing, transportation and medical benefits." *Id.*, at 562. These benefits were simply wages in another form, and under the "economic reality" test of employment, see *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U. S. 28,

[4] The Secretary also charged petitioners with failing to pay overtime wages to certain "outside" employees. The District Court made findings regarding these claims, all but one of which were upheld by the Court of Appeals. The parties have not sought review of that portion of the judgment.

33 (1961),[5] the associates were employees. The District Court also rejected petitioners' arguments that application of the Act to the Foundation violated the Free Exercise and Establishment Clauses of the First Amendment, and the court found no evidence that the Secretary had engaged in unconstitutional discrimination against petitioners in bringing this suit.[6]

The Court of Appeals for the Eighth Circuit affirmed the District Court's holding as to liability, but vacated and remanded as to the appropriate remedy. 722 F. 2d 397 (1984).[7] The Court of Appeals emphasized that the businesses operated by the Foundation serve the general public, in competition with other entrepreneurs. Under the "economic reality" test, the court held,

> "it would be difficult to conclude that the extensive commercial enterprise operated and controlled by the foundation was nothing but a religious liturgy engaged in bringing good news to a pagan world. By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The

---

[5] See also *United States* v. *Silk*, 331 U. S. 704, 713 (1947); *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, 729 (1947).

[6] The District Court enjoined petitioners from failing to comply with the Act and ordered that all former associates and others who had worked in the businesses covered by the Act be advised of their eligibility to submit a claim to the Secretary. The Secretary was to submit a proposed finding of back wages due each claimant, "less applicable benefits" that had been provided by the Foundation. 567 F. Supp., at 577. The Secretary appealed the remedial portions of the District Court's order.

[7] See n. 6, *supra*. The Court of Appeals held that the District Court should have calculated back wages due instead of requiring associates to initiate backpay proceedings. 722 F. 2d, at 404–405. On remand, in an unpublished order, the District Court identified specific associates due back wages and ordered the Secretary to submit a proposed judgment. Following this Court's grant of a writ of certiorari, the District Court "administratively terminate[d]" the action pending this Court's decision. Brief for Respondent 12, n. 8.

requirements of the Fair Labor Standards Act apply to its laborers." *Id.*, at 400.

Like the District Court, the Court of Appeals also rejected petitioners' constitutional claims. We granted certiorari, 469 U. S. 915 (1984), and now affirm.

II

In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must constitute an "[e]nterprise engaged in commerce or in the production of goods for commerce." 29 U. S. C. § 203(s).[8] Second, the associates must be "employees" within the meaning of the Act. While the statutory definition is exceedingly broad, see *United States* v. *Rosenwasser*, 323 U. S. 360, 362–363 (1945), it does have its limits. An individual who, "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is outside the sweep of the Act. *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 152 (1947).[9]

A

Petitioners contend that the Foundation is not an "enterprise" within the meaning of the Act because its activities are

---

[8] Employment may be covered under the Act pursuant to either "individual" or "enterprise" coverage. Prior to the introduction of enterprise coverage in 1961, the only individuals covered under the Act were those engaged directly in interstate commerce or in the production of goods for interstate commerce. Enterprise coverage substantially broadened the scope of the Act to include any employee of an enterprise engaged in interstate commerce, as defined by the Act. The Secretary did not proceed on the basis that the associates are within the scope of individual coverage.

[9] The Court of Appeals omitted this second step of the inquiry, although it mentioned in passing that the associates expected to receive and were dependent on the in-kind benefits. 722 F. 2d, at 399. The District Court's findings on this question are sufficiently clear, however, that a remand is unnecessary.

not performed for "a common business purpose."[10] In support of this assertion, petitioners point to the fact that the Internal Revenue Service has certified the Foundation as tax-exempt under 26 U. S. C. § 501(c)(3), which exempts "any . . . foundation . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."[11]

The Court has consistently construed the Act "liberally to apply to the furthest reaches consistent with congressional direction," *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U. S. 207, 211 (1959), recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency. *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 516 (1950).[12] The statute contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations,[13]

---

[10] Section 203(r) defines "enterprise" in pertinent part as

"the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor."

Petitioners do not dispute that the Foundation's various activities are performed "through . . . common control." Nor do they quarrel with the District Court's finding that the Foundation's annual gross volume of sales exceeds $250,000, as required by § 203(s)(1). See 567 F. Supp., at 561.

[11] The Internal Revenue Service has apparently not determined whether petitioners' commercial activities are "unrelated business" subject to taxation under 26 U. S. C. §§ 511–513. See App. to Brief for Petitioners 14; Tr. of Oral Arg. 30.

[12] See also *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961); *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722 (1947); *United States* v. *Rosenwasser*, 323 U. S. 360 (1945).

[13] Cf. *Powell* v. *United States Cartridge Co.*, 339 U. S., at 517 (exemptions from the Act are "narrow and specific," implying that "employees not thus exempted . . . remain within the Act").

and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses. The Labor Department's regulation defining "business purpose," which is entitled to considerable weight in construing the Act, explicitly states:

> "Activities of eleemosynary, religious, or educational organization *[sic]* may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise." 29 CFR § 779.214 (1984).

See also *Marshall* v. *Woods Hole Oceanographic Institution*, 458 F. Supp. 709 (Mass. 1978); *Marshall* v. *Elks Club of Huntington, Inc.*, 444 F. Supp. 957, 967–968 (SD W. Va. 1977). Cf. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (CA7), cert. denied, 347 U. S. 1013 (1954).

The legislative history of the Act supports this administrative and judicial gloss. When the Act was broadened in 1961 to cover "enterprises" as well as individuals, the Senate Committee Report indicated that the activities of nonprofit groups were excluded from coverage only insofar as they were not performed for a "business purpose."[14] Some illumination of congressional intent is provided by the debate on a proposed floor amendment that would have specifically excluded from the definition of "employer," see 29 U. S. C. § 203(d), organizations qualifying for tax exemption under 26

---

[14] The Senate Committee Report, in discussing the "common business purpose" requirement, states:

"[T]he definition would not include eleemosynary, religious, or educational organizations not operated for profit. The key word in the definition which supports this conclusion is the word 'business.' Activities of organizations of the type referred to, if they are not operated for profit, are not activities performed for a 'business' purpose." S. Rep. No. 1744, 86th Cong., 2d Sess., 28 (1960).

U. S. C. § 501(c)(3).[15] The floor manager of the bill opposed the amendment because it might have been interpreted to "g[o] beyond the language of the [Committee] report" by excluding a "profitmaking corporation or company" owned by "an eleemosynary institution."[16] The proponent of the failed amendment countered that it would not have excluded "a church which has a business operation on the side."[17] There was thus broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations.[18]

Petitioners further contend that the various businesses they operate differ from "ordinary" commercial businesses because they are infused with a religious purpose. The businesses minister to the needs of the associates, they contend, both by providing rehabilitation and by providing them with food, clothing, and shelter. In addition, petitioners argue, the businesses function as "churches in disguise"—vehicles

---

[15] 106 Cong. Rec. 16704 (1960).

[16] *Ibid.* (remarks of Sen. Kennedy).

[17] *Id.*, at 16703 (remarks of Sen. Goldwater). The following year, when the expansion of the Fair Labor Standards Act was again considered and this time enacted, Senator Curtis proposed the same amendment that Senator Goldwater had unsuccessfully introduced. The amendment was once more rejected. Senator McNamara, Chairman of the Senate Education and Labor Committee, opposed the amendment on the ground that it would remove from the protection of the Act employees of nonprofit organizations who were engaged in "activities which compete with private industry to such a degree that the competition would have a very adverse effect on private industry. . . . [W]hen such industry comes into competition in the marketplace with private industry, we say that their work is not charitable organization work." 107 Cong. Rec. 6255 (1961). See also H. R. Rep. No. 75, 87th Cong., 1st Sess., 8 (1961); S. Rep. No. 145, 87th Cong., 1st Sess., 41 (1961).

[18] Because we perceive no "significant risk" of an infringement on First Amendment rights, see *infra*, at 303–306, we do not require any clearer expression of congressional intent to regulate these activities. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979).

for preaching and spreading the gospel to the public. See Brief for Petitioners 27–28. The characterization of petitioners' businesses, however, is a factual question resolved against petitioners by both courts below, and therefore barred from review in this Court "absent the most exceptional circumstances."[19] The lower courts clearly took account of the religious aspects of the Foundation's endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope. Both courts found that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, see 722 F. 2d, at 400; 567 F. Supp., at 573, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method of competition" that the Act was intended to prevent, see 29 U. S. C. § 202(a)(3), and the admixture of religious motivations does not alter a business' effect on commerce.

B

That the Foundation's commercial activities are within the Act's definition of "enterprise" does not, as we have noted, end the inquiry. An individual may work for a covered enterprise and nevertheless not be an "employee." In *Walling* v. *Portland Terminal Co.*, 330 U. S. 148 (1947), the Court held that individuals being trained as railroad yard brakemen—individuals who unquestionably worked in "the kind of activities covered by the Act"[20]—were not "employees." The trainees enrolled in a course lasting approximately seven or eight days, during which time they did some actual work

---

[19] *Branti* v. *Finkel*, 445 U. S. 507, 512, n. 6 (1980).

[20] 330 U. S., at 150. Since *Walling* was decided before the advent of "enterprise coverage," see n. 8, *supra*, the Court's remark must have been premised on the fact that railroad brakemen work directly in interstate commerce.

under close supervision. If, after completion of the training period, the trainees obtained permanent employment with the railroad, they received a retroactive allowance of four dollars for each day of the course. Otherwise, however, they neither received or expected any remuneration. *Id.*, at 150. The Court held that, despite the comprehensive nature of the Act's definitions,[21] they were "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." The trainees were in much the same position as students in a school. Considering that the trainees' employment did not "contemplate . . . compensation," and accepting the findings that the railroads received "'no immediate advantage' from any work done by the trainees," the Court ruled that the trainees did not fall within the definition of "employee." *Id.*, at 153.

Relying on the affidavits and testimony of numerous associates, petitioners contend that the individuals who worked in the Foundation's businesses, like the trainees in *Portland Terminal*, expected no compensation for their labors. It is true that the District Court found that the Secretary had "failed to produce any past or present associate of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than 'volunteering' his services to the Foundation." 567 F. Supp., at 562. An associate characterized by the District Court as typical "testified convincingly that she considered her work in the Foundation's businesses as part of her ministry," and that she did not work for material rewards. *Ibid.* This same

[21] The Act defines "employ" as including "to suffer or permit to work" and "employee" as (with certain exceptions not relevant here) "any individual employed by an employer." 29 U. S. C. §§ 203(g), (e). See *Rutherford Food Corp.*, 331 U. S., at 728; *Rosenwasser*, 323 U. S., at 362–363, and n. 3 (quoting Sen. Black as stating that the term "employee" had been given "the broadest definition that has ever been included in any one act," 81 Cong. Rec. 7657 (1935)).

associate also testified that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul." App. 79.

Nevertheless, these protestations, however sincere, cannot be dispositive. The test of employment under the Act is one of "economic reality," see *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U. S., at 33, and the situation here is a far cry from that in *Portland Terminal.* Whereas in *Portland Terminal,* the training course lasted a little over a week, in this case the associates were "entirely dependent upon the Foundation for long periods, in some cases several years." 567 F. Supp., at 562. Under the circumstances, the District Court's finding that the associates must have expected to receive in-kind benefits—and expected them in exchange for their services—is certainly not clearly erroneous.[22] Under *Portland Terminal,* a compensation agreement may be "implied" as well as "express," 330 U. S., at 152, and the fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are, as the District Court stated, wages in another form.[23]

---

[22] Former associates called by the Secretary as witnesses testified that they had been "fined" heavily for poor job performance, worked on a "commission" basis, and were prohibited from obtaining food from the cafeteria if they were absent from work—even if the absence was due to illness or inclement weather. App. 148–149, 146, 153, 218–219. These former associates also testified that they sometimes worked as long as 10 to 15 hours per day, 6 or 7 days per week. This testimony was contradicted in part by petitoners' witnesses, who were current associates. See 567 F. Supp., at 562. Even their testimony, however, was somewhat ambiguous. Ann Elmore, for example, testified that the thought of receiving compensation was "vexing to [her] soul." But in the same paragraph, in answer to a question as to whether she expected the benefits, she stated that "the benefits are just a matter of—of course, we went out and we worked for them." App. 78–79.

[23] The Act defines "wage" as including board, food, lodging, and similar benefits customarily furnished by the employer to the employees. As the

That the associates themselves vehemently protest coverage under the Act makes this case unusual,[24] but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Cf. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981); *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945). Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses. As was observed in *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 252–254 (1945), it was there essential to uphold the Wage and Hour Administrator's authority to ban industrial homework in the embroideries industry, because "if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage."

Nor is there any reason to fear that, as petitioners assert, coverage of the Foundation's business activities will lead to coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy. See Brief for Petitioners 24–25. The Act reaches only the "ordinary commercial activities" of religious organizations, 29 CFR § 779.214 (1984), and only those who engage in those activities in expectation of compensation.

District Court recognized, an employer is entitled to credit for the reasonable cost of these benefits. 567 F. Supp., at 563, 577; see 29 U. S. C. § 203(m).

[24] Cf. *Van Schaick* v. *Church of Scientology*, 535 F. Supp. 1125 (Mass. 1982); *Turner* v. *Unification Church*, 473 F. Supp. 367 (RI 1978), aff'd, 602 F. 2d 458 (CA1 1979) (FLSA claims brought by former church members).

Ordinary volunteerism is not threatened by this interpretation of the statute.[25]

III

Petitioners further contend that application of the Act infringes on rights protected by the Religion Clauses of the First Amendment. Specifically, they argue that imposition of the minimum wage and recordkeeping requirements will violate the rights of the associates to freely exercise their religion[26] and the right of the Foundation to be free of excessive government entanglement in its affairs. Neither of these contentions has merit.

It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252, 256–257 (1982); *Thomas* v. *Review Board, Indiana Employment Security Div.*, 450 U. S. 707, 717–718 (1981). Petitioners claim that the receipt of "wages" would violate the religious convictions of the associates.[27] The Act, however, does not require

---

[25] The Solicitor General states that in determining whether individuals have truly volunteered their services, the Department of Labor considers a variety of factors, including the receipt of any benefits from those for whom the services are performed, whether the activity is a less than full-time occupation, and whether the services are of the kind typically associated with volunteer work. The Department has recognized as volunteer services those of individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth. See Brief for Respondent 4–5, and n. 3.

[26] Petitioner Larry La Roche is an associate and a former vice-president of the Foundation. The Foundation also has standing to raise the free exercise claims of the associates, who are members of the religious organization as well as employees under the Act. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 458–459 (1958). But cf. *Donovan* v. *Shenandoah Baptist Church*, 573 F. Supp. 320, 325–326 (WD Va. 1983).

[27] Petitioners point to the following testimony by two associates deemed representative by the District Court:

the payment of cash wages. Section 203(m) defines "wage" to include "the reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities." See n. 23, *supra*. Since the associates currently receive such benefits in exchange for working in the Foundation's businesses, application of the Act will work little or no change in their situation: the associates may simply continue to be paid in the form of benefits. The religious objection does not appear to be to receiving any specified *amount* of wages. Indeed, petitioners and the associates assert that the associates' standard of living far exceeds the minimum.[28] Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily.[29] We therefore fail to perceive how application of the Act would interfere with the associates' right to

---

"And no one ever expected any kind of compensation, and the thought is totally vexing to my soul. It would defeat my whole purpose." App. 79 (testimony of Ann Elmore).

"I believe it would be offensive to me to even be considered to be forced to take a wage. . . . I believe it offends my right to worship God as I choose." *Id.*, at 62–63 (testimony of Bill Levy).

Petitioners also argue that the recordkeeping requirements of the Act, 29 U. S. C. § 211, will burden the exercise of the associates' religious beliefs. This claim rests on a misreading of the Act. Section 211 imposes recordkeeping requirements on the employer, not on the employees.

[28] See App. 62, 89 (testimony of Bill Levy and Edward Mick); Brief for Petitioners 33. The actual value of the benefits provided to associates—a matter of heated dispute below—was determined by the District Court to average somewhat over $200 a month per associate. 567 F. Supp., at 566–570.

[29] Counsel for petitioners stated at oral argument that the associates would either fail to claim the backpay that was due them or simply return it to the Foundation. Tr. of Oral Arg. 25, 46. Counsel argued that this fact undermined the Secretary's argument that he had a "compelling interest" in applying the Act, but it is also indicative of how slight a change application of the Act would effect in the current state of affairs.

freely exercise their religious beliefs. Cf. *United States* v. *Lee*, *supra*, at 257.

Petitioners also argue that application of the Act's record-keeping requirements would have the "primary effect" of inhibiting religious activity and would foster "'an excessive government entanglement with religion,'" thereby violating the Establishment Clause. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (quoting *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970)).[30] The Act merely requires a covered employer to keep records "of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." 29 U. S. C. § 211(c). Employers must also preserve these records and "make such reports therefrom from time to time to the Administrator as he shall prescribe." *Ibid.* These requirements apply only to commercial activities undertaken with a "business purpose," and would therefore have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations. And the routine and factual inquiries required by § 211(c) bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.[31] The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, see *Lemon*, *supra*, at 614, and the recordkeeping requirements of the Fair Labor Standards Act, while

---

[30] Under the *Lemon* test, the criteria to be used in determining whether a statute violates the Establishment Clause are whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters excessive government entanglement with religion. 403 U. S., at 612–613. No one here contends that the Fair Labor Standards Act has anything other than secular purposes.

[31] See *Meek* v. *Pittenger*, 421 U. S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.[32]

IV

The Foundation's commercial activities, undertaken with a "common business purpose," are not beyond the reach of the Fair Labor Standards Act because of the Foundation's religious character, and its associates are "employees" within the meaning of the Act because they work in contemplation of compensation. Like other employees covered by the Act, the associates are entitled to its full protection. Furthermore, application of the Act to the Foundation's commercial activities is fully consistent with the requirements of the First Amendment. The judgment below is accordingly

Affirmed.

---

[32] Petitioners also argue that application of the Act to them denies them equal protection of the laws because the Foundation's treatment of its associates is no different from the Government's treatment of its own volunteer workers, such as those enrolled in the ACTION program. The respondent aptly characterizes this claim as "frivolous." Brief for Respondent 46. The activities of federal volunteers are directly supervised by the Government, unlike the activities of those alleged to be volunteering their services to private entities. Furthermore, work in Government volunteer programs is "limited to activities which would not otherwise be performed by employed workers and which will not supplant the hiring of or result in the displacement of employed workers." 42 U. S. C. § 5044(a). Thus, Congress could rationally have concluded that minimum wage coverage of such volunteers is required neither for the protection of the volunteers themselves nor for the prevention of unfair competition with private employers. Petitioners have identified no reason to scrutinize the Government's classification under any stricter standard. The District Court found no evidence that the Department was acting on the basis of hostility to petitioners' religious beliefs. 567 F. Supp., at 574.

FRANCIS, WARDEN *v.* FRANKLIN

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

No. 83–1590. Argued November 28, 1984—Decided April 29, 1985

Respondent state prisoner, while attempting to escape after receiving treatment at a local dentist's office, shot and killed the resident of a nearby house with a stolen pistol when, at the moment the resident slammed the front door as respondent demanded the key to the resident's car, the pistol fired and a bullet pierced the door hitting the resident in the chest. Respondent was tried in Georgia Superior Court on a charge of malice murder. His sole defense was a lack of the requisite intent to kill, claiming that the killing was an accident. The trial judge instructed the jury on the issue of intent as follows: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts . . . may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted." The jury was also instructed that the respondent was presumed innocent and that the State was required to prove every element of the offense beyond a reasonable doubt. The jury returned a guilty verdict, and respondent was sentenced to death. After an unsuccessful appeal to the Georgia Supreme Court and after exhausting state postconviction remedies, respondent sought habeas corpus relief in Federal District Court. That court denied relief, but the Court of Appeals reversed, holding that the jury charge on intent could have been interpreted by a reasonable juror as a mandatory presumption that shifted to respondent a burden of persuasion on the intent element of the offense, and accordingly violated the Fourteenth Amendment due process guarantees set forth in *Sandstrom* v. *Montana*, 442 U. S. 510.

Held: The instruction on intent, when read in the context of the jury charge as a whole, violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *Sandstrom* v. *Montana*, *supra*. Pp. 313–327.

(a) A jury instruction that creates a mandatory presumption whereby the jury must infer the presumed fact if the State proves certain predi-

cate facts violates the Due Process Clause if it relieves the State of the burden of persuasion on an element of an offense. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating such a presumption, the potentially offending words must be considered in the context of the charge as a whole. Pp. 313–315.

(b) Here, a reasonable juror could have understood that the first two sentences of the instruction on intent created a mandatory presumption that shifted to respondent the burden of persuasion on the element of intent once the State had proved the predicate acts. The fact that the jury was informed that the presumption "may be rebutted" does not cure the infirmity in the charge, since, when combined with the immediately preceding language, the instruction could be read as telling the jury that it was required to infer intent to kill as a natural and probable consequence of the act of firing the pistol unless respondent persuaded the jury that such an inference was unwarranted. Pp. 315–318.

(c) The general instructions as to the prosecution's burden and respondent's presumption of innocence did not dissipate the error in the challenged portion of the instruction on intent because such instructions are not necessarily inconsistent with language creating a mandatory presumption of intent. Nor did the more specific "criminal intention" instruction following the challenged sentences provide a sufficient corrective, since it may well be that it was not directed to the element of intent at all but to another element of malice murder in Georgia—the absence of provocation or justification. That is, a reasonable juror may well have thought that the instructions related to different elements of the crime and were therefore not contradictory—that he could presume intent to kill but not the absence of provocation or justification. But even if a juror could have understood the "criminal intention" instruction as applying to the element of intent, that instruction did no more than contradict the immediately preceding instructions. Language that merely contradicts and does not explain a constitutionally infirm instruction does not suffice to absolve the infirmity. Pp. 318–325.

(d) Whether or not *Sandstrom* error can ever be harmless, the constitutional infirmity in this jury charge was not harmless error because intent was plainly at issue and was not overwhelmingly proved by the evidence. Pp. 325–326.

720 F. 2d 1206 and 723 F. 2d 770, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, *post*, p. 327. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 331.

Susan V. Boleyn, Assistant Attorney General of Georgia, argued the cause for petitioner. With her on the brief were *Michael J. Bowers*, Attorney General, *James P. Googe, Jr.*, Executive Assistant Attorney General, *Marion O. Gordon*, First Assistant Attorney General, and *William B. Hill, Jr.*, Senior Assistant Attorney General.

Ronald J. Tabak argued the cause for respondent. With him on the brief was *John Charles Boger*.

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires that we decide whether certain jury instructions in a criminal prosecution in which intent is an element of the crime charged and the only contested issue at trial satisfy the principles of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Specifically, we must evaluate jury instructions stating that: (1) "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and (2) "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." App. 8a–9a. The question is whether these instructions, when read in the context of the jury charge as a whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. See *Sandstrom*, *supra*; *In re Winship*, 397 U. S. 358, 364 (1970).

I

Respondent Raymond Lee Franklin, then 21 years old and imprisoned for offenses unrelated to this case, sought to escape custody on January 17, 1979, while he and three other prisoners were receiving dental care at a local dentist's office. The four prisoners were secured by handcuffs to the same 8-foot length of chain as they sat in the dentist's waiting room. At some point Franklin was released from the chain,

taken into the dentist's office and given preliminary treatment, and then escorted back to the waiting room. As another prisoner was being released, Franklin, who had not been reshackled, seized a pistol from one of the two officers and managed to escape. He forced the dentist's assistant to accompany him as a hostage.

In the parking lot Franklin found the dentist's automobile, the keys to which he had taken before escaping, but was unable to unlock the door. He then fled with the dental assistant after refusing her request to be set free. The two set out across an open clearing and came upon a local resident. Franklin demanded this resident's car. When the resident responded that he did not own one, Franklin made no effort to harm him but continued with the dental assistant until they came to the home of the victim, one Collie. Franklin pounded on the heavy wooden front door of the home and Collie, a retired 72-year-old carpenter, answered. Franklin was pointing the stolen pistol at the door when Collie arrived. As Franklin demanded his car keys, Collie slammed the door. At this moment Franklin's gun went off. The bullet traveled through the wooden door and into Collie's chest killing him. Seconds later the gun fired again. The second bullet traveled upward through the door and into the ceiling of the residence.

Hearing the shots, the victim's wife entered the front room. In the confusion accompanying the shooting, the dental assistant fled and Franklin did not attempt to stop her. Franklin entered the house, demanded the car keys from the victim's wife, and added the threat "I might as well kill you." When she did not provide the keys, however, he made no effort to thwart her escape. Franklin then stepped outside and encountered the victim's adult daughter. He repeated his demand for car keys but made no effort to stop the daughter when she refused the demand and fled. Failing to obtain a car, Franklin left and remained at large until nightfall.

Shortly after being captured, Franklin made a formal statement to the authorities in which he admitted that he had

shot the victim but emphatically denied that he did so voluntarily or intentionally. He claimed that the shots were fired in accidental response to the slamming of the door. He was tried in the Superior Court of Bibb County, Georgia, on charges of malice murder[1]—a capital offense in Georgia—and kidnaping. His sole defense to the malice murder charge was a lack of the requisite intent to kill. To support his version of the events Franklin offered substantial circumstantial evidence tending to show a lack of intent. He claimed that the circumstances surrounding the firing of the gun, particularly the slamming of the door and the trajectory of the second bullet, supported the hypothesis of accident, and that his immediate confession to that effect buttressed the assertion. He also argued that his treatment of every other person encountered during the escape indicated a lack of disposition to use force.

On the dispositive issue of intent, the trial judge instructed the jury as follows:

> "A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will

---

[1] The malice murder statute at the time in question provided:

"A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. . . . Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." Ga. Code Ann. § 26–1101(a) (1978).

not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." App. 8a–9a.

Approximately one hour after the jury had received the charge and retired for deliberation, it returned to the courtroom and requested reinstruction on the element of intent and the definition of accident. *Id.*, at 13a–14a. Upon receiving the requested reinstruction, the jury deliberated 10 more minutes and returned a verdict of guilty. The next day Franklin was sentenced to death for the murder conviction.

Franklin unsuccessfully appealed the conviction and sentence to the Georgia Supreme Court. *Franklin* v. *State*, 245 Ga. 141, 263 S. E. 2d 666, cert. denied, 447 U. S. 930 (1980). He then unsuccessfully sought state postconviction relief. See *Franklin* v. *Zant*, Habeas Corpus File No. 5025 (Super. Ct. Butts Cty., Ga., Sept. 10, 1981), cert. denied, 456 U. S. 938 (1982). Having exhausted state postconviction remedies, Franklin sought federal habeas corpus relief, pursuant to 28 U. S. C. § 2254, in the United States District Court for the Middle District of Georgia on May 14, 1982. That court denied the application without an evidentiary hearing. App. 16a.

Franklin appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed the District Court and ordered that the writ issue. 720 F. 2d 1206 (1983). The court held that the jury charge on the dispositive issue of intent could have been interpreted by a reasonable juror as a mandatory presumption that shifted to the defendant a burden of persuasion on the intent element of the offense. For this reason the court held that the jury charge ran afoul of fundamental Fourteenth Amendment due process guarantees as explicated in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). See 720 F. 2d, at 1208–1212. In denying

petitioner Francis' subsequent petition for rehearing, the panel elaborated its earlier holding to make clear that the effect of the presumption at issue had been considered in the context of the jury charge as a whole. See 723 F. 2d 770, 771–772 (1984) *(per curiam)*.

We granted certiorari. 467 U. S. 1225 (1984). We affirm.

II

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S., at 364. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom* v. *Montana*, *supra*, at 520–524; *Patterson* v. *New York*, 432 U. S. 197, 210, 215 (1977); *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–701 (1975); see also *Morissette* v. *United States*, 342 U. S. 246, 274–275 (1952). The prohibition protects the "fundamental value determination of our society," given voice in Justice Harlan's concurrence in *Winship*, that "it is far worse to convict an innocent man than to let a guilty man go free." 397 U. S., at 372. See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). The question before the Court in this case is almost identical to that before the Court in *Sandstrom:* "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind," 442 U. S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense.

The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presump-

tion it describes." *Id.*, at 514. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see *id.*, at 520–524, or merely a permissive inference, see *Ulster County Court* v. *Allen*, 442 U. S. 140, 157–163 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.[2] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. *Patterson* v. *New York*, *supra*, at 215 ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also *Sandstrom*, *supra*, at 520–524; *Mullaney* v. *Wilbur*, *supra*, at 698–701.[3] A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*. A permissive inference violates the Due Process Clause only if the suggested

---

[2] A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See *Sandstrom* v. *Montana*, 442 U. S. 510, 517–518 (1979).

[3] We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question.

conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court*, *supra*, at 157–163.

Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). This analysis "requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom*, *supra*, at 514.

A

Franklin levels his constitutional attack at the following two sentences in the jury charge: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." App. 8a–9a.[4] The Georgia Supreme Court has interpreted this language as creating no more than a permissive inference that comports with the constitutional standards of *Ulster County Court* v. *Allen*, *supra*. See *Skrine* v. *State*, 244 Ga. 520, 521, 260 S. E. 2d 900, 901 (1979). The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but

---

[4] Intent to kill is an element of the offense of malice murder in Georgia. See *Patterson* v. *State*, 239 Ga. 409, 416–417, 238 S. E. 2d 2, 8 (1977).

rather what a reasonable juror could have understood the charge as meaning. *Sandstrom*, 442 U. S., at 516–517 (state court "is not the final authority on the interpretation which a jury could have given the instruction"). The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts.

The challenged sentences are cast in the language of command. They instruct the jury that "acts of a person of sound mind and discretion *are presumed* to be the product of the person's will," and that a person "*is presumed* to intend the natural and probable consequences of his acts," App. 8a–9a (emphasis added). These words carry precisely the message of the language condemned in *Sandstrom*, 442 U. S., at 515 ("'The law presumes that a person intends the ordinary consequences of his voluntary acts'"). The jurors "were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." *Ibid.* (emphasis added). The portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another. In this way the instructions "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to *find* the ultimate facts beyond a reasonable doubt." *Ulster County Court* v. *Allen*, *supra*, at 156 (emphasis added).

The language challenged here differs from *Sandstrom*, of course, in that the jury in this case was explicitly informed that the presumptions "may be rebutted." App. 8a–9a. The State makes much of this additional aspect of the instruction in seeking to differentiate the present case from *Sandstrom*. This distinction does not suffice, however, to cure the infirmity in the charge. Though the Court in *Sandstrom*

acknowledged that the instructions there challenged could have been reasonably understood as creating an irrebuttable presumption, 442 U. S., at 517, it was not on this basis alone that the instructions were invalidated. Had the jury reasonably understood the instructions as creating a mandatory *rebuttable* presumption the instructions would have been no less constitutionally infirm. *Id.*, at 520–524.

An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional. Our cases make clear that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Patterson* v. *New York*, 432 U. S., at 215. In *Mullaney* v. *Wilbur* we explicitly held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the question of intent. 421 U. S., at 698–701. And in *Sandstrom* we similarly held that instructions that might reasonably have been understood by the jury as creating a mandatory rebuttable presumption were unconstitutional. 442 U. S., at 524.[5]

---

[5] JUSTICE REHNQUIST's suggestion in dissent that our holding with respect to the constitutionality of mandatory rebuttable presumptions "extends" prior law, *post*, at 332, is simply inaccurate. In *Sandstrom* v. *Montana* our holding rested on equally valid alternative rationales: "[T]he question before this Court is whether the challenged jury instruction had

When combined with the immediately preceding mandatory language, the instruction that the presumptions "may be rebutted" could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted. The very statement that the presumption "may be rebutted" could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent.

B

The jury, of course, did not hear only the two challenged sentences. The jury charge taken as a whole might have

---

the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind. We conclude that *under either of the two possible interpretations of the instruction set out above*, precisely that effect would result, and that the instruction therefore represents constitutional error." 442 U. S., at 521 (emphasis added). In any event, the principle that mandatory rebuttable presumptions violate due process had been definitively established prior to *Sandstrom*. In *Mullaney* v. *Wilbur*, it was a mandatory *rebuttable* presumption that we held unconstitutional. 421 U. S., at 698–701. As we explained in *Patterson* v. *New York:*

"*Mullaney* surely held that a State . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." 432 U. S., at 215.

An *irrebuttable* presumption, of course, does not shift any burden to the defendant; it eliminates an element from the case if the State proves the requisite predicate facts. Thus the Court in *Patterson* could only have been referring to a mandatory *rebuttable* presumption when it stated that "such *shifting* of the burden of persuasion . . . is impermissible." *Ibid.* (emphasis added).

explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion. See *Cupp* v. *Naughten*, 414 U. S. 141 (1973). The State argues that sufficient clarifying language exists in this case. In particular, the State relies on an earlier portion of the charge instructing the jurors that the defendant was presumed innocent and that the State was required to prove every element of the offense beyond a reasonable doubt.[6] The State also points to the sentence immediately following the challenged portion of the charge, which reads: "[a] person will not be presumed to act with criminal intention . . . ." App. 9a.

As we explained in *Sandstrom*, general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," because "[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." 442 U. S., at 518–519, n. 7. In light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise. Cf. *Mullaney* v. *Wilbur*, 421 U. S., at 703, n. 31. These

---

[6] These portions of the instructions read:

"I charge you that before the State is entitled to a verdict of conviction of this defendant at your hands . . . the burden is upon the State of proving the defendant's guilt as charged . . . beyond a reasonable doubt." App. 4a.

"Now . . . the defendant enters upon his trial with the presumption of innocence in his favor and this presumption . . . remains with him throughout the trial, unless it is overcome by evidence sufficiently strong to satisfy you of his guilt . . . beyond a reasonable doubt." *Id.*, at 5a.

general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions.

Nor does the more specific instruction following the challenged sentences—"A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted," App. 9a—provide a sufficient corrective. It may well be that this "*criminal* intention" instruction was not directed to the element of intent at all, but to another element of the Georgia crime of malice murder. The statutory definition of capital murder in Georgia requires malice aforethought. Ga. Code Ann. § 16–5–1(1984) (formerly Ga. Code Ann. § 26–1101(a)(1978)). Under state law malice aforethought comprises two elements: intent to kill and the absence of provocation or justification. See *Patterson* v. *State*, 239 Ga. 409, 416–417, 238 S. E. 2d 2, 8 (1977); *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1337 (CA11 1982) (interpreting Ga. Code Ann. § 16–5–1), cert. denied, 460 U. S. 1024 (1983). At another point in the charge in this case, the trial court, consistently with this understanding of Georgia law, instructed the jury that malice is "the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse." App. 10a.

The statement "*criminal* intention may not be presumed" may well have been intended to instruct the jurors that they were not permitted to presume the absence of provocation or justification but that they could infer this conclusion from circumstantial evidence. Whatever the court's motivation in giving the instruction, the jury could certainly have understood it this way. A reasonable juror trying to make sense of the juxtaposition of an instruction that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts," *id.*, at 8a–9a, and an

instruction that "[a] person will not be presumed to act with criminal intention," *id.*, at 9a, may well have thought that the instructions related to different elements of the crime and were therefore not contradictory—that he could presume intent to kill but not the absence of justification or provocation.[7]

---

[7] Because the jurors heard the divergent intent instructions before they heard the instructions about absence of justification, JUSTICE REHNQUIST's dissent argues that no reasonable juror could have understood the criminal intent instruction as referring to the absence of justification. The dissent reproves the Court for reading the instructions "as a 'looking-glass charge' which, when held to a mirror, reads more clearly in the opposite direction." *Post*, at 340. A reasonable juror, however, would have sought to make sense of the conflicting intent instructions not only at the initial moment of hearing them but also later in the jury room after having heard the entire charge. One would expect most of the juror's reflection about the meaning of the instructions to occur during this subsequent deliberative stage of the process. Under these circumstances, it is certainly reasonable to expect a juror to attempt to make sense of a confusing earlier portion of the instruction by reference to a later portion of the instruction. The dissent obviously accepts this proposition because much of the language the dissent marshals to argue that the jury would not have misunderstood the intent instruction appears several paragraphs after the conflicting sentences about intent. Indeed much of this purportedly clarifying language appears *after* the portion of the charge concerning the element of absence of justification. See *post*, at 336 (REHNQUIST, J., dissenting), quoting App. 10a.

It is puzzling that the dissent thinks it "defies belief" to suggest that a reasonable juror would have related the contradictory intent instructions to the later instructions about the element of malice. *Post*, at 339. As the portion of the charge quoted in the dissent makes clear, the later malice instructions specifically spoke of intent: "Malice . . . is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing." App. 10a. See *post*, at 336 (REHNQUIST, J., dissenting). A reasonable juror might well have sought to understand this language by reference to the earlier instruction referring to criminal intent.

Finally, the dissent's representation of the language in this part of the charge as a clarifying "express statemen[t] . . . that there was no burden on the defendant to disprove malice," *post*, at 340, is misleading. The rele-

Even if a reasonable juror could have understood the prohibition of presuming "criminal intention" as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.[8] Had the instruc-

---

vant portion of the charge reads: "it is not required of the accused to prove an absence of malice, if the evidence for the State shows facts which may excuse or justify the homicide." App. 10a. This language is most naturally read as implying that if the State's evidence *does not* show mitigating facts the defendant *does* have the burden to prove absence of malice. Thus, if anything, this portion of the charge exacerbates the potential for an unconstitutional shifting of the burden to the defendant.

[8] JUSTICE REHNQUIST's dissent would hold a jury instruction invalid only when "it must at least be *likely*" that a reasonable juror would have understood the charge unconstitutionally to shift a burden of persuasion. *Post*, at 342. Apparently this "at least likely" test would not be met even when there exists a reasonable possibility that a juror would have understood the instructions unconstitutionally, so long as the instructions admitted of a "more 'reasonable'" constitutional interpretation. *Post*, at 340–341. Apart from suggesting that application of the "at least likely" standard would lead to the opposite result in the present case, the dissent leaves its proposed alternative distressingly undefined. Even when faced with clearly contradictory instructions respecting allocation of the burden of persuasion on a crucial element of an offense, a reviewing court apparently would be required to intuit, based on its sense of the "tone" of the jury instructions as a whole, see *ibid.*, whether a reasonable juror was more likely to have reached a constitutional understanding of the instructions than an unconstitutional understanding of the instructions.

This proposed alternative standard provides no sound basis for appellate review of jury instructions. Its malleability will certainly generate in-

tion "[a] person . . . is presumed to intend the natural and probable consequences of his acts," App. 8a–9a, been followed by the instruction "*this means that* a person will not be presumed to act with criminal intention but the jury may find criminal intention upon consideration of all circumstances connected with the act for which the accused is prosecuted," a somewhat stronger argument might be made that a reasonable juror could not have understood the challenged language as shifting the burden of persuasion to the defendant. Cf. *Sandstrom*, 442 U. S., at 517 ("[G]iven the lack of qualifying instructions as to the legal effect of the presumption, we can-

---

consistent appellate results and thereby compound the confusion that has plagued this area of the law. Perhaps more importantly, the suggested approach provides no incentive for trial courts to weed out potentially infirm language from jury instructions; in every case, the "presumption of innocence" boilerplate in the instructions will supply a basis from which to argue that the "tone" of the charge as a whole is not unconstitutional. For these reasons, the proposed standard promises reviewing courts, including this Court, an unending stream of cases in which ad hoc decisions will have to be made about the "tone" of jury instructions as a whole.

Most importantly, the dissent's proposed standard is irreconcilable with bedrock due process principles. The Court today holds that contradictory instructions as to intent—one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion—create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, "we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction." *Sandstrom*, 442 U. S., at 526. For this reason, it has been settled law since *Stromberg* v. *California*, 283 U. S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside. See *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); *Bachellar* v. *Maryland*, 397 U. S. 564, 571 (1970). The dissent's proposed alternative cannot be squared with this principle; notwithstanding a substantial doubt as to whether the jury decided that the State proved intent beyond a reasonable doubt, the dissent would uphold this conviction based on an impressionistic and intuitive judgment that it was *more* likely that the jury understood the charge in a constitutional manner than in an unconstitutional manner.

not discount the possibility that the jury may have interpreted the instruction" in an unconstitutional manner). See also *Corn* v. *Zant*, 708 F. 2d 549, 559 (CA11 1983), cert. denied, 467 U. S. 1220 (1984). Whether or not such explanatory language might have been sufficient, however, no such language is present in this jury charge. If a juror thought the "criminal intention" instruction pertained to the element of intent, the juror was left in a quandary as to whether to follow that instruction or the immediately preceding one it contradicted.[9]

---

[9] Rejecting this conclusion, JUSTICE REHNQUIST's dissent "simply do[es] not believe" that a reasonable juror would have paid sufficiently close attention to the particular language of the jury instructions to have been perplexed by the contradictory intent instructions. See *post*, at 340. See also *Sandstrom* v. *Montana*, *supra*, at 528 (REHNQUIST, J., concurring) ("I continue to have doubts as to whether this particular jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between 'infer' and 'presume' "). Apparently the dissent would have the degree of attention a juror is presumed to pay to particular jury instructions vary with whether a presumption of attentiveness would help or harm the criminal defendant. See, *e. g.*, *Parker* v. *Randolph*, 442 U. S. 62, 73 (1979) (opinion of REHNQUIST, J.) ("A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. . . . [A]n instruction directing the jury to consider a codefendant's extrajudicial statement only against its source has been found sufficient to avoid offending the confrontation right of the implicated defendant"); see also *id.*, at 75, n. 7 ("The 'rule'—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions"). Cf. *Wainwright* v. *Witt*, 469 U. S. 412 (1985).

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them. Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limit-

Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.

III

Petitioner argues that even if the jury charge fails under *Sandstrom* this Court should overturn the Court of Appeals because the constitutional infirmity in the charge was harmless error on this record. This Court has not resolved whether an erroneous charge that shifts a burden of persuasion to the defendant on an essential element of an offense can ever be harmless. See *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). We need not resolve the question in this case. The Court of Appeals conducted a careful harmless-error inquiry and concluded that the *Sandstrom* error at trial could not be deemed harmless. 720 F. 2d, at 1212. The court noted:

> "[Franklin's] only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude that defense. The coincidence of the first

---

ing instruction will not adequately protect a criminal defendant's constitutional rights. *E. g.*, *Bruton* v. *United States*, 391 U. S. 123 (1968); *Jackson* v. *Denno*, 378 U. S. 368 (1964). Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions. As Chief Justice Traynor has said: "[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case." R. Traynor, The Riddle of Harmless Error 73–74 (1970) (footnote omitted), quoted in *Connecticut* v. *Johnson*, 460 U. S. 73, 85, n. 14 (1983) (opinion of BLACKMUN, J.).

> shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense. A presumption that Franklin intended to kill completely eliminated his defense of 'no intent.' Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence . . . we cannot find the error to be harmless." *Ibid.*

Even under the harmless-error standard proposed by the dissenting Justices in *Connecticut* v. *Johnson*, *supra*, at 97, n. 5 (evidence "so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption") (POWELL, J., joined by BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., dissenting), this analysis by the Court of Appeals is surely correct.[10] The jury's request for reinstruction on the elements of malice and accident, App. 13a–14a, lends further substance to the court's conclusion that the evidence of intent was far from overwhelming in this case. We therefore affirm the Court of Appeals on the harmless-error question as well.

IV

Sandstrom v. *Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U. S., at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully

---

[10] The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision. See *Connecticut* v. *Johnson*, *supra*, at 102 (POWELL, J., dissenting) (harmless error "is a question more appropriately left to the courts below").

and correctly applied this rule, and the court's judgment is therefore

Affirmed.

JUSTICE POWELL, dissenting.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), we held that instructing the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates due process. We invalidated this instruction because a reasonable juror could interpret it either as "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" or "as a direction to find intent upon proof of the defendant's voluntary actions . . . unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." *Id.*, at 517 (original emphasis). Either interpretation, we held, would have relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. See *id.*, at 521; *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–701 (1975).

Unlike the charge in *Sandstrom*, the charge in the present case is not susceptible of either interpretation. It creates no "irrebuttable direction," and a reasonable juror could not conclude that it relieves the State of its burden of persuasion. The Court, however, believes that two sentences make the charge infirm:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." App. 8a–9a.

I agree with the Court that "*[s]tanding alone*," the challenged language could be viewed as "an unconstitutional burden-shifting presumption with respect to the element of

intent." *Ante*, at 318 (emphasis added). The fact is, however, that this language did *not* stand alone. It is but a small part of a lengthy charge, other parts of which clarify its meaning. Although the Court states that it considered the effect the rest of the charge would have had on a reasonable juror, its analysis overlooks or misinterprets several critical instructions. These instructions, I believe, would have prevented a reasonable juror from imposing on the defendant the burden of persuasion on intent. When viewed as a whole, see *Cupp* v. *Naughten*, 414 U. S. 141, 146–147 (1973), the jury charge satisfies the requirements of due process.

The trial court repeatedly impressed upon the jury both that the defendant should be presumed innocent until proved guilty and that the State bore the burden of proving guilt beyond a reasonable doubt. It stated:

> "[T]he burden is upon the State of proving the defendant's guilt as charged in such count beyond a reasonable doubt. . . .
>
> ". . . If, upon a consideration of all the facts and circumstances of this case, your mind is wavering, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the defendant the benefit of that doubt and acquit him.
>
> "Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption . . . remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.
>
> . . . . . .
>
> "Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further,

that there is no burden on the defendant to prove anything. The burden is on the State.

. . . . . .

"Members of the Jury, if, from a consideration of the evidence or from a lack of evidence, you are not satisfied beyond a reasonable doubt and to a reasonable and moral certainty that the State has established the guilt of the defendant . . . then it would be your duty to acquit him . . . ." App. 4a–12a.

We noted in *Sandstrom*, *supra*, at 518, n. 7, that general instructions may be insufficient by themselves to make clear that the burden of persuasion remains with the State. In this case, however, the trial court went well beyond the typical generality of such instructions. It repeatedly reiterated the presumption of innocence and the heavy burden imposed upon the State. In addition, the jury was told that the "presumption of innocence . . . remains with [the defendant] throughout the trial," App. 5a, and that "there is no burden on the defendant to prove anything. The burden is on the State," *id.*, at 8a.

More important is the immediate context of the two suspect sentences. They appeared in a paragraph that stated:

"A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. *A person will not be presumed to act with criminal intention*

> *but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." Id.*, at 8a–9a (emphasis added).

The final sentence clearly tells the jury that it cannot place on the defendant the burden of persuasion on intent. The Court, however, holds that in context it could not have had this effect. It believes that the term "criminal intention" refers not to intent at all, but to "absence of provocation or justification," *ante*, at 320, a separate element of malice murder. Despite the fact that provocation and justification are largely unrelated to intent, the Court believes that "the jury could certainly have understood [the term] this way." *Ibid.* Such a strained interpretation is neither logical nor justified.*

The instructions on circumstantial evidence further ensured that no reasonable juror would have switched the burden of proof on intent. Three times the trial court told the jury that it could not base a finding of any element of the offense on circumstantial evidence unless the evidence "exclude[d] every other reasonable hypothesis, save that of the [accused's] guilt . . . ." App. 6a. Under these instructions, a reasonable juror could not have found intent unless the State's evidence excluded any reasonable hypothesis that the defendant had acted unintentionally. This requirement

---

*The term's context also precludes such an interpretation. The term "criminal intention" appears in a paragraph describing the general requirements of all crimes without discussing the specific requirements of any particular one. The Court offers no reason why a reasonable juror might have believed that this paragraph referred to only one of the crimes charged—malice murder—especially when a different crime—kidnaping—was described in the immediately following paragraphs. It is much more reasonable to interpret the term "criminal intention" as shorthand for "intention or criminal negligence," the traditional *mens rea* requirement. In this view, the final sentence informs the jury that whatever else a rebuttable presumption might establish it cannot by itself establish *mens rea*.

placed a burden of *excluding* the possibility of lack of intent on the State and would have made it impossible to impose on the defendant the burden of persuasion on intent itself.

Together, I believe that the instructions on reasonable doubt and the presumption of innocence, the instruction that "criminal intention" cannot be presumed, and the instructions governing the interpretation of circumstantial evidence removed any danger that a reasonable juror could have believed that the two suspect sentences placed on the defendant the burden of persuasion on intent. When viewed as a whole, the jury instructions did not violate due process. I accordingly dissent.

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

In *In re Winship*, 397 U. S. 358 (1970), the trial judge in a bench trial held that although the State's proof was sufficient to warrant a finding of guilt by a preponderance of the evidence, it was not sufficient to warrant such a finding beyond a reasonable doubt. The outcome of the case turned on which burden of proof was to be imposed on the prosecution. This Court held that the Constitution requires proof beyond a reasonable doubt in a criminal case, and Winship's adjudication was set aside.

Today the Court sets aside Franklin's murder conviction, but not because either the trial judge or the trial jury found that his guilt had not been proved beyond a reasonable doubt. The conviction is set aside because this Court concludes that one or two sentences out of several pages of instructions given by the judge to the jury could be read as allowing the jury to return a guilty verdict in the absence of proof establishing every statutory element of the crime beyond a reasonable doubt. The Court reaches this result even though the judge admonished the jury at least four separate times that they could convict only if they found guilt beyond a reasonable doubt. The Court, instead of examining the charge to the jury as a whole, seems bent on piling syllogism on

syllogism to prove that someone *might* understand a few sentences in the charge to allow conviction on less than proof beyond a reasonable doubt. Such fine parsing of the jury instructions given in a state-court trial is not required by anything in the United States Constitution.

Today's decision needlessly extends our holding in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), to cases where the jury was not required to presume conclusively an element of a crime under state law. But even assuming the one or two sentences singled out by the Court might conceivably mislead, I do not believe that a reasonable person reading that language "in the context of the overall charge," see *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973), could possibly arrive at the Court's conclusion that constitutional error occurred here. I disagree with the Court's legal standard, which finds constitutional error where a reasonable juror *could* have understood the charge in a particular manner. But even on the facts, the Court's approach to the charge is more like that of a zealous lawyer bent on attaining a particular result than that of the "reasonable juror" referred to in *Sandstrom*.

In *Sandstrom* the jury was charged that "[t]he *law presumes* that a person intends the ordinary consequences of his voluntary acts." 442 U. S., at 515 (emphasis supplied). As in this case, intent was an element of the crime charged in *Sandstrom*, and the Court was of the opinion that given the mandatory nature of the above charge it was quite possible that the jury "once having found [Sandstrom's] act voluntary, would interpret the instruction as automatically directing a finding of intent." *Id.*, at 515–516. Such a presumption would have relieved the State entirely of the burden it had undertaken to prove that Sandstrom had killed intentionally—*i. e.*, "purposely or knowingly"—and would have mandated a finding of that intent regardless of whether other evidence in the case indicated to the contrary. *Id.*, at 520.

The *Sandstrom* Court went on, however, to discuss the constitutionality of a presumption that "did not conclusively

establish intent but rather could be rebutted." *Id.*, at 515. The Court opined that such a presumption would be unconstitutional because it could be understood as shifting the burden to the defendant to prove that he lacked the intent to kill. *Id.*, at 524 (citing *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975)). In addition, the Court in a footnote stated that such a burden-shifting "mandatory rebuttable presumption" could not be cured by other language in the charge indicating that the State bore the burden of proving guilt beyond a reasonable doubt, because "the jury could have interpreted the . . . instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." 422 U. S., at 519, n. 7.

It should be clear that the instructions at issue here—which provide that the challenged presumptions "may be rebutted"—are very different from the conclusive language at issue in *Sandstrom*. The conclusive presumption eliminates an element of the crime altogether; the rebuttable presumption here indicates that the particular element is still relevant, and may be shown not to exist. Nevertheless, the Court relies on the latter portion of the *Sandstrom* opinion, outlined above, as the precedent dictating its result. *Ante*, at 316–317, 319. The language relied upon is, of course, manifestly dicta, inasmuch as the *Sandstrom* Court had already held (1) that a mandatory conclusive presumption on intent is unconstitutional and (2) that a reasonable juror could have understood the instruction at issue as creating such a conclusive presumption.

Even if one accepts the *Sandstrom* dicta at face value, however, I do *not* agree with the Court that a "reasonable juror" listening to the charge "as a whole" could have understood the instructions as shifting the burden of disproving intent to the defendant. Before examining the convoluted reasoning that leads to the Court's conclusion, it will be useful to set out the relevant portions of the charge as the jury heard them, and not in scattered pieces as they are found in

the Court's opinion. The trial court began by explaining the general presumption of innocence:

> "I charge you that before the State is entitled to a verdict of conviction . . . the burden is upon the State of proving the defendant's guilt as charged in such count beyond a reasonable doubt. . . .
>
> "Now, reasonable doubt is just what that term implies. It's a doubt based on reason. . . . [A] reasonable doubt is the doubt of a fair-minded, impartial juror actively seeking for the truth and it may arise from a consideration of the evidence, from a conflict in the evidence or from a lack of evidence. If, upon a consideration of all the facts and circumstances of this case, your mind is wavering, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the defendant the benefit of that doubt and acquit him. If, on the other hand, no such doubt rests upon your mind, it would be equally your duty to return a verdict of guilty.
>
> "Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption, while not evidence, is yet in the nature of evidence and it remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt."

The court stated the burden of proof once more in its general instructions concerning evaluation of witness credibility, and then stated it again before it turned to more specific instructions:

> "Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further,

that there is no burden on the defendant to prove anything. The burden is on the State.

"Now I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.

"A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.*" (Emphasis supplied.)

After instructing the jury on the specific elements of Count I, charging respondent with the kidnaping of the nurse, the Court went on to instruct on the elements of murder:

"I charge you that the law of Georgia defines murder as follows: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

"Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. *Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing.* . . .

"Members of the Jury, *I charge you that it is not encumbent upon the accused to prove an absence of malice, if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice, if the evidence for the State shows facts which may excuse or justify the homicide.* But it is for you, the members of the Jury to say after a consideration of all the facts and circumstances in the case, whether or not malice, express or implied, exists in the case." (Emphasis supplied.)

In *Cupp* v. *Naughten*, 414 U. S. 141 (1973), we dealt with a constitutional challenge to an instruction that "every witness is presumed to speak the truth," in the context of a criminal trial where the defense presented no witnesses. We there reaffirmed "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.*, at 146–147 (citing *Boyd* v. *United States*, 271 U. S. 104, 107 (1926)). We noted that if a particular instruction was erroneous a reviewing court still must ask "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." 414 U. S., at 147. In reaching our conclusion that the instruction at issue in *Cupp* did not violate due process, we noted that the jury had

been fully informed of the State's burden to prove guilt beyond a reasonable doubt. We also pointed out that the instruction concerning the presumption of truthfulness had been accompanied by an instruction that in assessing a witness' credibility the jury should be attentive to the witness' own manner and words. We concluded that these instructions sufficiently allowed the jury to exercise its own judgment on the question of a witness' truthfulness; we also found no undue pressure on the defendant to take the stand and rebut the State's testimony, since the instruction indicated that such rebuttal could be founded on the State's own evidence. *Id.*, at 149.

I see no meaningful distinction between *Cupp* and the case at bar. Here the jury was instructed no less than four times that the State bore the burden of proof beyond a reasonable doubt. This language was accompanied early in the charge by a detailed discussion indicating that the jurors were the judges of their own reasonable doubt, that this doubt could arise after taking into account all the circumstances surrounding the incident at issue, and that where such doubt existed it was the jurors' duty to acquit. Four sentences prior to the offending language identified by the Court the jury was explicitly charged that "there is no burden on the defendant to prove anything." Immediately following that language the jury was charged that a person "will not be presumed to act with criminal intention," but that the jury could find such intention based upon the circumstances surrounding the act. The jury was then charged on Georgia's definition of malice, an essential element of murder which includes (1) deliberate intent to kill (2) without justification or mitigation or excuse. Again, the jury was explicitly charged that "it is not incumbent upon the accused to prove an absence of malice, if the evidence for the prosecution shows facts which may excuse or justify the homicide."

The Court nevertheless concludes, upon reading the charge in its entirety, that a "reasonable juror" could have

understood the instruction to mean (1) that the State had satisfied its burden of proving intent to kill by introducing evidence of the defendant's acts—drawing, aiming, and firing the gun—the "natural and probable consequences" of which were the death in question; (2) that upon proof of these acts the burden shifted to the defendant to disprove that he had acted with intent to kill; and (3) that if the defendant introduced no evidence or the jury was unconvinced by his evidence, the jury was *required* to find that the State had proved intent to kill even if the State's proof did not convince them of the defendant's intent.

The reasoning which leads to this conclusion would appeal only to a lawyer, and it is indeed difficult to believe that "reasonable jurors" would have arrived at it on their own. It runs like this. First, the Court states that a "reasonable juror" could understand the particular offending sentences, considered in isolation, to shift the burden to the defendant of disproving his intent to kill. *Ante*, at 318. The Court then proceeds to examine other portions of the charge, to determine whether they militate against this understanding. It casually dismisses the "general instructions on the State's burden of persuasion," relying on the *Sandstrom* footnote which stated that the burden-shifting instruction could be read consistently with the State's general burden because "[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Ante*, at 319.

Pausing here for a moment, I note that I am not at all sure that this expository fast footwork is as applicable where, unlike in *Sandstrom*, the presumption created by the charge is not conclusive, but rebuttable. Since in this case the presumption was "rebuttable," the obvious question is: "rebuttable by what?" The Court's analysis must assume that a "reasonable juror" understood the presumption to be a means

for satisfying the State's burden unless rebutted *by the defendant.* The italicized words, of course, are not included in the charge in this case, but if the jurors reasonably believed that the presumption could be rebutted by other means—for example, by the circumstances surrounding the incident—then the Court's analysis fails. But I find the Court's assumption unrealistic in any event, because if the jurors understood the charge as the Court posits then that conclusion was reached in the face of the contradictory preceding statement that *the defendant had no burden to prove anything.*

Undaunted, the Court does not even mention the italicized portion of the charge. Instead, it proceeds to dispose of the sentence immediately following the challenged sentences, which states that a person will *not* be presumed to act with "*criminal intent.*" With respect to this language, the Court first speculates that it might have been directed, not to the "intent" element of malice, but rather to the element of malice which requires that the defendant act without justification or excuse. Thus, the Court explains that its "reasonable juror" could have reconciled the two apparently conflicting sentences by deciding "that the instructions related to different elements of the crime and were therefore not contradictory—that he could presume intent to kill but not the absence of justification or provocation." *Ante*, at 321.

This statement defies belief. Passing the obvious problem that both sentences speak to the defendant's "intent," and not to "justification or provocation," the Court has presumed that the jurors hearing this charge reconciled two apparently contradictory sentences by neatly attributing them to separate elements of Georgia's definition of "malice"—no small feat for laymen—and did so *even though they had not yet been charged on the element of malice.* Either the Court is attributing qualities to the average juror that are found in very few lawyers, or it perversely reads the instructions as a

"looking-glass charge" which, when held to a mirror, reads more clearly in the opposite direction.*

Alternatively, the Court suggests that the sentences dealing with the presumptions on intent are flatly contradictory, and that the charge therefore is defective since there is no way to determine which instruction a reasonable juror would have followed. The Court reasoned in this regard:

> "Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Ante*, at 322.

It may well be that the Court's technical analysis of the charge holds together from a legal standpoint, but its tortured reasoning is alone sufficient to convince me that no "reasonable juror" followed that path. It is not that I think jurors are not conscientious, or that I believe jurors disregard troublesome trial court instructions; I agree with the Court that we generally must assume that jurors strive to follow the law as charged. See *ante*, at 324–325, n. 9. Rather, I simply do not believe that a "reasonable juror," upon listening to the above charge, could have interpreted it as shifting the burden to the defendant to disprove intent, and as requiring the juror to follow the presumption *even if he was not satisfied with the State's proof on that element.*

To reach this conclusion the juror would have had to disregard three express statements—that the defendant had no burden to prove anything, that "criminal intent" was not to be presumed, and that there was no burden on the defendant to disprove malice. In addition, he would have had to do so under circumstances where a far more "reasonable" interpre-

---

*"[Alice] puzzled over this for some time, but at last a bright thought struck her. 'Why, it's a Looking-glass book, of course! And, if I hold it up to a glass, the words will all go the right way again.'" L. Carroll, Through the Looking-Glass 19–20 (1950).

tation was available. The challenged language stated that the presumption could be rebutted. Throughout the charge the jury was told that they were to listen to all the evidence and draw their own conclusions, based upon a witness' demeanor and words and their own common sense. They were told that the burden of proof rested on the State, and they were told that circumstances surrounding the acts in question would provide a basis for drawing various conclusions with respect to intent and malice. The reasonable interpretation of the challenged charge is that, just as in *Cupp*, the presumption could be rebutted by the circumstances surrounding the acts, whether presented by the State or the defendant. Such an interpretation would not require a juror to disregard any possibly conflicting instructions; it also would have been consistent with the entire tone of the charge from start to finish. See *McInerney* v. *Berman*, 621 F. 2d 20, 24 (CA1 1980) ("[I]t will be presumed that [a juror] will not isolate a particular portion of the charge and ascribe to it more importance than the rest").

Perhaps more importantly, however, the Court's reasoning set out above indicates quite clearly that where a particular isolated instruction can be read as burden-shifting the Court is not disposed to find that instruction constitutionally harmless in the absence of specific language elsewhere in the charge which addresses and cures that instruction. See also *ante*, at 322–323, n. 8. This reasoning cannot be squared with *Cupp*, in which this Court emphasized that "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." 414 U. S., at 147. It is true that the problems raised here probably could be alleviated if the words "is presumed" were merely changed to "may be presumed," thereby making the presumption permissive, see *ante*, at 316; *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1339–1340 (CA11 1982); *McInerney*, *supra*, at 24, and admittedly the Court's analysis of the charge establishes a

rule that is easier in application in the appellate courts. But that is not the question. *Cupp* indicates that due process is not violated in every case where an isolated sentence implicates constitutional problems, and the Court's hypertechnical arguments only highlight how far it has strayed from the norm of "fundamental fairness" in order to invalidate this conviction.

Thus, even accepting the Court's reasonable-juror test, I cannot agree that the charge read as a whole was constitutionally infirm. But quite apart from that, I would take a different approach than the Court does with respect to the applicable legal standard. It appears that under the Court's approach it will reverse a conviction if a "reasonable juror" hypothetically *might* have understood the charge unconstitutionally to shift a burden of proof, even if it was unlikely that a single juror had such an understanding. I believe that it must at least be *likely* that a juror so understood the charge before constitutional error can be found. Where as here a *Sandstrom* error is alleged involving not a conclusive presumption, but a rebuttable presumption, language in the charge indicating the State's general burden of proof and the jury's duty to examine all surrounding facts and circumstances generally should be sufficient to dissipate any constitutional infirmity. Otherwise we risk finding constitutional error in a record such as this one, after finely parsing through the elements of state crimes that are really far removed from the problems presented by the burden of proof charge in *Winship*. I do not believe that the Court must inject itself this far into the state criminal process to protect the fundamental rights of criminal defendants. I dissent and would reverse the judgment of the Court of Appeals.

Syllabus

COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL.

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

No. 84–261. Argued March 19, 1985—Decided April 29, 1985

Petitioner filed a complaint in Federal District Court alleging violations of the Commodity Exchange Act by Chicago Discount Commodity Brokers (CDCB), and respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree that resulted in the appointment of a receiver who was ultimately appointed trustee in bankruptcy after he filed a voluntary petition in bankruptcy on behalf of CDCB. Respondent Weintraub, CDCB's former counsel, appeared for a deposition pursuant to a subpoena *duces tecum* served by petitioner as part of its investigation of CDCB, but refused to answer certain questions, asserting CDCB's attorney-client privilege. Petitioner then obtained a waiver of the privilege from the trustee as to any communications occurring on or before the date of his initial appointment as a receiver. The District Court upheld a Magistrate's order directing Weintraub to testify, but the Court of Appeals reversed, holding that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition.

Held: The trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. Pp. 348–358.

(a) The attorney-client privilege attaches to corporations as well as to individuals, and with regard to solvent corporations the power to waive the privilege rests with the corporation's management and is normally exercised by its officers and directors. When control of the corporation passes to new management, the authority to assert and waive the privilege also passes, and the new managers may waive the privilege with respect to corporate communications made by former officers and directors. Pp. 348–349.

(b) The Bankruptcy Code does not explicitly address the question whether control of the privilege of a corporation in bankruptcy with respect to prebankruptcy communications passes to the bankruptcy trustee or, as respondents assert, remains with the debtor's directors. Respondents' contention that the issue is controlled by § 542(e) of the Code—which provides that "[s]ubject to any applicable privilege," the

court may order an attorney who holds recorded information relating to the debtor's property or financial affairs to disclose such information to the trustee—is not supported by the statutory language or the legislative history. Instead, the history makes clear that Congress intended the courts to deal with privilege questions. Pp. 349–351.

(c) The Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited. Thus the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. Pp. 352–353.

(d) No federal interests would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, vesting such power in the directors would frustrate the Code's goal of empowering the trustee to uncover insider fraud and recover misappropriated corporate assets. Pp. 353–354.

(e) There is no merit to respondents' contention that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors. When a trustee is appointed, the privilege must be exercised in accordance with the trustee's fiduciary duty to all interested parties. Even though in some cases the trustee's exercise of the privilege will benefit only creditors, such a result is in keeping with the hierarchy of interests created by the bankruptcy laws. Pp. 354–356.

(f) Nor is there any merit to other arguments of respondents, including the contentions that giving the trustee control over the privilege would have an undesirable chilling effect on attorney-client communications and would discriminate against insolvent corporations. The chilling effect is no greater here than in the case of a solvent corporation, and, by definition, corporations in bankruptcy are treated differently from solvent corporations. Pp. 356–358.

722 F. 2d 338, reversed.

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

Bruce N. Kuhlik argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee*,

Deputy Solicitor General Bator, Kenneth M. Raisler, Whitney Adams, and *Helen G. Blechman.*

David A. Epstein argued the cause for respondents. With him on the brief for respondents McGhee et al. was *Gary A. Weintraub, pro se.**

JUSTICE MARSHALL delivered the opinion of the Court.

The question here is whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation's attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy.

I

The case arises out of a formal investigation by petitioner Commodity Futures Trading Commission to determine whether Chicago Discount Commodity Brokers (CDCB), or persons associated with that firm, violated the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.* CDCB was a discount commodity brokerage house registered with the Commission, pursuant to 7 U. S. C. § 6d(1), as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Act. That same day, respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree with the Commission, which provided for the appointment of a receiver and for the receiver to file a petition for liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The District Court appointed John K. Notz, Jr., as receiver.

Notz then filed a voluntary petition in bankruptcy on behalf of CDCB. He sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, which provides for the

---

**John K. Notz, Jr., pro se,* and *David F. Heroy* filed a brief for John K. Notz, Jr., Trustee, as *amicus curiae* urging reversal.

liquidation of bankrupt commodity brokers. 11 U. S. C. §§ 761–766. The Bankruptcy Court appointed Notz as interim trustee and, later, as permanent trustee.

As part of its investigation of CDCB, the Commission served a subpoena *duces tecum* upon CDCB's former counsel, respondent Gary Weintraub. The Commission sought Weintraub's testimony about various CDCB matters, including suspected misappropriation of customer funds by CDCB's officers and employees, and other fraudulent activities. Weintraub appeared for his deposition and responded to numerous inquiries but refused to answer 23 questions, asserting CDCB's attorney-client privilege. The Commission then moved to compel answers to those questions. It argued that Weintraub's assertion of the attorney-client privilege was inappropriate because the privilege could not be used to "thwart legitimate access to information sought in an administrative investigation." App. 44.

Even though the Commission argued in its motion that the matters on which Weintraub refused to testify were not protected by CDCB's attorney-client privilege, it also asked Notz to waive that privilege. In a letter to Notz, the Commission maintained that CDCB's former officers, directors, and employees no longer had the authority to assert the privilege. According to the Commission, that power was vested in Notz as the then-interim trustee. *Id.*, at 47–48. In response to the Commission's request, Notz waived "any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980"—the date of Notz' appointment as receiver. *Id.*, at 49.

On April 26, 1982, a United States Magistrate ordered Weintraub to testify. The Magistrate found that Weintraub had the power to assert CDCB's privilege. He added, however, that Notz was "successor in interest of all assets, rights and privileges of CDCB, including the attorney/client privilege at issue herein," and that Notz' waiver was therefore valid. App. to Pet. for Cert. 19a–20a. The District Court

upheld the Magistrate's order on June 9. *Id.*, at 18a. Thereafter, Frank McGhee and his brother, respondent Andrew McGhee, intervened and argued that Notz could not validly waive the privilege over their objection. Record, Doc. No. 49, p. 7.[1] The District Court rejected this argument and, on July 27, entered a new order requiring Weintraub to testify without asserting an attorney-client privilege on behalf of CDCB. App. to Pet. for Cert. 17a.[2]

The McGhees appealed from the District Court's order of July 27 and the Court of Appeals for the Seventh Circuit reversed. 722 F. 2d 338 (1984). It held that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition. The court recognized that two other Circuits had addressed the question and had come to the opposite conclusion. See *In re O. P. M. Leasing Services, Inc.*, 670 F. 2d 383 (CA2 1982); *Citibank, N. A.* v. *Andros*, 666 F. 2d 1192 (CA8 1981).[3] We granted certiorari to resolve the conflict. 469 U. S. 929 (1984). We now reverse the Court of Appeals.

---

[1] The Court of Appeals found that Andrew McGhee resigned his position as officer and director of CDCB on October 21, 1980. 722 F. 2d 338, 339 (1984). Frank McGhee, however, remained as an officer and director. See n. 5, *infra*.

[2] The June 9 order had not made clear that Weintraub was barred only from invoking the *corporation's* attorney-client privilege.

[3] The Court of Appeals distinguished *O. P. M. Leasing*, where waiver of the privilege was opposed by the corporation's sole voting stockholder, on the ground that the corporation in *O. P. M. Leasing* had no board of directors in existence during the tenure of the trustee. Here, instead, Frank McGhee remained an officer and director of CDCB during Notz' trusteeship. 722 F. 2d, at 341. The court acknowledged, however, a square conflict with *Citibank* v. *Andros*.

After the Court of Appeals' decision in this case, the Court of Appeals for the Ninth Circuit held that a bankruptcy examiner has the power to waive the corporation's attorney-client privilege over the objections of the debtor-in-possession. *In re Boileau*, 736 F. 2d 503 (1984). That holding also conflicts with the holding of the Seventh Circuit in this case.

II

It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals. *Upjohn Co.* v. *United States*, 449 U. S. 383 (1981). Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice. See, *e. g.*, *Upjohn Co.* v. *United States*, *supra*, at 389; *Trammel* v. *United States*, 445 U. S. 40, 51 (1980); *Fisher* v. *United States*, 425 U. S. 391, 403 (1976).

The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation. In *Upjohn Co.*, we considered whether the privilege covers only communications between counsel and top management, and decided that, under certain circumstances, communications between counsel and lower-level employees are also covered. Here, we face the related question of which corporate actors are empowered to waive the corporation's privilege.

The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.[4] The managers, of

---

[4] State corporation laws generally vest management authority in a corporation's board of directors. See, *e. g.*, Del. Code Ann., Tit. 8, § 141 (1983); N. Y. Bus. Corp. Law § 701 (McKinney Supp. 1983–1984); Model Bus. Corp. Act § 35 (1979). The authority of officers derives legally from that of the board of directors. See generally Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors,

course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. See, *e. g.*, *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 507, 170 N. W. 668, 684 (1919).

The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties. See Brief for Petitioner 11; Tr. of Oral Arg. 26. See generally *In re O. P. M. Leasing Services, Inc.*, *supra*, at 386; *Citibank* v. *Andros*, *supra*, at 1195; *In re Grand Jury Investigation*, 599 F. 2d 1224, 1236 (CA3 1979); *Diversified Industries, Inc.* v. *Meredith*, 572 F. 2d 596, 611, n. 5 (CA8 1978) (en banc).[5]

The dispute in this case centers on the control of the attorney-client privilege of a corporation in bankruptcy. The Government maintains that the power to exercise that privilege with respect to prebankruptcy communications passes to the bankruptcy trustee. In contrast, respondents maintain that this power remains with the debtor's directors.

III

As might be expected given the conflict among the Courts of Appeals, the Bankruptcy Code does not explicitly address

---

and Accountants, 63 Calif. L. Rev. 375 (1975). The distinctions between the powers of officers and directors are not relevant to this case.

[5] It follows that Andrew McGhee, who is now neither an officer nor a director, see n. 1, *supra*, retains no control over the corporation's privilege. The remainder of this opinion therefore focuses on whether Frank McGhee has such power.

the question before us. Respondents assert that 11 U. S. C. § 542(e) is dispositive, but we find reliance on that provision misplaced. Section 542(e) states:

> "*Subject to any applicable privilege*, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee" (emphasis added).

According to respondents, the "subject to any applicable privilege" language means that the attorney cannot be compelled to turn over to the trustee materials within the corporation's attorney-client privilege. In addition, they claim, this language would be superfluous if the trustee had the power to waive the corporation's privilege.

The statutory language does not support respondents' contentions. First, the statute says nothing about a trustee's authority to waive the corporation's attorney-client privilege. To the extent that a trustee has that power, the statute poses no bar on his ability to obtain materials within that privilege. Indeed, a privilege that has been properly waived is not an "applicable" privilege for the purposes of § 542(e).

Moreover, rejecting respondents' reading does not render the statute a nullity, as privileges of parties other than the corporation would still be "applicable" as against the trustee. For example, consistent with the statute, an attorney could invoke the personal attorney-client privilege of an individual manager.

The legislative history also makes clear that Congress did not intend to give the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Indeed, statements made by Members of Congress regarding the effect of § 542(e) "specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee." *In re O. P. M. Leasing*

Services, Inc., 13 B. R. 54, 70 (SDNY 1981) (Weinfeld, J.), aff'd, 670 F. 2d 383 (CA2 1982); see also 4 Collier on Bankruptcy ¶ 542.06 (15th ed. 1985). Rather, Congress intended that the courts deal with this problem:

> "The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis." 124 Cong. Rec. 32400 (1978) (remarks of Rep. Edwards); *id.*, at 33999 (remarks of Sen. DeConcini).

The "subject to any applicable privilege" language is thus merely an invitation for judicial determination of privilege questions.

In addition, the legislative history establishes that § 542(e) was intended to restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. Both the House and the Senate Reports state that § 542(e) "is a new provision that deprives accountants and attorneys of the leverage that they ha[d], . . . under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate." S. Rep. No. 95–989, p. 84 (1978); H. R. Rep. No. 95–595, pp. 369–370 (1977). It is therefore clear that § 542(e) was not intended to limit the trustee's ability to obtain corporate information.

IV

In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. See *Butner* v. *United States*, 440 U. S. 48, 55 (1979). Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of manage-

ment should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

A

The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U. S. C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1), and has the duty to maximize the value of the estate, see § 704(1); *In re Washington Group, Inc.*, 476 F. Supp. 246, 250 (MDNC 1979), aff'd *sub nom. Johnston* v. *Gilbert*, 636 F. 2d 1213 (CA4 1980), cert. denied, 452 U. S. 940 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Moreover, in reorganization, the trustee has the power to "operate the debtor's business" unless the court orders otherwise. § 1108. Even in liquidation, the court "may authorize the trustee to operate the business" for a limited period of time. § 721. In the course of operating the debtor's business, the trustee "may enter into transactions, including the sale or lease of property of the estate" without court approval. § 363(c)(1).

As even this brief and incomplete list should indicate, the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. See 2 Collier on Bankruptcy ¶ 323.01 (15th ed. 1985). In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. §§ 521, 343. Congress contemplated that when a trustee is appointed, he assumes control of the business, and

the debtor's directors are "completely ousted." See H. R. Rep. No. 95–595, pp. 220–221 (1977).[6]

In light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management. Given that the debtor's directors retain virtually no management powers, they should not exercise the traditional management function of controlling the corporation's attorney-client privilege, see *supra*, at 348, unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws.

B

We find no federal interests that would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, the rule suggested by respondents—that the debtor's directors have this power—would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. See generally 11 U. S. C. §§ 704(4), 547, 548. It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own

[6] While this reference is to the role of a trustee in reorganization, nothing in the Code or its legislative history suggests that the debtor's directors enjoy substantially greater powers in liquidation.

conduct. See generally *In re Browy*, 527 F. 2d 799, 802 (CA7 1976) *(per curiam)*.

Respondents contend that the trustee can adequately investigate fraud without controlling the corporation's attorney-client privilege. They point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts, see, *e. g.*, *Clark* v. *United States*, 289 U. S. 1, 15 (1933); *Garner* v. *Wolfinbarger*, 430 F. 2d 1093, 1102–1103 (CA5 1970), cert. denied, 401 U. S. 974 (1971). Brief for Respondents 11. The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. See *Clark* v. *United States*, *supra*, at 15. Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing.

In summary, we conclude that vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code.

V

Respondents do not seriously contest that the bankruptcy trustee exercises functions analogous to those exercised by management outside of bankruptcy, whereas the debtor's directors exercise virtually no management functions at all. Neither do respondents seriously dispute that vesting control over the attorney-client privilege in the trustee will facilitate the recovery of misappropriated corporate assets.

Respondents argue, however, that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors, who elect him and who often will be the only beneficiaries of his efforts. See 11 U. S. C. §§ 702 (creditors elect trustee), 726(a) (shareholders

are last to recover in bankruptcy). Thus, they contend, as a practical matter bankruptcy trustees represent only the creditors. Brief for Respondents 22.

We are unpersuaded by this argument. First, the fiduciary duty of the trustee runs to shareholders as well as to creditors. See, *e. g.*, *In re Washington Group, Inc.*, 476 F. Supp., at 250; *In re Ducker*, 134 F. 43, 47 (CA6 1905).[7] Second, respondents do not explain why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders. Perhaps most importantly, respondents' position ignores the fact that bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors. In cases in which it is clear that the estate is not large enough to cover any shareholder claims, the trustee's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. See generally 11 U. S. C. § 726(a).

Respondents also ignore that if a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. *Wolf* v. *Weinstein*, 372 U. S. 633, 649–652 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." *Id.*, at 651. Surely, then, the management of a debtor-in-possession

[7] The propriety of the trustee's waiver of the attorney-client privilege in a particular case can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee's fiduciary duties. Respondents, however, did not challenge the waiver on those grounds; rather, they asserted that the trustee never has the power to waive the privilege.

would have to exercise control of the corporation's attorney-client privilege consistently with this obligation to treat all parties, not merely the shareholders, fairly. By the same token, when a trustee is appointed, the privilege must be exercised in accordance with the trustee's fiduciary duty to all interested parties.

To accept respondents' position would lead to one of two outcomes: (1) a rule under which the management of a debtor-in-possession exercises control of the attorney-client privilege for the benefit only of shareholders but exercises all of its other functions for the benefit of both shareholders and creditors, or (2) a rule under which the attorney-client privilege is exercised for the benefit of both creditors and shareholders when the debtor remains in possession, but is exercised for the benefit only of shareholders when a trustee is appointed. We find nothing in the bankruptcy laws that would suggest, much less compel, either of these implausible results.

VI

Respondents' other arguments are similarly unpersuasive. First, respondents maintain that the result we reach today would also apply to *individuals* in bankruptcy, a result that respondents find "unpalatable." Brief for Respondents 27. But our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. As we have stated, a corporation, as an inanimate entity, must act through agents. See *supra*, at 348. When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be

under some theory different from the one that we embrace in this case.

Second, respondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. See Brief for Respondents 37–42; see also 722 F. 2d, at 343. But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel. See *supra*, at 348–349.

Respondents also maintain that the result we reach discriminates against insolvent corporations. According to respondents, to prevent the debtor's directors from controlling the privilege amounts to "economic discrimination" given that directors, as representatives of the shareholders, control the privilege for solvent corporations. Brief for Respondents 42; see also 722 F. 2d, at 342–343. Respondents' argument misses the point that, by definition, corporations in bankruptcy are treated differently from solvent corporations. "Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations." *McDonald* v. *Williams*, 174 U. S. 397, 404 (1899). Respondents do not explain why we should be particularly concerned about differential treatment in this context.

Finally, respondents maintain that upholding trustee waivers would create a disincentive for debtors to invoke the protections of bankruptcy and provide an incentive for creditors to file for involuntary bankruptcy. According to respondents, "[i]njection of such considerations into bankruptcy

would skew the application of the bankruptcy laws in a manner not contemplated by Congress." Brief for Respondents 43. The law creates numerous incentives, both for and against the filing of bankruptcy petitions. Respondents do not explain why our holding creates incentives that are inconsistent with congressional intent, and we do not believe that it does.

VII

For the foregoing reasons, we hold that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications. We therefore conclude that Notz, in his capacity as trustee, properly waived CDCB's privilege in this case. The judgment of the Court of Appeals for the Seventh Circuit is accordingly reversed.

It is so ordered.

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

Syllabus

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL.

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

No. 84–433. Argued March 26, 1985—Decided April 29, 1985

The Education of the Handicapped Act requires participating state and local educational agencies to assure that handicapped children and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education for such children. These procedures include the parents' right to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. With respect to judicial review, the Act in 20 U. S. C. § 1415(e)(2) authorizes the reviewing court to "grant such relief as the court determines is appropriate." Section 1415(e)(3) provides that during the pendency of any review proceedings, unless the state or local educational agency and the parents otherwise agree, "the child shall remain in the then current educational placement of such child." Respondent father of a handicapped child rejected petitioner town's proposed IEP for the 1979–1980 school year calling for placement of the child in a certain public school, and sought review by respondent Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). Meanwhile, the father, at his own expense, enrolled the child in a state-approved private school for special education. The BSEA thereafter decided that the town's proposed IEP was inappropriate and that the private school was better suited for the child's educational needs, and ordered the town to pay the child's expenses at the private school for the 1979–1980 school year. The town then sought review in Federal District Court. Ultimately, after the town in the meantime had agreed to pay for the child's private-school placement for the 1980–1981 school year but refused to reimburse the father for the 1979–1980 school year as ordered by the BSEA, the court overturned the BSEA's decision, holding that the appropriate 1979–1980 placement was the one proposed in the IEP and that the town was not responsible for the costs at the private school for the 1979–1980 through 1981–1982 school years. The Court of Appeals, remanding, held that the father's unilateral change of the child's placement during the pendency of the

administrative proceedings would not be a bar to reimbursement if such change were held to be appropriate.

Held:

1. The grant of authority to a reviewing court under § 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. The ordinary meaning of the language in § 1415(e)(2) directing the court to "grant such relief as [it] determines is appropriate" confers broad discretion on the court. To deny such reimbursement would mean that the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards of the Act would be less than complete. Pp. 369–371.

2. A parental violation of § 1415(e)(3) by changing the "then current educational placement" of their child during the pendency of proceedings to review a challenged proposed IEP does not constitute a waiver of the parents' right to reimbursement for expenses of the private placement. Otherwise, the parents would be forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. But if the courts ultimately determine that the proposed IEP was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3). Pp. 371–374.

736 F. 2d 773, affirmed.

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

David Berman argued the cause for petitioners. With him on the briefs was *Jane Kenworthy Lewis*.

Ellen L. Janos, Assistant Attorney General of Massachusetts, argued the cause for respondent Department of Education of Massachusetts. With her on the brief were *Francis X. Bellotti*, Attorney General, *Judith S. Yogman*, Assistant Attorney General, and *Kristen Reasoner Apgar*. *David W. Rosenberg* argued the cause and filed a brief for respondent Panico.*

**Thomas A. Mela* and *Stanley J. Eichner* filed a brief for Developmental Disabilities Law Center et al. as *amici curiae* urging affirmance.

JUSTICE REHNQUIST delivered the opinion of the Court.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U. S. C. § 1401 *et seq.*, requires participating state and local educational agencies "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" to such handicapped children. § 1415(a). These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. §§ 1401(19), 1415(b), (d), (e). Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement. This case requires us to address some of those questions.

Michael Panico, the son of respondent Robert Panico, was a first grader in the public school system of petitioner Town of Burlington, Mass., when he began experiencing serious difficulties in school. It later became evident that he had "specific learning disabilities" and thus was "handicapped" within the meaning of the Act, 20 U. S. C. § 1401(1). This entitled him to receive at public expense specially designed instruction to meet his unique needs, as well as related transportation. §§ 1401(16), 1401(17). The negotiations and other proceedings between the Town and the Panicos, thus far spanning more than eight years, are too involved to relate in full detail; the following are the parts relevant to the issues on which we granted certiorari.

In the spring of 1979, Michael attended the third grade of the Memorial School, a public school in Burlington, Mass., under an IEP calling for individual tutoring by a reading specialist for one hour a day and individual and group counselling. Michael's continued poor performance and the fact that

Memorial School was not equipped to handle his needs led to much discussion between his parents and Town school officials about his difficulties and his future schooling. Apparently the course of these discussions did not run smoothly; the upshot was that the Panicos and the Town agreed that Michael was generally of above average to superior intelligence, but had special educational needs calling for a placement in a school other than Memorial. They disagreed over the source and exact nature of Michael's learning difficulties, the Town believing the source to be emotional and the parents believing it to be neurological.

In late June, the Town presented the Panicos with a proposed IEP for Michael for the 1979–1980 academic year. It called for placing Michael in a highly structured class of six children with special academic and social needs, located at another Town public school, the Pine Glen School. On July 3, Michael's father rejected the proposed IEP and sought review under § 1415(b)(2) by respondent Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). A hearing was initially scheduled for August 8, but was apparently postponed in favor of a mediation session on August 17. The mediation efforts proved unsuccessful.

Meanwhile the Panicos received the results of the latest expert evaluation of Michael by specialists at Massachusetts General Hospital, who opined that Michael's "emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties" and recommended "a highly specialized setting for children with learning handicaps . . . such as the Carroll School," a state-approved private school for special education located in Lincoln, Mass. App. 26, 31. Believing that the Town's proposed placement of Michael at the Pine Glen School was inappropriate in light of Michael's needs, Mr. Panico enrolled Michael in the Carroll School in mid-August at his own expense, and Michael started there in September.

The BSEA held several hearings during the fall of 1979, and in January 1980 the hearing officer decided that the Town's proposed placement at the Pine Glen School was inappropriate and that the Carroll School was "the least restrictive adequate program within the record" for Michael's educational needs. The hearing officer ordered the Town to pay for Michael's tuition and transportation to the Carroll School for the 1979–1980 school year, including reimbursing the Panicos for their expenditures on these items for the school year to date.

The Town sought judicial review of the State's administrative decision in the United States District Court for the District of Massachusetts pursuant to 20 U. S. C. § 1415(e)(2) and a parallel state statute, naming Mr. Panico and the State Department of Education as defendants. In November 1980, the District Court granted summary judgment against the Town on the state-law claim under a "substantial evidence" standard of review, entering a final judgment on this claim under Federal Rule of Civil Procedure 54(b). The court also set the federal claim for future trial. The Court of Appeals vacated the judgment on the state-law claim, holding that review under the state statute was pre-empted by § 1415(e)(2), which establishes a "preponderance of the evidence" standard of review and which permits the reviewing court to hear additional evidence. 655 F. 2d 428, 431–432 (1981).

In the meantime, the Town had refused to comply with the BSEA order, the District Court had denied a stay of that order, and the Panicos and the State had moved for preliminary injunctive relief. The State also had threatened outside of the judicial proceedings to freeze all of the Town's special education assistance unless it complied with the BSEA order. Apparently in response to this threat, the Town agreed in February 1981 to pay for Michael's Carroll School placement and related transportation for the 1980–1981 term, none of which had yet been paid, and to continue

paying for these expenses until the case was decided. But the Town persisted in refusing to reimburse Mr. Panico for the expenses of the 1979–1980 school year. When the Court of Appeals disposed of the state claim, it also held that under this status quo none of the parties could show irreparable injury and thus none was entitled to a preliminary injunction. The court reasoned that the Town had not shown that Mr. Panico would not be able to repay the tuition and related costs borne by the Town if he ultimately lost on the merits, and Mr. Panico had not shown that he would be irreparably harmed if not reimbursed immediately for past payments which might ultimately be determined to be the Town's responsibility.

On remand, the District Court entered an extensive pretrial order on the Town's federal claim. In denying the Town summary judgment, it ruled that 20 U. S. C. § 1415(e)(3) did not bar reimbursement despite the Town's insistence that the Panicos violated that provision by changing Michael's placement to the Carroll School during the pendency of the administrative proceedings. The court reasoned that § 1415(e)(3) concerned the physical placement of the child and not the right to tuition reimbursement or to procedural review of a contested IEP. The court also dealt with the problem that no IEP had been developed for the 1980–1981 or 1981–1982 school years. It held that its power under § 1415(e)(2) to grant "appropriate" relief upon reviewing the contested IEP for the 1979–1980 school year included the power to grant relief for subsequent school years despite the lack of IEPs for those years. In this connection, however, the court interpreted the statute to place the burden of proof on the Town to upset the BSEA decision that the IEP was inappropriate for 1979–1980 and on the Panicos and the State to show that the relief for subsequent terms was appropriate.

After a 4-day trial, the District Court in August 1982 overturned the BSEA decision, holding that the appropriate 1979–1980 placement for Michael was the one proposed by

the Town in the IEP and that the parents had failed to show that this placement would not also have been appropriate for subsequent years. Accordingly, the court concluded that the Town was "not responsible for the cost of Michael's education at the Carroll School for the academic years 1979–80 through 1981–82."

In contesting the Town's proposed form of judgment embodying the court's conclusion, Mr. Panico argued that, despite finally losing on the merits of the IEP in August 1982, he should be reimbursed for his expenditures in 1979–1980, that the Town should finish paying for the recently completed 1981–1982 term, and that he should not be required to reimburse the Town for its payments to date, apparently because the school terms in question fell within the pendency of the administrative and judicial review contemplated by § 1415(e)(2). The case was transferred to another District Judge and consolidated with two other cases to resolve similar issues concerning the reimbursement for expenditures during the pendency of review proceedings.

In a decision on the consolidated cases, the court rejected Mr. Panico's argument that the Carroll School was the "current educational placement" during the pendency of the review proceedings and thus that under § 1415(e)(3) the Town was obligated to maintain that placement. *Doe* v. *Anrig*, 561 F. Supp. 121 (1983). The court reasoned that the Panicos' unilateral action in placing Michael at the Carroll School without the Town's consent could not "confer thereon the imprimatur of continued placement," *id.*, at 129, n. 5, even though strictly speaking there was no actual placement in effect during the summer of 1979 because all parties agreed Michael was finished with the Memorial School and the Town itself proposed in the IEP to transfer him to a new school in the fall.

The District Court next rejected an argument, apparently grounded at least in part on a state regulation, that the Panicos were entitled to rely on the BSEA decision upholding

their placement contrary to the IEP, regardless of whether that decision were ultimately reversed by a court. With respect to the payments made by the Town after the BSEA decision, under the State's threat to cut off funding, the court criticized the State for resorting to extrajudicial pressure to enforce a decision subject to further review. Because this "was not a case where the town was legally obliged under section 1415(e)(3) to continue payments preserving the status quo," the State's coercion could not be viewed as "the basis for a final decision on liability," and could only be "regarded as other than wrongful . . . on the assumption that the payments were to be returned if the order was ultimately reversed." *Id.*, at 130. The court entered a judgment ordering the Panicos to reimburse the Town for its payments for Michael's Carroll placement and related transportation in 1980–1981 and 1981–1982. The Panicos appealed.

In a broad opinion, most of which we do not review, the Court of Appeals for the First Circuit remanded the case a second time. 736 F. 2d 773 (1984). The court ruled, among other things, that the District Court erred in conducting a full trial *de novo*, that it gave insufficient weight to the BSEA findings, and that in other respects it did not properly evaluate the IEP. The court also considered several questions about the availability of reimbursement for interim placement. The Town argued that § 1415(e)(3) bars the Panicos from any reimbursement relief, even if on remand they were to prevail on the merits of the IEP, because of their unilateral change of Michael's placement during the pendency of the § 1415(e)(2) proceedings. The court held that such unilateral parental change of placement would not be "a bar to reimbursement of the parents if their actions are held to be appropriate at final judgment." *Id.*, at 799. In dictum the court suggested, however, that a lack of parental consultation with the Town or "attempt to achieve a negotiated compromise and agreement on a private placement," as

contemplated by the Act, "may be taken into account in a district court's computation of an award of equitable reimbursement." *Ibid.* To guide the District Court on remand, the court stated that "whether to order reimbursement, and at what amount, is a question determined by balancing the equities." *Id.*, at 801. The court also held that the Panicos' reliance on the BSEA decision would estop the Town from obtaining reimbursement "for the period of reliance and requires that where parents have paid the bill for the period, they must be reimbursed." *Ibid.*

The Town filed a petition for a writ of certiorari in this Court challenging the decision of the Court of Appeals on numerous issues, including the scope of judicial review of the administrative decision and the relevance to the merits of an IEP of violations by local school authorities of the Act's procedural requirements. We granted certiorari, 469 U. S. 1071 (1984), only to consider the following two issues: whether the potential relief available under § 1415(e)(2) includes reimbursement to parents for private school tuition and related expenses, and whether § 1415(e)(3) bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities. We express no opinion on any of the many other views stated by the Court of Appeals.

Congress stated the purpose of the Act in these words:

> "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U. S. C. § 1400(c).

The Act defines a "free appropriate public education" to mean

> "special education and related services which (A) have been provided at public expense, under public supervi-

sion and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program." 20 U. S. C. § 1401(18).

To accomplish this ambitious objective, the Act provides federal money to state and local educational agencies that undertake to implement the substantive and procedural requirements of the Act. See *Hendrick Hudson District Bd. of Education* v. *Rowley*, 458 U. S. 176, 179–184 (1982).

The *modus operandi* of the Act is the already mentioned "individualized educational program." The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. § 1401 (19). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 CFR § 300.345 (1984).

Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement

of the child, and to present complaints with respect to any of the above. The parents are further entitled to "an impartial due process hearing," which in the instant case was the BSEA hearing, to resolve their complaints.

The Act also provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" made after the due process hearing. The Act confers on the reviewing court the following authority:

> "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

The first question on which we granted certiorari requires us to decide whether this grant of authority includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.

We conclude that the Act authorizes such reimbursement. The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. See § 1412(5); 34 CFR §§ 300.132, 300.227, 300.307(b), 300.347

(1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient. As this case so vividly demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay

expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a *post hoc* determination of financial responsibility was contemplated in the legislative history:

> "If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and *the question of who remains financially responsible* is a matter to which the due process procedures established under [the predecessor to § 1415] appl[y]." S. Rep. No. 94–168, p. 32 (1975) (emphasis added).

See 34 CFR § 300.403(b) (1984) (disagreements and question of financial responsibility subject to the due process procedures).

Regardless of the availability of reimbursement as a form of relief in a proper case, the Town maintains that the Panicos have waived any right they otherwise might have to reimbursement because they violated § 1415(e)(3), which provides:

> "During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ."

We need not resolve the academic question of what Michael's "then current educational placement" was in the summer of 1979, when both the Town and the parents had agreed that a new school was in order. For the purposes of our decision, we assume that the Pine Glen School, proposed in the IEP, was Michael's current placement and, therefore, that the Panicos did "change" his placement after they had rejected the IEP and had set the administrative review in motion. In

so doing, the Panicos contravened the conditional command of § 1415(e)(3) that "the child shall remain in the then current educational placement."

As an initial matter, we note that the section calls for agreement by *either* the *State or* the *local educational agency.* The BSEA's decision in favor of the Panicos and the Carroll School placement would seem to constitute agreement by the State to the change of placement. The decision was issued in January 1980, so from then on the Panicos were no longer in violation of § 1415(e)(3). This conclusion, however, does not entirely resolve the instant dispute because the Panicos are also seeking reimbursement for Michael's expenses during the fall of 1979, prior to the State's concurrence in the Carroll School placement.

We do not agree with the Town that a parental violation of § 1415(e)(3) constitutes a waiver of reimbursement. The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings. Moreover, if the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available. As in this case, parents will often notice a child's learning difficulties while the child is in a regular public school program. If the school officials disagree with the need for special education or the adequacy of the public school's program to meet the child's needs, it is unlikely they will agree to an interim private school placement while the review process runs its course. Thus, under the Town's reading of § 1415(e)(3), the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

The legislative history supports this interpretation, favoring a proper interim placement pending the resolution of disagreements over the IEP:

> "The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the State." 121 Cong. Rec. 37412 (1975) (Sen. Stafford).

We think at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings. As we observed in *Rowley*, 458 U. S., at 192, the impetus for the Act came from two federal-court decisions, *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (1972), and *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools. Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes. See § 1400(b)(4); 34 CFR § 300.347(a) (1984). We also note that § 1415(e)(3) is located in a section detailing procedural safeguards which are largely for the benefit of the parents and the child.

This is not to say that § 1415(e)(3) has no effect on parents. While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of

review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3). This conclusion is supported by the agency's interpretation of the Act's application to private placements by the parents:

> "(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. . . .
>
> "(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under [§ 1415]." 34 CFR § 300.403 (1984).

We thus resolve the questions on which we granted certiorari; because the case is here in an interlocutory posture, we do not consider the estoppel ruling below or the specific equitable factors identified by the Court of Appeals for granting relief. We do think that the court was correct in concluding that "such relief as the court determines is appropriate," within the meaning of § 1415(e)(2), means that equitable considerations are relevant in fashioning relief.

The judgment of the Court of Appeals is

Affirmed.

UNITED STATES *v.* MAINE ET AL. (RHODE ISLAND AND NEW YORK BOUNDARY CASE)

ON BILL OF COMPLAINT

No. 35, Orig. Decided March 17, 1975—Decree entered October 6, 1975—Supplemental decree entered June 15, 1981—Decided February 19, 1985—Supplemental decree entered April 29, 1985

Supplemental decree entered.

Opinion reported: 420 U. S. 515; decree reported: 423 U. S. 1; supplemental decree reported: 452 U. S. 429; opinion reported: 469 U. S. 504.

The Court having, by its decision of February 19, 1985, 469 U. S. 504, overruled all exceptions to the Report of its Special Master herein, adopted the Master's recommendations, and confirmed his Report:

SUPPLEMENTAL DECREE

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. For the purposes of the Court's Decree herein dated October 6, 1975, 423 U. S. 1 (defining the boundary line between the submerged lands of the United States and the submerged lands of the States bordering the Atlantic Ocean), the coastline of the States of Rhode Island and New York shall be determined on the basis that the whole of Long Island Sound and that portion of Block Island Sound lying west of a straight line between Montauk Point on Long Island (at approximately 41°04′18″ N, 71°51′24″ W) and Watch Hill Point on the Rhode Island mainland (at approximately 41°18′12.1″ N, 71°51′33″ W) constitute state inland waters;

2. The parties shall bear their own costs of these proceedings and the actual expenses of the Special Master herein shall be borne half by the United States and half by Rhode Island and New York jointly;

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from

time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

ARKANSAS *v.* MISSISSIPPI

ON BILL OF COMPLAINT

No. 92, Orig. Final decree entered April 29, 1985

FINAL DECREE

The Report of the Special Master is received and ordered filed. The parties have presented a stipulation for entry of the proposed agreed decree. The Report of the Special Master is adopted and a final decree is entered accordingly.

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The common boundary between the States of Arkansas and Mississippi in the Mississippi River is the thalweg, which is the middle of the main navigable channel followed as the principal course of downstream navigation. This judgment determines the geographical location of this boundary in the reach of the Mississippi River, as more particularly described hereinafter, separating portions of Lee County, Arkansas and Tunica County, Mississippi in the vicinity of Bordeaux Point and Whiskey Island/Bordeaux Island.

2. Establishment of the common Arkansas-Mississippi boundary in "old" Walnut Bend, looping Whiskey Island/Bordeaux Island, originated with the Bordeaux Chute Cut-off, which occurred in or about 1874 and was complete in or about 1883. The locus of that portion of the state boundary consisting of approximately the eastern one-half of "old" Walnut Bend has been subsequently established by long acquiescence by the States of Arkansas and Mississippi in private boundary lines resulting from prior litigation and agreements among the owners of lands adjacent thereto. The locus of these private boundaries, which the States of Arkansas and Mississippi have adopted by acquiescence as also being the locus of the interstate boundary, is as shown on the map of Mr. W. H. Guyer, a true and correct copy of which is

attached hereto as Exhibit "A"* and described by geodetic coordinates as Segment B, Points PA through PL, in the composite description set forth hereinafter. The remainder of the interstate boundary in approximately the western one-half of "old" Walnut Bend lies along the dead thalweg of the Mississippi River as it existed when the River's flow ceased in this abandoned bendway subsequent to, and caused by, the Bordeaux Chute Cutoff. The locus of this portion of the interstate boundary in "old" Walnut Bend is as shown in Exhibit "B" and described as Segment B, Points Pm through Pbb in the composite description set forth hereinafter.

3. Establishment of the common Arkansas-Mississippi boundary along the southerly limit of Bordeaux Point originated with the Hardin Point Cutoff, constructed by the United States Army Corps of Engineers in 1942. In 1947, when the Mississippi River ceased to flow in this abandoned bendway (Fox Island Bend), the locus of the state boundary along the dead thalweg was determined by Mr. St. George Richardson, whose plat thereof has been accepted since that time by the States of Arkansas and Mississippi as correctly depicting this portion of the interstate boundary looping Bordeaux Point. A true and correct copy of the St. George Richardson survey is attached hereto as Exhibit "C" and described as Segment D in the composite description set forth hereinafter.

The common Arkansas-Mississippi boundary looping Bordeaux Point between Lee County, Arkansas and Tunica County, Mississippi, from the upper end of Mhoon Bend to the upper end of Fox Island Bend, exclusive of that portion of this boundary in "old" Walnut Bend looping Whiskey Island/Bordeaux Island, is depicted on Exhibit "D" and de-

---

*[Reporter's Note: It is not practicable to attach copies of Exhibits "A," "B," "C," and "D" for purposes of publishing the decree in the United States Reports. True and correct copies of the Exhibits are on file in the Office of the Clerk. See also paragraph 6 of the decree.]

scribed as Segment A and Segments C and D in the composite description set forth hereinafter.

4. The common Arkansas-Mississippi state boundary looping Bordeaux Point between Lee County, Arkansas and Tunica County, Mississippi, from the upper end of Mhoon Bend to the upper end of Fox Island Bend, as depicted on Exhibits "B" and "D" hereto, is described using geodetic coordinates as follows:

a. SEGMENT A

That portion of the Arkansas-Mississippi state boundary line being the line of the live thalweg of the Mississippi River, points P1 through P8 as depicted on the accompanying map titled "Arkansas-Mississippi State Boundary in the Vicinity of Bordeaux Point," and being more particularly described as follows:

Beginning at point P1 on the live thalweg of the Mississippi River at Mhoon Bend, said point being at approximately River Mile 686.3, at longitude 90°28′00″ west and at approximately latitude 34°43′36″ north;

thence westerly, downriver, coincident with the River's live thalweg (Arkansas being on the right and Mississippi being on the left) the following approximate courses:

Commencing at point P1,

thence westerly to point P2 at latitude 34°43′26″ north, longitude 90°28′30″ west,

thence westerly to point P3 at latitude 34°43′20″ north, longitude 90°29′00″ west,

thence westerly to point P4 at latitude 34°43′17″ north, longitude 90°29′30″ west,

thence westerly to point P5 at latitude 34°43′18″ north, longitude 90°30′00″ west,

thence westerly to point P6 at latitude 34°43′25″ north, longitude 90°30′30″ west,

thence westerly to point P7 at latitude 34°43′38″ north, longitude 90°31′00″ west,

thence westerly to point P8 at latitude 34°43′53″ north, longitude 90°31′27″ west,

Said point P8 being at the easternmost intersection of the River's live thalweg with the fixed thalweg of the abandoned Old Walnut Bend Channel which resulted from the 1874 Bordeaux Chute Cutoff.

b. SEGMENT B

That portion of the Arkansas-Mississippi state boundary being the boundary line as surveyed and marked in October, 1974 and November, 1975 by W. H. Guyer, which plat of survey is recorded at Plat Book 1, Page 183, Lee County, Arkansas land records; and at Plat Book 2, Page 25, Tunica County, Mississippi land records; AND said state boundary being the line of the 1883 fixed thalweg line in the sector of the Old Walnut Bend Channel that was abandoned after the avulsive Bordeaux Chute Cutoff; being Points A through L (the W. H. Guyer survey) and Points Pm through Pbb (the fixed thalweg line) as depicted on the accompanying map titled "Arkansas-Mississippi State Boundary in the Vicinity of Whiskey Island and Bordeaux Island" and being more particularly described as follows:

Beginning at said point P8 at the intersection of the River's live thalweg with a line bearing geodetic South 35°50′ West from the southern terminus of the said W. H. Guyer survey line;

thence North 35°50′ East to point A at the southern terminus of the said W. H. Guyer survey line at approximately latitude 34°44′20″ north, and approximately 90°31′03″ west;

thence northerly coincident with the said W. H. Guyer survey line the following courses:

Commencing at point A,

thence northeasterly to point B of the W. H. Guyer survey at latitude 34°44′40″ north, longitude 90°30′46″ west,

thence northeasterly to point C of the W. H. Guyer survey at latitude 34°44′52″ north, longitude 90°30′35″ west,

thence northeasterly to point D of the W. H. Guyer survey at latitude 34°45′04″ north, longitude 90°30′17″ west,

thence northeasterly to point E of the W. H. Guyer survey at latitude 34°45′16″ north, longitude 90°29′57″ west,

thence northeasterly to point F of the W. H. Guyer survey at latitude 34°45′27″ north, longitude 90°29′39″ west,

thence northerly to point G of the W. H. Guyer survey at latitude 34°45′53″ north, longitude 90°29′33″ west,

thence northerly to point H of the W. H. Guyer survey at latitude 34°46′21″ north, longitude 90°29′34″ west,

thence northwesterly to point I of the W. H. Guyer survey at latitude 34°47′00″ north, longitude 90°30′11″ west,

thence northwesterly to point J of the W. H. Guyer survey at latitude 34°47′16″ north, longitude 90°30′30″ west,

thence northwesterly to point K of the W. H. Guyer survey at latitude 34°47′24″ north, longitude 90°30′41″ west,

thence northerly to point L of the W. H. Guyer survey at latitude 34°47′52″ north, longitude 90°30′40″ west,

thence continuing north to the fixed thalweg line in the sector of the Old Walnut Bend Channel at point Pm at latitude 34°47′54″ north, longitude 90°30′40″ west,

thence westerly and southerly along the fixed thalweg line in the sector of the Old Walnut Bend Channel the following courses:

Commencing at point Pm,

thence westerly to point Pn at latitude 34°48′00″ north, longitude 90°30′50″ west,

thence westerly to point Po at latitude 34°48′03″ north, longitude 90°31′00″ west,

thence westerly to point Pp at latitude 34°48′07″ north, longitude 90°31′16″ west,

thence westerly to point Pq at latitude 34°48′06″ north, longitude 90°31′35″ west,

thence westerly to point Pr at latitude 34°48′00″ north, longitude 90°32′00″ west,

thence southwesterly to point Ps at latitude 34°47′45″ north, longitude 90°32′27″ west,

thence southwesterly to point Pt at latitude 34°47′30″ north, longitude 90°32′39″ west,

thence southwesterly to point Pu at latitude 34°47′15″ north, longitude 90°32′46″ west,

thence southwesterly to point Pv at latitude 34°47′00″ north, longitude 90°32′52″ west,

thence southeasterly to point Pw at latitude 34°46′30″ north, longitude 90°32′47″ west,

thence southeasterly to point Px at latitude 34°46′15″ north, longitude 90°32′43″ west,

thence southeasterly to point Py at latitude 34°46′00″ north, longitude 90°32′37″ west,

thence southeasterly to point Pz at latitude 34°45′30″ north, longitude 90°32′26″ west,

thence southeasterly to point Paa at latitude 34°45′19″ north, longitude 90°32′22″ west,

thence southwesterly to point Pbb at latitude 34°45′02″ north, longitude 90°32′28″ west,

thence continuing southwesterly along course Paa to Pbb extended to point P9 at approximately latitude 34°44′20″ north, longitude 90°32′44″ west.

Said point P9 being the westernmost intersection of the River's live thalweg with the fixed thalweg of the abandoned Old Walnut Bend Channel.

c. SEGMENT C

That portion of the Arkansas-Mississippi state boundary being the line of the live thalweg of the Mississippi River, points P9 through P18, as depicted on the accompanying map titled "Arkansas-Mississippi State Boundary in the Vicinity of Bordeaux Point," and being more particularly described as follows:

Beginning at point P9 which is the westernmost intersection of the River's live thalweg with the dead thalweg of the abandoned, truncated portion of Old Walnut Bend Channel resulting from the 1874 Bordeaux Chute Cutoff, said point being at approximately River Mile 681.5, approximately latitude 34°44′20″ north, and approximately longitude 90°32′44″ west;

thence westerly and southerly downriver, coincident with the River's live thalweg (Arkansas being on the right and Mississippi on the left) the following approximate courses:

Commencing at point P9,

thence westerly to point P10 at latitude 34°44′23″ north, longitude 90°33′00″ west,

thence westerly to point P11 at latitude 34°44′21″ north, longitude 90°33′30″ west,

thence westerly to point P12 at latitude 34°44′16″ north, longitude 90°33′49″ west,

thence southerly to point P13 at latitude 34°44′06″ north, longitude 90°34′00″ west,

thence southerly to point P14 at latitude 34°44′00″ north, longitude 90°34′04″ west,

thence southerly to point P15 at latitude 34°43′30″ north, longitude 90°34′07″ west,

thence southerly to point P16 at latitude 34°43′17″ north, longitude 90°34′07″ west,

thence southerly to point P17 at latitude 34°43′00″ north, longitude 90°34′15″ west,

thence southerly to point P18 at latitude 34°42′46″ north, longitude 90°34′19″ west,

Said point P18 being the intersection of the River's live thalweg with a line bearing geodetic North 82°41′ West from the western terminus of the said St. George Richardson survey line.

d. SEGMENT D

That portion of the Arkansas-Mississippi state boundary principally, being the 1947 survey line of St. George Richardson, points P18 through P32 as depicted on the accompanying map titled "Arkansas-Mississippi State Boundary in the Vicinity of Bordeaux Point," and being more particularly described as follows:

Beginning at point P18 at the intersection of the River's live thalweg with a line bearing geodetic North 82°41′ West from the western terminus of the said St. George Richardson survey line,

thence geodetic South 82°41′ East to point P19, at longitude 90°34′00″ west,

thence continuing geodetic South 82°41′ East to the said western terminus, being point P20, at latitude 34°42′39″ north, longitude 90°33′34″ west,

thence easterly coincident with the said St. George Richardson survey line the following courses:

Commencing at point P20,

thence easterly to point P21 at latitude 34°42′30″ north, longitude 90°33′24″ west,

thence easterly to point P22 at latitude 34°42′14″ north, longitude 90°33′00″ west,

thence easterly to point P23 at latitude 34°42′00″ north, longitude 90°32′33″ west,

thence easterly to point P24 at latitude 34°41′55″ north, longitude 90°32′22″ west,

thence easterly to point P25 at latitude 34°41′47″ north, longitude 90°32′00″ west,

thence easterly to point P26 at latitude 34°41′44″ north, longitude 90°31′42″ west,

thence easterly to point P27 at latitude 34°41′44″ north, longitude 90°31′00″ west,

thence easterly to point P28 at latitude 34°42′00″ north, longitude 90°30′00″ west,

thence easterly to point P29 at latitude 34°42′15″ north, longitude 90°29′00″ west,

thence easterly to point P30 at latitude 34°42′19″ north, longitude 90°28′27″ west,

thence easterly to point P31 at latitude 34°42′08″ north, longitude 90°28′08″ west,

thence easterly to point P32 at latitude 34°42′00″ north, longitude 90°28′00″ west.

5. All lands now lying on the Arkansas side of the boundary line described hereinabove are wholly within, and a part of, the State of Arkansas. All lands now lying on the Mississippi side of the boundary line described hereinabove are wholly within, and a part of, the State of Mississippi.

6. Certified copies of Exhibits A, B, C, and D in full size are to be filed upon entry of this decree with the Custodian of Official Land Records, in Lee County, Arkansas and Tunica County, Mississippi by representatives of the Attorneys General of the States of Arkansas and Mississippi.

CALIFORNIA *v.* CARNEY

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 83–859. Argued October 30, 1984—Decided May 13, 1985

A Drug Enforcement Administration (DEA) agent, who had information that respondent's mobile motor home was being used to exchange marihuana for sex, watched respondent approach a youth who accompanied respondent to the motor home, which was parked in a lot in downtown San Diego. The agent and other agents then kept the vehicle under surveillance, and stopped the youth after he left the vehicle. He told them that he had received marihuana in return for allowing respondent sexual contacts. At the agents' request, the youth returned to the motor home and knocked on the door; respondent stepped out. Without a warrant or consent, one agent then entered the motor home and observed marihuana. A subsequent search of the motor home at the police station revealed additional marihuana, and respondent was charged with possession of marihuana for sale. After his motion to suppress the evidence discovered in the motor home was denied, respondent was convicted in California Superior Court on a plea of *nolo contendere*. The California Court of Appeal affirmed. The California Supreme Court reversed, holding that the search of the motor home was unreasonable and that the motor vehicle exception to the warrant requirement of the Fourth Amendment did not apply, because expectations of privacy in a motor home are more like those in a dwelling than in an automobile.

Held: The warrantless search of respondent's motor home did not violate the Fourth Amendment. Pp. 390–395.

(a) When a vehicle is being used on the highways or is capable of such use and is found stationary in a place not regularly used for residential purposes, the two justifications for the vehicle exception come into play. First, the vehicle is readily mobile, and, second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. Here, while respondent's vehicle possessed some attributes of a home, it clearly falls within the vehicle exception. To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that the exception be applied depending on the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home would ignore the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic or other illegal activity. Pp. 390–394.

(b) The search in question was not unreasonable. It was one that a magistrate could have authorized if presented with the facts. The DEA agents, based on uncontradicted evidence that respondent was distributing a controlled substance from the vehicle, had abundant probable cause to enter and search the vehicle. Pp. 394–395.

34 Cal. 3d 597, 668 P. 2d 807, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 395.

Louis R. Hanoian, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Michael D. Wellington* and *John W. Carney*, Deputy Attorneys General.

Thomas F. Homann argued the cause for respondent. With him on the brief was *A. Dale Manicom.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether law enforcement agents violated the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile "motor home" located in a public place.

I

On May 31, 1979, Drug Enforcement Agency Agent Robert Williams watched respondent, Charles Carney, ap-

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Alan I. Horowitz*, and *Kathleen A. Felton;* and for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Thomas F. Catania, Jr.*, and *Paul R. Kempainen*, Special Assistant Attorneys General, *Jim Smith*, Attorney General of Florida, *Tany S. Hong*, Attorney General of Hawaii, and *Michael A. Lilly*, First Deputy Attorney General.

Frank O. Bell, Jr., and *George L. Schraer* filed a brief for the California State Public Defender as *amicus curiae* urging affirmance.

proach a youth in downtown San Diego. The youth accompanied Carney to a Dodge Mini Motor Home parked in a nearby lot. Carney and the youth closed the window shades in the motor home, including one across the front window. Agent Williams had previously received uncorroborated information that the same motor home was used by another person who was exchanging marihuana for sex. Williams, with assistance from other agents, kept the motor home under surveillance for the entire one and one-quarter hours that Carney and the youth remained inside. When the youth left the motor home, the agents followed and stopped him. The youth told the agents that he had received marihuana in return for allowing Carney sexual contacts.

At the agents' request, the youth returned to the motor home and knocked on its door; Carney stepped out. The agents identified themselves as law enforcement officers. Without a warrant or consent, one agent entered the motor home and observed marihuana, plastic bags, and a scale of the kind used in weighing drugs on a table. Agent Williams took Carney into custody and took possession of the motor home. A subsequent search of the motor home at the police station revealed additional marihuana in the cupboards and refrigerator.

Respondent was charged with possession of marihuana for sale. At a preliminary hearing, he moved to suppress the evidence discovered in the motor home. The Magistrate denied the motion, upholding the initial search as a justifiable search for other persons, and the subsequent search as a routine inventory search.

Respondent renewed his suppression motion in the Superior Court. The Superior Court also rejected the claim, holding that there was probable cause to arrest respondent, that the search of the motor home was authorized under the automobile exception to the Fourth Amendment's warrant requirement, and that the motor home itself could be seized without a warrant as an instrumentality of the crime. Re-

spondent then pleaded *nolo contendere* to the charges against him, and was placed on probation for three years.

Respondent appealed from the order placing him on probation. The California Court of Appeal affirmed, reasoning that the vehicle exception applied to respondent's motor home. 117 Cal. App. 3d 36, 172 Cal. Rptr. 430 (1981).

The California Supreme Court reversed the conviction. 34 Cal. 3d 597, 668 P. 2d 807 (1983). The Supreme Court did not disagree with the conclusion of the trial court that the agents had probable cause to arrest respondent and to believe that the vehicle contained evidence of a crime; however, the court held that the search was unreasonable because no warrant was obtained, rejecting the State's argument that the vehicle exception to the warrant requirement should apply.[1] That court reached its decision by concluding that the mobility of a vehicle "is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile.'" *Id.*, at 605, 668 P. 2d, at 811. The California Supreme Court held that the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to "provide the occupant with living quarters." *Id.*, at 606, 668 P. 2d, at 812.

We granted certiorari, 465 U. S. 1098 (1984). We reverse.

---

[1] Respondent contends that the state-court decision rests on an adequate and independent state ground, because the opinion refers to the State as well as the Federal Constitution. Respondent's argument is clearly foreclosed by our opinion in *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983), in which we held, "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." We read the opinion as resting on federal law.

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." This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer. There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called "automobile exception" at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in *Carroll* v. *United States*, 267 U. S. 132 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests. The Court rested this exception on a long-recognized distinction between stationary structures and vehicles:

> "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be *quickly moved* out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153 (emphasis added).

The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. See, *e. g.*, *Cooper* v. *California*, 386 U. S. 58, 59 (1967); *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970); *Cady* v. *Dombrowski*, 413 U. S. 433, 442 (1973);

Cardwell v. *Lewis*, 417 U. S. 583, 588 (1974); *South Dakota* v. *Opperman*, 428 U. S. 364, 367 (1976). In *Chambers*, for example, commenting on the rationale for the vehicle exception, we noted that "the opportunity to search is fleeting since a car is readily movable." 399 U. S., at 51. More recently, in *United States* v. *Ross*, 456 U. S. 798, 806 (1982), we once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit . . . ." The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota* v. *Opperman*, *supra*, at 367.

However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. 428 U. S., at 367. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Ibid.*

Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, *e. g.*, *Cady* v. *Dombrowski*, *supra*. In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held in *Cardwell* v. *Lewis*, *supra*, at 590, that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. But even when enclosed "repository" areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, *Cady* v. *Dombrowski*, *supra*, a sealed package in a car trunk, *Ross*, *supra*, a closed compartment under the dashboard, *Cham-*

bers v. *Maroney*, *supra*, the interior of a vehicle's upholstery, *Carroll*, *supra*, or sealed packages inside a covered pickup truck, *United States* v. *Johns*, 469 U. S. 478 (1985).

These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. *Cady* v. *Dombrowski*, *supra*, at 440–441. As we explained in *South Dakota* v. *Opperman*, an inventory search case:

> "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." 428 U. S., at 368.

The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." *Ross*, *supra*, at 806, n. 8. In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception

come into play.[2] First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

While it is true that respondent's vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll*, respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to "operate on public streets; [was] serviced in public places; . . . and [was] subject to extensive regulation and inspection." *Rakas* v. *Illinois*, 439 U. S. 128, 154, n. 2 (1978) (POWELL, J., concurring). And the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.

Respondent urges us to distinguish his vehicle from other vehicles within the exception because it was *capable of functioning as a home.* In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i. e.*, as a "home" or "residence." To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles

---

[2] With few exceptions, the courts have not hesitated to apply the vehicle exception to vehicles other than automobiles. See, *e. g.*, *United States* v. *Rollins*, 699 F. 2d 530 (CA11) (airplane), cert. denied, 464 U. S. 933 (1983).

such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity. In *United States* v. *Ross*, 456 U. S., at 822, we declined to distinguish between "worthy" and "unworthy" containers, noting that "the central purpose of the Fourth Amendment forecloses such a distinction." We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.[3] These two requirements for application of the exception ensure that law enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected. Applying the vehicle exception in these circumstances allows the essential purposes served by the exception to be fulfilled, while assuring that the exception will acknowledge legitimate privacy interests.

III

The question remains whether, apart from the lack of a warrant, this search was unreasonable. Under the vehicle exception to the warrant requirement, "[o]nly the prior approval of the magistrate is waived; the search otherwise [must be such] as the magistrate could authorize." *Ross*, *supra*, at 823.

---

[3] We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

This search was not unreasonable; it was plainly one that the magistrate could authorize if presented with these facts. The DEA agents had fresh, direct, uncontradicted evidence that the respondent was distributing a controlled substance from the vehicle, apart from evidence of other possible offenses. The agents thus had abundant probable cause to enter and search the vehicle for evidence of a crime notwithstanding its possible use as a dwelling place.

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The character of "the place to be searched"[1] plays an important role in Fourth Amendment analysis. In this case, police officers searched a Dodge/Midas Mini Motor Home. The California Supreme Court correctly characterized this vehicle as a "hybrid" which combines "the mobility attribute of an automobile . . . with most of the privacy characteristics of a house."[2]

The hybrid character of the motor home places it at the crossroads between the privacy interests that generally forbid warrantless invasions of the home, *Payton* v. *New York*, 445 U. S. 573, 585–590 (1980), and the law enforcement interests that support the exception for warrantless searches of automobiles based on probable cause, *United States* v. *Ross*, 456 U. S. 798, 806, 820 (1982). By choosing to follow the latter route, the Court errs in three respects: it has entered new

---

[1] 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."

[2] 34 Cal. 3d 597, 606, 668 P. 2d 807, 812 (1983).

territory prematurely, it has accorded priority to an exception rather than to the general rule, and it has abandoned the limits on the exception imposed by prior cases.

I

In recent Terms, the Court has displayed little confidence in state and lower federal court decisions that purport to enforce the Fourth Amendment. Unless an order suppressing evidence is clearly correct, a petition for certiorari is likely to garner the four votes required for a grant of plenary review—as the one in this case did. Much of the Court's "burdensome" workload is a product of its own aggressiveness in this area. By promoting the Supreme Court of the United States as the High Magistrate for every warrantless search and seizure, this practice has burdened the argument docket with cases presenting fact-bound errors of minimal significance.[3] It has also encouraged state legal officers to file petitions for certiorari in even the most frivolous search and seizure cases.[4]

The Court's lack of trust in lower judicial authority has resulted in another improvident exercise of discretionary

---

[3] *E. g.*, *United States* v. *Johns*, 469 U. S. 478 (1985); *United States* v. *Sharpe*, 470 U. S. 675 (1985); *Oklahoma* v. *Castleberry*, *ante*, p. 146. Cf. *Florida* v. *Rodriguez*, 469 U. S. 1, 12–13 (1984) (STEVENS, J., dissenting, joined by BRENNAN, J.).

[4] See, *e. g.*, *State* v. *Caponi*, 12 Ohio St. 3d 302, 466 N. E. 2d 551 (1984), cert. denied, 469 U. S. 1209 (1985). The Court's inventiveness in the search and seizure area has also emboldened state legal officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds. See, *e. g.*, *Jamison* v. *State*, 455 So. 2d 1112 (Fla. App. 1984), cert. denied, 469 U. S. 1127 (1985); *Ex parte Gannaway*, 448 So. 2d 413 (Ala. 1984), cert. denied, 469 U. S. 1207 (1985); *State* v. *Burkholder*, 12 Ohio St. 3d 205, 466 N. E. 2d 176, cert. denied, 469 U. S. 1062 (1984); *People* v. *Corr*, 682 P. 2d 20 (Colo.), cert. denied, 469 U. S. 855 (1984); *State* v. *Von Bulow*, 475 A. 2d 995 (R. I.), cert. denied, 469 U. S. 875 (1984).

jurisdiction.[5] In what is at most only a modest extension of our Fourth Amendment precedents, the California Supreme Court held that police officers may not conduct a nonexigent search of a motor home without a warrant supported by probable cause. The State of California filed a petition for certiorari contending that the decision below conflicted with the authority of other jurisdictions.[6] Even a cursory examination of the cases alleged to be in conflict revealed that they did not consider the question presented here.[7]

---

[5] *Michigan* v. *Long*, 463 U. S. 1032, 1065 (1983) (STEVENS, J., dissenting); *California* v. *Ramos*, 463 U. S. 992, 1029 (1983) (STEVENS, J., dissenting); *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 72–73 (1983) (STEVENS, J., dissenting); *Watt* v. *Alaska*, 451 U. S. 259, 273 (1981) (STEVENS, J., concurring). See also Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 182 (1982).

[6] Pet. for Cert. 15–17, 21, 24–25. The petition acknowledged that the decision below was consistent with dictum in two recent Ninth Circuit decisions. See *United States* v. *Wiga*, 662 F. 2d 1325, 1329 (1981), cert. denied, 456 U. S. 918 (1982); *United States* v. *Williams*, 630 F. 2d 1322, 1326, cert. denied, 449 U. S. 865 (1980).

[7] Only one case contained any reference to heightened expectations of privacy in mobile living quarters. *United States* v. *Cadena*, 588 F. 2d 100, 101–102 (CA5 1979) *(per curiam)*. Analogizing to automobile cases, the court upheld the warrantless search of an oceangoing ship while in transit. The court observed that the mobility "exception" required probable cause *and* exigency, and that "the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant." *Id.*, at 102.

In all of the other cases, defendants challenged warrantless searches for vehicles claiming either no probable cause or the absence of exigency under *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). *United States* v. *Montgomery*, 620 F. 2d 753, 760 (CA10) ("camper"), cert. denied, 449 U. S. 882 (1980); *United States* v. *Clark*, 559 F. 2d 420, 423–425 (CA5) ("camper pick-up truck"), cert. denied, 434 U. S. 969 (1977); *United States* v. *Lovenguth*, 514 F. 2d 96, 97 (CA9 1975) ("pick up with . . . camper top"); *United States* v. *Cusanelli*, 472 F. 2d 1204, 1206 (CA6) *(per curiam)* (two camper trucks), cert. denied, 412 U. S. 953 (1973); *United States* v. *Miller*, 460 F. 2d 582, 585–586 (CA10 1972) ("motor home"); *United States* v. *Rodgers*, 442 F. 2d 902, 904 (CA5 1971) ("camper truck"); *State* v. *Million*, 120

This is not a case "in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, . . . a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law." *Michigan* v. *Long*, 463 U. S. 1032, 1067–1068 (1983) (STEVENS, J., dissenting). As an unusually perceptive study of this Court's docket stated with reference to *California* v. *Ramos*, 463 U. S. 992 (1983), "this . . . situation . . . rarely presents a compelling reason for Court review in the absence of a fully percolated conflict."[8] The Court's decision to forge ahead

---

Ariz. 10, 15–16, 583 P. 2d 897, 902–903 (1978) ("motor home"); *State* v. *Sardo*, 112 Ariz. 509, 513–514, 543 P. 2d 1138, 1142 (1975) ("motor home"). Only *Sardo* involved a vehicle that was not in transit, but the motor home in that case was about to depart the premises.

Two State Supreme Courts have upheld the warrantless search of mobile homes in transit, notwithstanding a claim of heightened privacy interests. See *State* v. *Mower*, 407 A. 2d 729, 732 (Me. 1979); *State* v. *Lepley*, 343 N. W. 2d 41, 42–43 (Minn. 1984). Those cases—which were not cited in the petition for certiorari—are factually distinguishable from the search of the parked motor home here. In any case, some conflict among state courts on novel questions of the kind involved here is desirable as a means of exploring and refining alternative approaches to the problem.

[8] Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities (1984) (to be published in 59 N. Y. U. L. Rev. 677, 761 (1984)). The study elaborated: "[T]he Court should not hear cases in which a state court has invalidated state action on a federal ground in the absence of a conflict or a decision to treat the case as a vehicle for a major pronouncement of federal law. Without further percolation, there is ordinarily little reason to believe that the issue is one of recurring national significance. In general, correction of error, even regarding a matter of constitutional law, is not a sufficient basis for Supreme Court intervention. This last category differs from a federal court's invalidation of state action in that a structural justification for intervention is generally missing, given the absence of vertical federalism difficulties and the built-in assurance that state courts functioning under significant political constraints are not likely to invalidate state action lightly, even on federal grounds. . . . [The Court] should not grant . . . merely to correct perceived error." *Id.*, at 738–739 (footnote omitted). Chief Justice Samuel Roberts, Retired, of the Pennsylvania Supreme Court has expressed similar concerns. Roberts, The Adequate and Inde-

has established a rule for searching motor homes that is to be followed by the entire Nation. If the Court had merely allowed the decision below to stand, it would have only governed searches of those vehicles in a single State. The breadth of this Court's mandate counsels greater patience before we offer our binding judgment on the meaning of the Constitution.

Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles. Despite the age of the automobile exception and the countless cases in which it has been applied, we have no prior cases defining the contours of a reasonable search in the context of hybrids such as motor homes, house trailers, houseboats, or yachts. In this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.[9] The line or lines separating mobile homes from permanent structures might have been drawn in various ways, with consideration given to whether the home is moving or at rest, whether it rests on land or water, the form of the vehicle's attachment to its location, its potential speed of departure, its size and capacity to serve as a domicile, and its method of locomotion. Rational decisionmaking strongly counsels against divining the uses and abuses of these vehicles in the vacuum of the first case raising the question before us.

Of course, we may not abdicate our responsibility to clarify the law in this field. Some caution, however, is justified when every decision requires us to resolve a vexing "conflict . . . between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." *United States* v. *Ross*, 456 U. S., at 804. "The certainty that is supposed to come from speedy resolution

---

pendent State Ground: Some Practical Considerations, 17 IJA Rep., No. 2, pp. 1–2 (1985).

[9] See generally 45 Trailer Life, No. 1 (1985); *id.*, No. 2; 22 Motor Home, No. 1 (1985); *id.*, No. 2; 1 RV Lifestyle Magazine, No. 3 (1985).

may prove illusory if a premature decision raises more questions than it answers."[10] The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. Consideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests. To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.[11] Deliberation on the question over time winnows out the unnecessary

---

[10] Hellman, The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?, 11 Hastings Const. L. Q. 375, 405 (1984).

[11] "Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears. . . . Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.

. . . . . .

"Our system is already committed in substantial measure to the principle of percolation. This is one justification for the absence of intercircuit stare decisis. Similarly, state and federal courts daily engage in a process of 'dialectical federalism' wherein state courts are not bound by the holdings of lower federal courts in the same geographical area. But more than past practice and the structure of the judicial system supports a policy of awaiting percolation before Supreme Court intervention. A managerial conception of the Court's role embraces lower court percolation as an affirmative value. The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law. The occurrence of a conflict acts as a signaling device to help the Court identify important issues. Moreover, the principle of percolation encourages the lower courts to act as responsible agents in the process of development of national law." Estreicher & Sexton, *supra* n. 8, at 716, 719 (footnotes omitted).

and discordant elements of doctrine and preserves "whatever is pure and sound and fine."[12]

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." We have interpreted this language to provide law enforcement officers with a bright-line standard: "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." *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnotes omitted); *Arkansas* v. *Sanders*, 442 U. S. 753, 758 (1979).

In *United States* v. *Ross*, the Court reaffirmed the primary importance of the general rule condemning warrantless searches, and emphasized that the exception permitting the search of automobiles without a warrant is a narrow one. 456 U. S., at 824–825. We expressly endorsed "the general rule," stated in *Carroll* v. *United States*, 267 U. S. 132, 156 (1925), that "'[i]n cases where the securing of a warrant is reasonably practicable, it must be used.'" 456 U. S., at 807. Given this warning and the presumption of regularity that attaches to a warrant,[13] it is hardly unrealistic to expect experienced law enforcement officers to obtain a search warrant when one can easily be secured.

The ascendancy of the warrant requirement in our system of justice must not be bullied aside by extravagant claims of necessity:

> "'The warrant requirement . . . is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part

---

[12] B. Cardozo, The Nature of the Judicial Process 179 (1921).

[13] *United States* v. *Leon*, 468 U. S. 897, 913–914 (1984); *Illinois* v. *Gates*, 462 U. S. 213, 236–237 (1983).

> of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.' [*Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971).]
>
> ". . . By requiring that conclusions concerning probable cause and the scope of a search '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' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority." *Arkansas* v. *Sanders*, 442 U. S., at 758–759.

If the motor home were parked in the exact middle of the intersection between the general rule and the exception for automobiles, priority should be given to the rule rather than the exception.

III

The motor home, however, was not parked in the middle of that intersection. Our prior cases teach us that inherent mobility is not a sufficient justification for the fashioning of an exception to the warrant requirement, especially in the face of heightened expectations of privacy in the location searched. Motor homes, by their common use and construction, afford their owners a substantial and legitimate expectation of privacy when they dwell within. When a motor home is parked in a location that is removed from the public highway, I believe that society is prepared to recognize that the expectations of privacy within it are not unlike the expectations one has in a fixed dwelling. As a general rule, such places may only be searched with a warrant based upon probable cause. Warrantless searches of motor homes are only reasonable when the motor home is traveling on the public streets or highways, or when exigent circumstances otherwise require an immediate search without the expenditure of time necessary to obtain a warrant.

As we explained in *Ross*, the automobile exception is the product of a long history:

> "[S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable." 456 U. S., at 806–807 (footnotes omitted).[14]

The automobile exception has been developed to ameliorate the practical problems associated with the search of vehicles that have been stopped on the streets or public highways because there was probable cause to believe they were transporting contraband. Until today, however, the Court has never decided whether the practical justifications that apply to a vehicle that is stopped in transit on a public way apply with the same force to a vehicle parked in a lot near a courthouse where it could easily be detained while a warrant is issued.[15]

---

[14] "As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history." 456 U. S., at 820.

[15] In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), a plurality refused to apply the automobile exception to an automobile that was seized while parked in the driveway of the suspect's house, towed to a secure police compound, and later searched:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll* v. *United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be

In this case, the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application.[16] The officers clearly had the element of surprise with them, and with curtains covering the windshield, the motor home offered no indication of any imminent departure. The officers plainly had probable cause to arrest the respondent and search the motor home, and on this record, it is inexplicable why they eschewed the safe harbor of a warrant.[17]

In the absence of any evidence of exigency in the circumstances of this case, the Court relies on the inherent mobility of the motor home to create a conclusive presumption of exigency. This Court, however, has squarely held that mobility of the place to be searched is not a sufficient justification for abandoning the warrant requirement. In *United States* v. *Chadwick*, 433 U. S. 1 (1977), the Court held that a warrantless search of a footlocker violated the Fourth Amendment even

---

made into a case where 'it is not practicable to secure a warrant.' [267 U. S., at 153,] and the 'automobile exception' despite its label, is simply irrelevant." *Id.*, at 461–462 (opinion of Stewart, J., joined by Douglas, BRENNAN, and MARSHALL, JJ.).

In *Cardwell* v. *Lewis*, 417 U. S. 583 (1974), a different plurality approved the seizure of an automobile from a public parking lot, and a later examination of its exterior. *Id.*, at 592–594 (opinion of BLACKMUN, J.). Here, of course, we are concerned with the reasonableness of the search, not the seizure. Even if the diminished expectations of privacy associated with an automobile justify the warrantless search of a parked automobile notwithstanding the diminished exigency, the heightened expectations of privacy in the interior of a motor home require a different result.

[16] See Suppression Hearing Tr. 7; Tr. of Oral Arg. 27. In addition, a telephonic warrant was only 20 cents and the nearest phone booth away. See Cal. Penal Code Ann. §§ 1526(b), 1528(b) (West 1982); *People* v. *Morrongiello*, 145 Cal. App. 3d 1, 9, 193 Cal. Rptr. 105, 109 (1983).

[17] This willingness to search first and later seek justification has properly been characterized as "a decision roughly comparable in prudence to determining whether an electrical wire is charged by grasping it." *United States* v. *Mitchell*, 538 F. 2d 1230, 1233 (CA5 1976) (en banc), cert. denied, 430 U. S. 945 (1977).

though there was ample probable cause to believe it contained contraband. The Government had argued that the rationale of the automobile exception applied to movable containers in general, and that the warrant requirement should be limited to searches of homes and other "core" areas of privacy. See *id.*, at 7. We categorically rejected the Government's argument, observing that there are greater privacy interests associated with containers than with automobiles,[18] and that there are less practical problems associated with the temporary detention of a container than with the detention of an automobile. See *id.*, at 13, and n. 7.

We again endorsed that analysis in *Ross:*

> "The Court in *Chadwick* specifically rejected the argument that the warrantless search was 'reasonable' because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that 'a person's expectations of privacy in personal luggage are substantially greater than in an automobile,' [433 U. S., at 13], and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at 13, n. 7." 456 U. S., at 811.

It is perfectly obvious that the citizen has a much greater expectation of privacy concerning the interior of a mobile home than of a piece of luggage such as a footlocker. If "inherent mobility" does not justify warrantless searches

---

[18] "The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U. S., at 13.

of containers, it cannot rationally provide a sufficient justification for the search of a person's dwelling place.

Unlike a brick bungalow or a frame Victorian, a motor home seldom serves as a permanent lifetime abode. The motor home in this case, however, was designed to accommodate a breadth of ordinary everyday living. Photographs in the record indicate that its height, length, and beam provided substantial living space inside: stuffed chairs surround a table; cupboards provide room for storage of personal effects; bunk beds provide sleeping space; and a refrigerator provides ample space for food and beverages.[19] Moreover, curtains and large opaque walls inhibit viewing the activities inside from the exterior of the vehicle. The interior configuration of the motor home establishes that the vehicle's size, shape, and mode of construction should have indicated to the officers that it was a vehicle containing mobile living quarters.

The State contends that officers in the field will have an impossible task determining whether or not other vehicles contain mobile living quarters. It is not necessary for the Court to resolve every unanswered question in this area in a single case, but common English usage suggests that we already distinguish between a "motor home" which is "equipped as a self-contained traveling home," a "camper" which is only equipped for "casual travel and camping," and an automobile which is "designed for passenger transportation."[20] Surely the exteriors of these vehicles contain clues about their different functions which could alert officers in the field to the necessity of a warrant.[21]

---

[19] Record, Ex. Nos. 102, 103.

[20] Webster's Ninth New Collegiate Dictionary 118, 199, 775 (1983).

[21] In refusing to extend the California Supreme Court's decision in *Carney* beyond its context, the California Courts of Appeal have had no difficulty in distinguishing the motor home involved there from a Ford van, *People* v. *Chestnut*, 151 Cal. App. 3d 721, 726–727, 198 Cal. Rptr. 8, 11 (1983), and a cab-high camper shell on the back of a pickup truck, *People* v. *Gordon*, 156 Cal. App. 3d 74, 82, 202 Cal. Rptr. 566, 570 (1984). There is no reason to believe that trained officers could not make similar dis-

The California Vehicle Code also refutes the State's argument that the exclusion of "motor homes" from the automobile exception would be impossible to apply in practice. In its definitional section, the Code distinguishes campers and house cars from station wagons, and suggests that they are special categories of the more general terms—motor vehicles and passenger vehicles.[22] A "house car" is "a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached."[23] Alcoholic beverages may not be opened or consumed in motor vehicles traveling on the highways, except in the "living quarters of a housecar or camper."[24] The same definitions might not necessarily apply in the context of the Fourth Amendment, but they do indicate that descriptive distinctions are humanly possible. They also reflect the California Legislature's judgment that "house cars" entertain different kinds of activities than the ordinary passenger vehicle.

In my opinion, searches of places that regularly accommodate a wide range of private human activity are fundamentally different from searches of automobiles which primarily serve a public transportation function.[25] Although it may not be a castle, a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin. These places may be as spar-

---

tinctions between different vehicles, especially when state vehicle laws already require them to do so.

[22] Cal. Veh. Code Ann. §§ 243, 362, 415, 465, 585 (West 1971 and Supp. 1985).

[23] § 362 (West 1971).

[24] §§ 23221, 23223, 23225, 23226, 23229 (West Supp. 1985).

[25] Cf. *Cardwell* v. *Lewis*, 417 U. S., at 590 (opinion of BLACKMUN, J.): "One has a lesser expectation of privacy in a motor vehicle because its function is transportation, and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

tan as a humble cottage when compared to the most majestic mansion, 456 U. S., at 822; *ante*, at 393, but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court. *Stoner* v. *California*, 376 U. S. 483, 490 (1964); *Payton* v. *New York*, 445 U. S., at 585; *United States* v. *Karo*, 468 U. S. 705, 714–715 (1984).[26] In my opinion, a warrantless search of living quarters in a motor home is "presumptively unreasonable absent exigent circumstances." *Ibid.*

I respectfully dissent.

---

[26] "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *United States* v. *Karo*, 468 U. S., at 714–715.

TENNESSEE *v.* STREET

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE, EASTERN DISTRICT

No. 83–2143. Argued March 18, 1985—Decided May 13, 1985

At respondent's Tennessee state-court trial for murder, the State relied on a confession that respondent made to the Sheriff. Respondent testified that his confession was coercively derived from an accomplice's written confession, claiming that the Sheriff read from the accomplice's confession and directed respondent to say the same thing. In rebuttal, the State called the Sheriff, who denied that respondent was read the accomplice's confession and who read that confession to the jury after the trial judge had instructed the jury that the confession was not admitted for the purpose of proving its truthfulness but for the purpose of rebuttal only. The prosecutor then elicited from the Sheriff testimony emphasizing the differences between respondent's confession and the accomplice's confession. Respondent was found guilty and sentenced to life imprisonment. The Tennessee Court of Criminal Appeals reversed, holding that the introduction of the accomplice's confession denied respondent his Sixth Amendment right to confront witnesses, even though the confession was introduced for the nonhearsay purpose of rebutting respondent's testimony.

Held: Respondent's rights under the Confrontation Clause of the Sixth Amendment were not violated by the introduction of the accomplice's confession for rebuttal purposes. Pp. 413–417.

(a) The *nonhearsay* aspect of the accomplice's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination was satisfied by the Sheriff's presence on the witness stand. Pp. 413–414.

(b) If the prosecutor had been denied the opportunity to present the accomplice's confession in rebuttal so as to enable the jury to make the relevant comparison with respondent's confession, the jury would have been impeded in evaluating the truth of respondent's testimony and in weighing the reliability of his confession. Such a result would have been at odds with the Confrontation Clause's mission of advancing the accuracy of the truth-determining process in criminal trials. There were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence. Pp. 414–416.

(c) The trial judge's instructions to the jury as to the limited purpose of admitting the accomplice's confession were the appropriate way to limit the use of that evidence in a manner consistent with the Confrontation Clause. P. 417.

674 S. W. 2d 741, reversed.

BURGER, C. 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 case. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 417.

Robert A. Grunow, Associate Chief Deputy Attorney General of Tennessee, argued the cause for petitioner. With him on the briefs were *W. J. Michael Cody*, Attorney General, and *Wayne E. Uhl* and *J. Andrew Hoyal II*, Assistant Attorneys General.

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Lance J. Rogers argued the cause for respondent. With him on the brief were *Stuart Hampton*, by appointment of the Court, 469 U.S. 1103, and *Vivian Berger*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether respondent's rights under the Confrontation Clause were violated by the introduction of the confession of an accomplice for the nonhearsay purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement.

I

Ben Tester was last seen alive on August 26, 1981, as he walked toward his home in Hampton, Tennessee. The next day Tester's body was found hanging by a nylon rope from an

apple tree in his yard. Tester's house had been ransacked, and it appeared that Tester had struggled with his assailants.

Respondent, a neighbor of Tester, was arrested and charged with the murder. At respondent's trial, which was severed from the trials of others charged with the crime, the State relied on a detailed confession that respondent made during an interview with Sheriff Papantoniou and agents of the Tennessee Bureau of Investigation on September 17, 1981. According to respondent's confession, he and Clifford Peele decided to burglarize Ben Tester's house when Tester was away at church. While respondent, Peele and two others were in the house, however, Tester returned home and surprised the intruders. Peele threw Tester to the floor and declared that they were going to "string him up." Working toward that end, respondent tore a sheet to make a gag for Tester's mouth. Respondent then watched as the others carried Tester out of the house, placed him in the back of a pickup truck, put a rope around his neck, tied the rope to a tree, and pushed him off the tailgate.[1]

Respondent testified at trial that he did not burglarize Tester's house, nor participate in the murder. He also maintained that his September 17 confession was coerced. The confession, respondent testified, was derived from a written statement that Peele had previously given the Sheriff. Respondent claimed that Sheriff Papantoniou read from Peele's statement and directed him to say the same thing.

In rebuttal, the State called Sheriff Papantoniou to testify about the September 17 interview. The Sheriff denied that respondent was read Peele's statement or pressured to repeat the terms of Peele's confession. To corroborate this testimony, and to rebut respondent's claim that his own con-

---

[1] The Judicial Commissioner of Carter County testified that respondent made another statement on June 27, 1982, while at the county jail. According to this witness, respondent admitted having placed the rope around Tester's neck.

fession was a coerced imitation, the Sheriff read Peele's confession to the jury.[2] Before Peele's statement was received, however, the trial judge twice informed the jury that it was admitted "not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only." App. 292, 293.

Although Peele's statement was generally consistent with Street's confession, there were some differences. For instance, Peele portrayed respondent as an active participant in Tester's hanging, and respondent's statement contained factual details that were not found in Peele's confession.[3] Following the reading of Peele's confession, the prosecutor elicited from the Sheriff testimony emphasizing the differences between the confessions.

The prosecutor referred to Peele's confession in his closing argument to dispute respondent's claim that he had been forced to repeat Peele's statement. The prosecutor noted details of the crime that appeared solely in respondent's confession and argued that respondent knew these facts because he participated in the murder. In instructing the jury, the trial judge stated:

> "The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.
>
> "I instruct you that such can be considered by you for rebutable *[sic]* purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." *Id.*, at 350.

Respondent was found guilty and sentenced to life in prison. The Court of Criminal Appeals of Tennessee, ruling that the introduction of Peele's confession denied respondent his Sixth Amendment right to confront witnesses, reversed.

---

[2] Peele's written statement was also introduced into evidence as an exhibit.

[3] These details included the color and composition of the rope, the source of the gag placed on Tester, and the taking of money from Tester's wallet.

674 S. W. 2d 741 (1984). The court noted that Peele's confession was not hearsay evidence because it was not admitted to prove the truth of Peele's assertions. Nevertheless, the court believed that the jury was left with the impression "that the confession was a true rendition of events on the night of the homicide." *Id.*, at 745. It held, therefore, that "admission of [Peele's] confession for any purpose constitutes a denial of [respondent's] fundamental right to cross-examine those witnesses against him." *Ibid.*[4]

We granted certiorari. 469 U. S. 929 (1984). We reverse.

II

A

This case is significantly different from the Court's previous Confrontation Clause cases such as *Ohio* v. *Roberts*, 448 U. S. 56 (1980), *Dutton* v. *Evans*, 400 U. S. 74 (1970), and *Bruton* v. *United States*, 391 U. S. 123 (1968). Confrontation Clause issues arose in *Roberts* and *Dutton* because hearsay evidence was admitted as substantive evidence against the defendants. 448 U. S., at 77; 400 U. S., at 79. And in *Bruton*, the Court considered whether a codefendant's confession, which was inadmissible hearsay as to Bruton, could be admitted into evidence accompanied by a limiting instruction. 391 U. S., at 135–136.

In this case, by contrast, the prosecutor did not introduce Peele's out-of-court confession to prove the truth of Peele's assertions. Thus, as the Court of Criminal Appeals acknowledged, Peele's confession was *not* hearsay under traditional rules of evidence. 674 S. W. 2d, at 744; accord, Fed. Rule Evid. 801(c). In fact, the prosecutor's nonhearsay use of Peele's confession was critical to rebut respondent's testimony that his own confession was derived from Peele's. Before the details of Peele's confession were admitted, the jury

[4] The Supreme Court of Tennessee denied the State's application for permission to appeal.

could evaluate the reliability of respondent's confession only by weighing and comparing the testimony of respondent and Sheriff Papantoniou. Once Peele's statement was introduced, however, the jury could compare the two confessions to determine whether it was plausible that respondent's account of the crime was a coerced imitation.[5]

The *nonhearsay* aspect of Peele's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns. The Clause's fundamental role in protecting the right of cross-examination, see *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965), was satisfied by Sheriff Papantoniou's presence on the stand. If respondent's counsel doubted that Peele's confession was accurately recounted, he was free to cross-examine the Sheriff. By cross-examination respondent's counsel could also challenge Sheriff Papantoniou's testimony that he did not read from Peele's statement and direct respondent to say the same thing. In short, the State's rebuttal witness against respondent was not Peele, but Sheriff Papantoniou. See generally *Anderson* v. *United States*, 417 U. S. 211, 219–220 (1974).

B

The only similarity to *Bruton* is that Peele's statement, like the codefendant's confession in *Bruton*, could have been misused by the jury. If the jury had been asked to infer that Peele's confession proved that respondent participated in the murder, then the evidence would have been hearsay; and because Peele was not available for cross-examination, Confrontation Clause concerns would have been implicated. The jury, however, was pointedly instructed by the trial court "not to consider the truthfulness of [Peele's] statement in any

[5] The differences between the two confessions do not logically compel the inference that respondent's testimony was false; for instance, respondent may have invented factual details out of whole cloth. Nevertheless, the discrepancies do cast doubt on respondent's version of his interrogation.

way whatsoever." App. 350. Thus as in *Bruton*, the question is reduced to whether, in light of the competing values at stake, we may rely on the "'crucial assumption'" that the jurors followed "'the instructions given them by the trial judge.'" *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983) (quoting *Parker* v. *Randolph*, 442 U. S. 62, 73 (1979) (REHNQUIST, J.)).[6]

The State's most important piece of substantive evidence was respondent's confession. When respondent testified that his confession was a coerced imitation, therefore, the focus turned to the State's ability to rebut respondent's testimony. Had the prosecutor been denied the opportunity to present Peele's confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of respondent's testimony and handicapped in weighing the reliability of his confession. Such a result would have been at odds with the Confrontation Clause's very mission—to advance "the accuracy of the truth-determining process in criminal trials." *Dutton* v. *Evans*, *supra*, at 89.

Moreover, unlike the situation in *Bruton*, *supra*, at 134, there were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence.[7] We do not agree with the Court of Criminal Appeals' suggestion that Peele's confession could have been edited to reduce the risk of jury misuse "without detracting from the alleged purpose for which the confession was introduced." 674 S. W. 2d, at 745; see generally *Bruton*, *supra*, at 134, n. 10. If all of Peele's references to respondent had been deleted,

---

[6] The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue. See, *e. g.*, *Frazier* v. *Cupp*, 394 U. S. 731, 735 (1969).

[7] Severance obviously was not an available alternative; respondent's trial had been severed from those of his codefendants.

it would have been more difficult for the jury to evaluate respondent's testimony that his confession was a coerced imitation of Peele's. Indeed, such an approach would have undercut the theory of defense by creating artificial differences between respondent's and Peele's confessions.

Respondent correctly notes that Sheriff Papantoniou could have pointed out the differences between the two statements without reading Peele's confession. But such a rebuttal presentation was not the only option constitutionally open. After respondent testified that his confession was based on Peele's, the Sheriff read Peele's confession to the jury and answered questions that emphasized the differences. In closing argument, the prosecutor recited the details that appeared only in respondent's confession, and argued that respondent knew these facts because he participated in the murder. The whole of the State's rebuttal, therefore, was designed to focus the jury's attention on the differences, not the similarities between the two confessions.

Finally, we reject the Court of Criminal Appeals' implicit holding that the State was required to call Peele to testify or to forgo effective rebuttal of respondent's testimony. 674 S. W. 2d, at 745. Because Peele's confession was introduced to refute respondent's claim of coercive interrogation, Peele's testimony would not have made the State's point. And respondent's cross-examination of Peele would have been ineffective to undermine the prosecutor's limited purpose in introducing Peele's confession. It was appropriate that, instead of forcing the State to call a witness who could offer no relevant testimony on the immediate issue of coercion,[8] the trial judge left to respondent the choice whether to call Peele.[9]

---

[8] If Peele did not invoke his privilege against self-incrimination, he might have helped the prosecution prove that respondent participated in the murder; but he would have been of no assistance in rebutting respondent's claim that he had been forced to repeat Peele's confession.

[9] The parties were aware that Peele was located in the county jail.

III

The State introduced Peele's confession for the legitimate, nonhearsay purpose of rebutting respondent's testimony that his own confession was a coerced "copy" of Peele's statement. The jury's attention was directed to this distinctive and limited purpose by the prosecutor's questions and closing argument. In this context, we hold that the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause. Accordingly, the judgment of the Court of Criminal Appeals is

Reversed.

JUSTICE POWELL took no part in the consideration or decision in this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the opinion of the Court today admitting Peele's out-of-court confession for nonhearsay rebuttal purposes. I do so on the understanding that the trial court's limiting instruction is not itself sufficient to justify admission of the confession. See *Bruton* v. *United States*, 391 U. S. 123 (1968). The out-of-court confession is admissible for nonhearsay purposes in this case only because that confession was essential to the State's rebuttal of respondent Street's defense and because no alternative short of admitting the statement would have adequately served the State's interest. See *ante*, at 415–416. With respect to the State's need to admit the confession for rebuttal purposes, it is important to note that respondent created the need to admit the statement by pressing the defense that his confession was a coerced imitation of Peele's out-of-court confession.* Also, the record

*In fact, at an earlier point in the trial respondent unsuccessfully sought to introduce Peele's confession on the ground that it was "very material" to the argument that respondent's confession was a coerced imitation. App. 41.

contains no suggestion that the State was engaged in any improper effort to place prejudicial hearsay evidence before the jury. See *Douglas* v. *Alabama*, 380 U. S. 415 (1965). Under the circumstances of the present case, admission of the out-of-court confession for nonhearsay rebuttal purposes raises no Confrontation Clause problems.

LIPAROTA *v.* UNITED STATES

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

No. 84–5108. Argued March 19, 1985—Decided May 13, 1985

The federal statute governing food stamp fraud provides in 7 U. S. C. § 2024(b)(1) that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" shall be guilty of a criminal offense. Petitioner was indicted for violation of § 2024(b)(1). At a jury trial in Federal District Court, the Government proved that petitioner on three occasions had purchased food stamps from an undercover Department of Agriculture agent for substantially less then their face value. The court refused petitioner's proposed jury instruction that the Government must prove that petitioner knowingly did an act that the law forbids, purposely intending to violate the law. Rather, over petitioner's objection, the court instructed the jury that the Government had to prove that petitioner acquired and possessed the food stamps in a manner not authorized by statute or regulations and that he knowingly and willfully acquired the stamps. Petitioner was convicted. The Court of Appeals affirmed.

Held: Absent any indication of a contrary purpose in the statute's language or legislative history, the Government in a prosecution for violation of § 2024(b)(1) must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. Pp. 423–434.

(a) Criminal offenses requiring no *mens rea* have a generally disfavored status. The failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law. Moreover, to interpret the statute to dispense with *mens rea* would be to criminalize a broad range of apparently innocent conduct. In addition, requiring *mens rea* in this case is in keeping with the established principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Pp. 425–428.

(b) The fact that § 2024(c), which is directed primarily at stores authorized to accept food stamps from program participants, differs in wording and structure from § 2024(b)(1) and provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption . . . knowing the same to have been received, transferred, or used in any

manner in violation of [the statute] or the regulations," fails to show a congressional purpose not to require proof of the defendant's knowledge of illegality in a § 2024(b)(1) prosecution. Nor has it been shown that requiring knowledge of illegality in a § 2024(c), but not a § 2024(b)(1), prosecution is supported by such obvious and compelling policy reasons that it should be assumed that Congress intended to make such a distinction. Pp. 428–430.

(c) *United States* v. *Yermian*, 468 U. S. 63, does not support an interpretation of § 2024(b)(1) dispensing with the requirement that the Government prove the defendant's knowledge of illegality. Nor is the § 2024(b)(1) offense a "public welfare" offense that depends on no mental element but consists only of forbidden acts or omissions. Pp. 431–433.

735 F. 2d 1044, reversed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 434. POWELL, J., took no part in the consideration or decision of the case.

William T. Huyck, by appointment of the Court, 469 U. S. 1032, argued the cause and filed briefs for petitioner.

Charles A. Rothfeld argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Claiborne*.

JUSTICE BRENNAN delivered the opinion of the Court.

The federal statute governing food stamp fraud provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment. 78 Stat. 708, as amended, 7 U. S. C. § 2024(b)(1).[1] The question presented is whether

[1] The statute provides in relevant part:

"[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and

in a prosecution under this provision the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations.

I

Petitioner Frank Liparota was the co-owner with his brother of Moon's Sandwich Shop in Chicago, Illinois. He was indicted for acquiring and possessing food stamps in violation of § 2024(b)(1). The Department of Agriculture had not authorized petitioner's restaurant to accept food stamps. App. 6–7.[2] At trial, the Government proved that petitioner on three occasions purchased food stamps from an undercover Department of Agriculture agent for substantially less than their face value. On the first occasion, the agent informed petitioner that she had $195 worth of food stamps to sell. The agent then accepted petitioner's offer of $150 and consummated the transaction in a back room of the restaurant with petitioner's brother. A similar transaction occurred one week later, in which the agent sold $500 worth of coupons for $350. Approximately one month later, peti-

---

any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title."

[2] Food stamps are provided by the Government to those who meet certain need-related criteria. See 7 U. S. C. §§ 2014(a), 2014(c). They generally may be used only to purchase food in retail food stores. 7 U. S. C. § 2016(b). If a restaurant receives proper authorization from the Department of Agriculture, it may receive food stamps as payment for meals under certain special circumstances not relevant here. App. 6–7.

tioner bought $500 worth of food stamps from the agent for $300.

In submitting the case to the jury, the District Court rejected petitioner's proposed "specific intent" instruction, which would have instructed the jury that the Government must prove that "the defendant knowingly did an act which the law forbids, purposely intending to violate the law." *Id.*, at 34.[3] Concluding that "[t]his is not a specific intent crime" but rather a "knowledge case," *id.*, at 31, the District Court instead instructed the jury as follows:

> "When the word 'knowingly' is used in these instructions, it means that the Defendant realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident. Knowledge may be proved by defendant's conduct and by all of the facts and circumstances surrounding the case." *Id.*, at 33.

The District Court also instructed that the Government had to prove that "the Defendant acquired and possessed food stamp coupons for cash in a manner not authorized by federal statute or regulations" and that "the Defendant knowingly and wilfully acquired the food stamps." 3 Tr. 251. Petitioner objected that this instruction required the jury to find merely that he knew that he was acquiring or possessing food stamps; he argued that the statute should be construed instead to reach only "people who knew that they were acting

---

[3] The instruction proffered by petitioner was drawn from 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.03 (1977). The instruction reads in its entirety:

"The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case."

unlawfully." App. 31. The judge did not alter or supplement his instructions, and the jury returned a verdict of guilty.

Petitioner appealed his conviction to the Court of Appeals for the Seventh Circuit, arguing that the District Court erred in refusing to instruct the jury that "specific intent" is required in a prosecution under 7 U. S. C. § 2024(b)(1). The Court of Appeals rejected petitioner's arguments. 735 F. 2d 1044 (1984). Because this decision conflicted with recent decisions of three other Courts of Appeals,[4] we granted certiorari. 469 U. S. 930 (1984). We reverse.

II

The controversy between the parties concerns the mental state, if any, that the Government must show in proving that petitioner acted "in any manner not authorized by [the statute] or the regulations." The Government argues that petitioner violated the statute if he knew that he acquired or possessed food stamps and if in fact that acquisition or possession was in a manner not authorized by statute or regulations. According to the Government, no *mens rea*, or "evil-meaning mind," *Morissette* v. *United States*, 342 U. S. 246, 251 (1952), is necessary for conviction. Petitioner claims that the Government's interpretation, by dispensing with *mens rea*, dispenses with the only morally blameworthy element in the definition of the crime. To avoid this allegedly untoward result, he claims that an individual violates the statute if he knows that he has acquired or possessed food stamps *and* if he also knows that he has done so in an unauthorized manner.[5] Our task is to determine which meaning Congress intended.

---

[4] See *United States* v. *Pollard*, 724 F. 2d 1438 (CA6 1984); *United States* v. *Marvin*, 687 F. 2d 1221 (CA8 1982), cert. denied, 460 U. S. 1081 (1983); *United States* v. *Faltico*, 687 F. 2d 273 (CA8 1982), cert. denied, 460 U. S. 1088 (1983); *United States* v. *O'Brien*, 686 F. 2d 850 (CA10 1982).

[5] The required mental state may of course be different for different elements of a crime. *United States* v. *Bailey*, 444 U. S. 394, 405–406 (1980);

The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *United States* v. *Hudson*, 7 Cranch 32 (1812).[6] With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.[7] The legislative history of the statute contains noth-

---

United States v. *Freed*, 401 U. S. 601, 612–614 (1971) (BRENNAN, J., concurring in judgment). See generally Robinson & Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681 (1983). In this case, for instance, both parties agree that petitioner must have known that he acquired and possessed food stamps. They disagree over whether any mental element at all is required with respect to the unauthorized nature of that acquisition or possession.

We have also recognized that the mental element in criminal law encompasses more than the two possibilities of "specific" and "general" intent. See *United States* v. *Bailey*, *supra*, at 403–407; *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 444–445 (1978); *United States* v. *Freed*, *supra*, at 613 (BRENNAN, J., concurring in judgment). The Model Penal Code, for instance, recognizes four mental states—purpose, knowledge, recklessness, and negligence. ALI, Model Penal Code § 2.02 (Prop. Off. Draft 1962). In this case, petitioner argues that with respect to the element at issue, knowledge is required. The Government contends that *no* mental state is required with respect to that element.

[6] Of course, Congress must act within any applicable constitutional constraints in defining criminal offenses. In this case, there is no allegation that the statute would be unconstitutional under either interpretation.

[7] One treatise has aptly summed up the ambiguity in an analogous situation:

"Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does 'knowingly' modify in a sentence from a 'blue sky' law criminal statute punishing one who 'knowingly sells a security without a permit'

ing that would clarify the congressional purpose on this point.[8]

Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.[9] "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

---

from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word 'knowingly' is intended to travel—whether it modifies 'sells,' or 'sells a security,' or 'sells a security without a permit.'" W. LaFave & A. Scott, Criminal Law § 27 (1972).

[8] See n. 12, *infra*.

[9] The dissent repeatedly claims that our holding today creates a defense of "mistake of law." *Post*, at 436, 439, 441. Our holding today no more creates a "mistake of law" defense than does a statute making knowing receipt of stolen goods unlawful. See *post*, at 436. In both cases, there is a legal element in the definition of the offense. In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the "use, transfer, acquisition," etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It *is*, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized. See ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955); *United States* v. *Freed*, *supra*, at 614–615 (BRENNAN, J., concurring in judgment). Cf. *Morissette* v. *United States*, 342 U. S. 246 (1952) (holding that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion).

Morissette v. *United States*, *supra*, at 250. Thus, in *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 438 (1978), we noted that "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" and that criminal offenses requiring no *mens rea* have a "generally disfavored status." Similarly, in this case, the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct. For instance, § 2024(b)(1) declares it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. The statute provides further that "[c]oupons issued to eligible households shall be used by them only to purchase food in retail food stores which have been approved for participation in the food stamp program *at prices prevailing in such stores.*" 7 U. S. C. § 2016(b) (emphasis added); see also 7 CFR § 274.10(a) (1985).[10] This seems to be the *only* authorized use. A strict reading of the statute with no knowledge-of-illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the

[10] As the Committee Report in the House of Representatives noted when this provision in essentially its current form was first enacted, the provision "makes it clear that participants shall be charged the regular price prevailing in the retail store when they purchase food with stamps." H. R. Rep. No. 1228, 88th Cong., 2d Sess., 14 (1964). See also S. Rep. No. 1124, 88th Cong., 2d Sess., 15 (1964).

mail[11] due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away. Of course, Congress *could* have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.

In addition, requiring *mens rea* is in keeping with our longstanding recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). See also *United States* v. *United States Gypsum Co.*, *supra*, at 437; *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971); *Bell* v. *United States*, 349 U. S. 81, 83 (1955); *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952). Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. See *United States* v. *Bass*, *supra*, at 348 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear. In the instant case, the rule directly supports petitioner's contention that the Government

---

[11] The Department of Agriculture's regulations permit state agencies administering the food stamp program to mail the coupons directly to program participants. The regulations provide that "[t]he State agency may issue some or all of the coupon allotments through the mail." 7 CFR § 274.3(a) (1985).

must prove knowledge of illegality to convict him under § 2024(b)(1).

The Government argues, however, that a comparison between § 2024(b)(1) and its companion, § 2024(c), demonstrates a congressional purpose not to require proof of the defendant's knowledge of illegality in a § 2024(b)(1) prosecution. Section 2024(c) is directed primarily at stores authorized to accept food stamps from program participants. It provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption . . . *knowing* the same to have been received, transferred, or used in any manner in violation of [the statute] or the regulations" is subject to fine and imprisonment (emphasis added).[12] The Government contrasts this language with that of § 2024(b)(1), in which the word "knowingly" is placed differently: "whoever *knowingly* uses, transfers . . ." (emphasis added). Since § 2024(c) undeniably requires a knowledge of illegality, the suggested infer-

[12] The statute provides in full:

"Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $10,000, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteeen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title."

It is worth noting that the penalties under this section are virtually identical to those provided in § 2024(b)(1). See n. 1, *supra*.

ence is that the difference in wording and structure between the two sections indicates that § 2024(b)(1) does not.

The Government urges that this distinction between the mental state required for a § 2024(c) violation and that required for a § 2024(b)(1) violation is a sensible one. Absent a requirement of *mens rea*, a grocer presenting food stamps for payment might be criminally liable under § 2024(c) even if his customer or employees have illegally procured or transferred the stamps without the grocer's knowledge. Requiring knowledge of illegality in a § 2024(c) prosecution is allegedly necessary to avoid this kind of vicarious, and non-fault-based, criminal liability. Since the offense defined in § 2024(b)(1)—using, transferring, acquiring, altering, or possessing food stamps in an unauthorized manner—does not involve this possibility of vicarious liability, argues the Government, Congress had no reason to impose a similar knowledge of illegality requirement in that section.

We do not find this argument persuasive. The difference in wording between § 2024(b)(1) and § 2024(c) is too slender a reed to support the attempted distinction, for if the Government's argument were accepted, it would lead to the demise of the very distinction that Congress is said to have desired. According to the Government, Congress *did* intend a knowledge of illegality requirement in § 2024(c), while it *did not* intend such a requirement in § 2024(b)(1). Anyone who has violated § 2024(c) has "present[ed], or caus[ed] to be presented, coupons for payment or redemption" in an unauthorized manner. Such a person would seemingly have also "use[d], transfer[red], acquir[ed], alter[ed], or possess[ed]" the coupons in a similarly unauthorized manner, and thus to have violated § 2024(b)(1). It follows that the Government will be able to prosecute any violator of § 2024(c) under § 2024(b)(1) as well. If only § 2024(c)—and not § 2024(b)(1)—required the Government to prove knowledge of illegality, the result would be that the Government could *always* avoid proving knowledge of illegality in food stamp fraud cases,

simply by bringing its prosecutions under § 2024(b)(1). If Congress wanted to require the Government to prove knowledge of illegality in some, but not all, food stamp fraud cases, it thus chose a peculiar way to do so.

For similar reasons, the Government's arguments that Congress could have had a plausible reason to require knowledge of illegality in prosecutions under § 2024(c), but not § 2024(b)(1), are equally unpersuasive. Grocers are participants in the food stamp program who have had the benefit of an extensive informational campaign concerning the authorized use and handling of food stamps. App. 7–8. Yet the Government would have to prove knowledge of illegality when prosecuting such grocers, while it would have no such burden when prosecuting third parties who may well have had no opportunity to acquaint themselves with the rules governing food stamps. It is not immediately obvious that Congress would have been so concerned about imposing strict liability on grocers, while it had no similar concerns about imposing strict liability on nonparticipants in the program. Our point once again is not that Congress could not have chosen to enact a statute along these lines, for there are no doubt policy arguments on both sides of the question as to whether such a statute would have been desirable. Rather, we conclude that the policy underlying such a construction is neither so obvious nor so compelling that we must assume, in the absence of any discussion of this issue in the legislative history, that Congress *did* enact such a statute.[13]

---

[13] Notwithstanding the absence of any explicit discussion of this issue in the legislative history, the Government argues that certain statements in the Committee Reports support its position. The statute originally was enacted as part of the Food Stamp Act of 1964, Pub. L. 88–525, § 14, 78 Stat. 708. The Committee Report accompanying the bill in the House of Representatives described both sections together: "This section makes it a violation of Federal law to knowingly use, transfer, acquire, or possess coupons in any manner not authorized by this act or to present, or cause to be presented, such coupons for redemption knowing them to have been received, transferred or used in any manner in violation of the provisions

The Government advances two additional arguments in support of its reading of the statute. First, the Government contends that this Court's decision last Term in *United States* v. *Yermian*, 468 U. S. 63 (1984), supports its interpretation. *Yermian* involved a prosecution for violation of the federal false statement statute, 18 U. S. C. § 1001.[14] All par-

---

of the act." H. R. Rep. No. 1228, 88th Cong., 2d Sess., 16 (1964). See also S. Rep. No. 1124, 88th Cong. 2d Sess., 18 (1964). The Government believes that the description of both sections in this single sentence emphasizes the difference in meaning between them. We fail to see how this sentence, which merely parrots the terms of the statute, offers any enlightenment as to what those terms mean.

The Government similarly points to the legislative history of the 1977 Act that substantially revised the previous food stamp program. The House Report explained that "[a]ny unauthorized use, transfer, acquisition, alteration, or possession of food stamps . . . by any individual . . . may be prosecuted under the provisions of" § 2024(b)(1). H. R. Rep. No. 95–464, p. 376 (1977). The Report continued that "under [§ 2024(c)] . . . the same penalties are prescribed for whoever presents or causes to be presented food stamps (for payment or redemption) knowing that they have been received, transferred or used in any manner violating the provisions of the Act or regulations implementing the Act." *Ibid.* Presumably relying on the omission of the word "knowingly" in its description of § 2024(b)(1), the Government argues that this language indicates that "the difference between Sections 2024(b) and 2024(c) was plainly visible to Congress and that Congress was fully aware of the scope of the former provision . . . ." Brief for United States 20. We do not believe that the omission of the word "knowingly" is evidence that Congress devoted its attention to the issue before the Court today; it is as likely that the Committee, unaware of the problem, simply did not realize the need to discuss the mental element needed for a conviction under § 2024(b)(1). Moreover, the omission of the word "knowingly" in the description of § 2024(b)(1) would indicate, if anything, an intent to dispense with any requirement of knowledge in § 2024(b)(1), an intent that is at odds with the language of the statute and the interpretation urged even by the Government today. The omission of the word "knowingly" thus provides no support for the argument that Congress intended not to require knowledge of illegality in a § 2024(b)(1) prosecution.

[14] The statute provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or

ties agreed that the statute required proof at least that the defendant "knowingly and willfully" made a false statement. Thus, unlike the instant case, all parties in *Yermian* agreed that the Government had to prove the defendant's *mens rea*.[15] The controversy in *Yermian* centered on whether the Government also had to prove that the defendant knew that the false statement was made in a matter within the jurisdiction of a federal agency. With respect to this element, although the Court held that the Government did not have to prove actual knowledge of federal agency jurisdiction, the Court explicitly reserved the question whether *some* culpability was necessary with respect even to the jurisdictional element. 468 U. S., at 75, n. 14. In contrast, the Government in the instant case argues that *no mens rea* is required with respect to any element of the crime. Finally, *Yermian* found that the statutory language was unambiguous and that the legislative history supported its interpretation. The statute at issue in this case differs in both respects.

Second, the Government contends that the § 2024(b)(1) offense is a "public welfare" offense, which the Court defined in *Morissette* v. *United States*, 342 U. S., at 252–253, to "depend on no mental element but consist only of forbidden acts or omissions." Yet the offense at issue here differs substantially from those "public welfare offenses" we have previously

---

covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[15] The fact that both parties in *Yermian* agreed that the Government had to prove that the defendant had "knowingly and willfully" made a false statement does not of course indicate that the parties agreed on the mental state applicable to other elements of the offense. See *post*, at 435, n. 1 (WHITE, J., dissenting). What it does mean is that in *Yermian*, unlike this case, all parties agreed that an "evil-meaning mind" was required with respect at least to one element of the crime.

recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. Thus, in *United States* v. *Freed*, 401 U. S. 601 (1971), we examined the federal statute making it illegal to receive or possess an unregistered firearm. In holding that the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, we noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*, at 609. See also *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 564–565 (1971). Similarly, in *United States* v. *Dotterweich*, 320 U. S. 277, 284 (1943), the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even "though consciousness of wrongdoing be totally wanting." See also *United States* v. *Balint*, 258 U. S. 250 (1922). The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, see *Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.

III

We hold that in a prosecution for violation of § 2024(b)(1), the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations.[16] This holding does

[16] Although we agree with petitioner concerning his interpretation of the statute, we express no opinion on the "specific intent" instruction he tendered, see n. 3, *supra*. This instruction has been criticized as too general and potentially misleading, see *United States* v. *Arambasich*, 597 F. 2d 609, 613 (CA7 1979). A more useful instruction might relate specifically to the mental state required under § 2024(b)(1) and eschew use of difficult legal concepts like "specific intent" and "general intent."

not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.[17]

Reversed.

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

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Forsaking reliance on either the language or the history of § 2024(b)(1), the majority bases its result on the absence of an explicit rejection of the general principle that criminal liability requires not only an *actus reus*, but a *mens rea*. In my view, the result below is in fact supported by the statute's language and its history, and it is the majority that has ignored general principles of criminal liability.

I

The Court views the statutory problem here as being how far down the sentence the term "knowingly" travels. See

---

[17] In this case, for instance, the Government introduced evidence that petitioner bought food stamps at a substantial discount from face value and that he conducted part of the transaction in a back room of his restaurant to avoid the presence of the other patrons. Moreover, the Government asserts that food stamps themselves are stamped "nontransferable." Brief for United States 34. A jury could have inferred from this evidence that petitioner knew that his acquisition and possession of the stamps were unauthorized.

ante, at 424–425, n. 7. Accepting for the moment that if "knowingly" does extend to the "in any manner" language today's holding would be correct—a position with which I take issue below—I doubt that it gets that far. The "in any manner" language is separated from the litany of verbs to which "knowingly" is directly connected by the intervening nouns. We considered an identically phrased statute last Term in *United States* v. *Yermian*, 468 U. S. 63 (1984). The predecessor to the statute at issue in that case provided: "'[W]hoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined.'" *Id.*, at 69, n. 6 (quoting Act of June 18, 1934, ch. 587, 48 Stat. 996). We found that under the "most natural reading" of the statute, "knowingly and willfully" applied only to the making of false or fraudulent statements and not to the fact of jurisdiction. 468 U. S., at 69, n. 6. By the same token, the "most natural reading" of § 2024(b)(1) is that "knowingly" modifies only the verbs to which it is attached.[1]

In any event, I think that the premise of this approach is mistaken. Even accepting that "knowingly" does extend through the sentence, or at least that we should read

[1] The majority's efforts to distinguish *Yermian* are unavailing. First, it points out that under the statute at issue there, the prosecution had to establish some *mens rea* because it had to show a knowing falsehood. *Ante*, at 431–432. However, as the majority itself points out elsewhere, *ante*, at 423–424, n. 5, different mental states can apply to different elements of an offense. The fact that in *Yermian mens rea* had to be proved as to the first element was irrelevant to the Court's holding that it did not with regard to the second. There is no reason to read this statute differently. Second, the majority states that the language in *Yermian* was "unambiguous." *Ante*, at 432. Since it is identical, the language at issue in this case can be no less so. Finally, the majority notes, *ibid.*, that the Court in *Yermian* did not decide whether the prosecution might have to prove that the defendant "should have known" that his statements were within the agency's jurisdiction. 468 U. S., at 75, n. 14. However, that passing statement was irrelevant to the interpretation of the statute's language the Court did undertake.

§ 2024(b)(1) as if it does, the statute does not mean what the Court says it does. Rather, it requires only that the defendant be aware of the relevant aspects of his conduct. A requirement that the defendant know that he is acting in a particular manner, coupled with the fact that that manner is forbidden, does not establish a defense of ignorance of the law. It creates only a defense of ignorance or mistake of fact. Knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law.

This point is demonstrated by the hypothetical statute referred to by the majority, which punishes one who "knowingly sells a security without a permit." See *ante*, at 424–425, n. 7. Even if "knowingly" does reach "without a permit," I would think that a defendant who knew that he did not have a permit, though not that a permit was required, could be convicted.

Section 2024(b)(1) is an identical statute, except that instead of detailing the various legal requirements, it incorporates them by proscribing use of coupons "in any manner not authorized" by law. This shorthand approach to drafting does not transform knowledge of illegality into an element of the crime. As written, § 2024(b)(1) is substantively no different than if it had been broken down into a collection of specific provisions making crimes of particular improper uses. For example, food stamps cannot be used to purchase tobacco. 7 CFR §§ 271.2, 274.10(a), 278.2(a) (1985). The statute might have said, *inter alia*, that anyone "who knowingly uses coupons to purchase cigarettes" commits a crime. Under no plausible reading could a defendant then be acquitted because he did not know cigarettes are not "eligible food." But in fact, that is exactly what § 2024(b)(1) does say; it just does not write it out longhand.

The Court's opinion provides another illustration of the general point: someone who used food stamps to purchase groceries at inflated prices without realizing he was over-

charged.[2] I agree that such a person may not be convicted, but not for the reason given by the majority. The purchaser did not "knowingly" use the stamps in the proscribed manner, for he was unaware of the circumstances of the transaction that made it illegal.

The majority and I would part company in result as well as rationale if the purchaser knew he was charged higher than normal prices but not that overcharging is prohibited. In such a case, he would have been aware of the nature of his actions, and therefore the purchase would have been "knowing." I would hold that such a mental state satisfies the statute. Under the Court's holding, as I understand it, that person could not be convicted because he did not know that his conduct was illegal.[3]

---

[2] Under the agency's interpretation of the statute, as evidenced in the regulations, it is not at all clear that such a person would in fact be violating the statute. The regulation referred to by the majority, 7 CFR § 274.10(a) (1985), states that "coupons may be used only by the household . . . to purchase eligible food for the household." The prevailing price requirement is mentioned only in a section that applies to participating stores: "Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store." § 278.2(b). For purposes of illustration, however, I will accept that not only overcharging, but also being overcharged, violates the statute.

[3] The appropriate prosecutorial target in such a situation would of course be the seller rather than the purchaser. I have no doubt that every prosecutor in the country would agree. The discussion of this hypothetical is wholly academic.

For similar reasons, I am unmoved by the specter of criminal liability for someone who is mistakenly mailed food stamps and throws them out, see *ante*, at 426–427, and do not think the hypothetical offers much of a guide to congressional intent. We should proceed on the assumption that Congress had in mind the run-of-the-mill situation, not its most bizarre mutation. Arguments that presume wildly unreasonable conduct by Government officials are by their nature unconvincing, and reliance on them is likely to do more harm than good. *United States* v. *Dotterweich*, 320 U. S. 277, 284–285 (1943). No rule, including that adopted by the Court today, is immune from such contrived defects.

Much has been made of the comparison between § 2024(b)(1) and § 2024(c). The Government, like the court below, see 735 F. 2d 1044, 1047–1048 (1984), argues that the express requirement of knowing illegality in subsection (c) supports an inference that the absence of such a provision in subsection (b)(1) was intentional. While I disagree with the majority's refutation of this argument,[4] I view most of this discussion as beside the point. The Government's premise seems to me mistaken. Subsection (c) does not impose a requirement of knowing illegality. The provision is much like statutes that forbid the receipt or sale of stolen goods. See, *e. g.*, 18 U. S. C. §§ 641, 2313. Just as those statutes generally require knowledge that the goods were stolen, so § 2024(c) requires knowledge of the past impropriety. But receipt-of-stolen-goods statutes do not require that the defendant know that receipt itself is illegal, and similarly § 2024(c) plainly does not require that the defendant know that it is illegal to present coupons that have been improperly used in the past. It is not inconceivable that someone presenting such coupons—again, like someone buying stolen goods—would think that his conduct was aboveboard despite

---

[4] The Court asserts that the distinction would be meaningless because anyone who has violated subsection (c) will necessarily have violated subsection (b)(1) as well by "present[ing], or caus[ing] to be presented, coupons for payment or redemption" in an unauthorized manner. *Ante*, at 429. However, subsection (c) forbids presenting coupons knowing that they have been improperly used or acquired in the past. The manner of acquisition and presentation by the offender may be perfectly proper; the point is that the coupons are in a sense tainted by the prior transaction. Thus, if a check-out clerk accepts stamps for ineligible items, thereby violating § 2024(b)(1), and his employer collects the stamps and presents them for redemption in the normal course of business, it would not seem that the latter has violated § 2024(b)(1). He has done nothing in a manner not authorized by law. He has violated subsection (c) if, but only if, he knew of the clerk's wrongdoing. It may be that merely by violating subsection (c) a grocer also violates subsection (b)(1); but absent the violation of subsection (c), I do not see how the grocer would violate subsection (b)(1) in such a case.

the preceding illegality. But that belief, however sincere, would not be a defense. In short, because § 2024(c) does not require that the defendant know that the conduct for which he is being prosecuted was illegal, it does not create an ignorance-of-the-law defense.[5]

I therefore cannot draw the Government's suggested inference. The two provisions are nonetheless fruitfully compared. What matters is not their difference, but their similarity. Neither contains any indication that "knowledge of the law defining the offense [is] an element of the offense." See ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955). A requirement of knowing illegality should not be read into either provision.

I do agree with the Government that when Congress wants to include a knowledge-of-illegality requirement in a statute it knows how to do so, even though I do not consider subsection (c) an example. Other provisions of the United States Code explicitly include a requirement of familiarity with the law defining the offense—indeed, in places where, under the majority's analysis, it is entirely superfluous. *E. g.*, 15 U. S. C. §§ 79z–3, 80a–48. See also Model Penal Code, *supra*, at 139. Congress could easily have included a similar provision in § 2024(b)(1), but did not. Cf. *United States* v. *Turkette*, 452 U. S. 576, 580–581 (1981).

Finally, the lower court's reading of the statute is consistent with the legislative history. As the majority points out,

---

[5] Similarly, it is a valid defense to a charge of theft that the defendant thought the property legally belonged to him, even if that belief is incorrect. But this is not because ignorance of the law is an excuse. Rather, "the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge . . . is required for culpability . . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." ALI, Model Penal Code § 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955). Accord, *United States* v. *Freed*, 401 U. S. 601, 614–615 (1971) (BRENNAN, J., concurring in judgment). Cf. *Morissette* v. *United States*, 342 U. S. 246 (1952).

the history provides little to go on. Significantly, however, the brief discussions of this provision in the relevant congressional Reports do not mention any requirement of knowing illegality. To the contrary, when the Food Stamp Act was rewritten in 1977, the House Report noted that "*[a]ny* unauthorized use, transfer, acquisition, alteration, or possession of food stamps . . . may be prosecuted under" § 2024(b)(1). H. R. Rep. No. 95–464, p. 376 (1977) (emphasis added).

II

The broad principles of the Court's opinion are easy to live with in a case such as this. But the application of its reasoning might not always be so benign. For example, § 2024(b)(1) is little different from the basic federal prohibition on the manufacture and distribution of controlled substances. Title 21 U. S. C. § 841(a) provides:

> " Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . ."

I am sure that the Members of the majority would agree that a defendant charged under this provision could not defend on the ground that he did not realize his manufacture was unauthorized or that the particular substance was controlled. See *United States* v. *Balint*, 258 U. S. 250 (1922). On the other hand, it would be a defense if he could prove he thought the substance was something other than what it was. By the same token, I think, someone in petitioner's position should not be heard to say that he did not know his purchase of food stamps was unauthorized, though he may certainly argue that he did not know he was buying food stamps. I would not stretch the term "knowingly" to require awareness of the absence of statutory authority in either of these provisions.

These provisions might be distinguished because of the different placements of the "except as authorized" and the "in any manner not authorized" clauses in the sentences. But see *United States* v. *Yermian*, 468 U. S., at 69, and n. 6. However, nothing in the majority's opinion indicates that this difference is relevant. Indeed, the logic of the Court's opinion would require knowledge of illegality for conviction under any statute making it a crime to do something "in any manner not authorized by law" or "unlawfully." I suspect that if a case arises in the future where such a result is unacceptable, the Court will manage to distinguish today's decision. But I will be interested to see how it does so.

III

In relying on the "background assumption of our criminal law" that *mens rea* is required, *ante*, at 426, the Court ignores the equally well founded assumption that ignorance of the law is no excuse. It is "the conventional position that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense . . . ." Model Penal Code, *supra*, at 130.

This Court's prior cases indicate that a statutory requirement of a "knowing violation" does not supersede this principle. For example, under the statute at issue in *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558 (1971), the Interstate Commerce Commission was authorized to promulgate regulations regarding the transportation of corrosive liquids, and it was a crime to "knowingly violat[e] any such regulation." 18 U. S. C. § 834(f) (1970 ed.). Viewing the word "regulations" as "a shorthand designation for specific acts or omissions which violate the Act," 402 U. S., at 562, we adhered to the traditional rule that ignorance of the law is not a defense. The violation had to be "knowing" in that the defendant had to know that he was transporting corrosive liquids and not, for example, merely water. *Id.*, at 563–564. But there was no requirement that

he be aware that he was violating a particular regulation. Similarly, in this case the phrase "in any manner not authorized by" the statute or regulations is a shorthand incorporation of a variety of legal requirements. To be convicted, a defendant must have been aware of what he was doing, but not that it was illegal.

In *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (1952), the Court considered a statute that punished anyone who "knowingly violates" a regulation requiring trucks transporting dangerous items to avoid congested areas where possible. In rejecting a vagueness challenge, the Court read "knowingly" to mean not that the driver had to be aware of the regulation, see *id.*, at 345 (Jackson, J., dissenting), but that he had to know a safer alternative route was available. Likewise, in construing 18 U. S. C. § 1461, which punishes "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section or section 3001(e) of Title 39 to be nonmailable," we held that the defendant need not have known that the materials were nonmailable. *Hamling* v. *United States*, 418 U. S. 87, 120–124 (1974). "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law," and was not required by the statute. *Id.*, at 123–124. Accord, *Rosen* v. *United States*, 161 U. S. 29 (1896). See also *United States* v. *Freed*, 401 U. S. 601 (1971); *id.*, at 612–615 (BRENNAN, J., concurring in judgment).

In each of these cases, the statutory language lent itself to the approach adopted today if anything more readily than does § 2024(b)(1).[6] I would read § 2024(b)(1) like those stat-

[6] The Court distinguishes these as "public welfare offense" cases involving inherently dangerous articles of commerce whose users should have assumed were subject to regulation. *Ante*, at 432–433. But see *United States* v. *Freed*, 401 U. S., at 612 (BRENNAN, J., concurring in judgment). Apart from the fact that a reasonable person would also assume food stamps are heavily regulated and not subject to sale and exchange, this dis-

utes, to require awareness of only the relevant aspects of one's conduct rendering it illegal, not the fact of illegality. This reading does not abandon the "background assumption" of *mens rea* by creating a strict-liability offense,[7] and is consistent with the equally important background assumption that ignorance of the law is not a defense.

IV

I wholly agree that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette* v. *United States*, 342 U. S. 246, 250 (1952); *ante*, at 425. But the holding of the court below is not at all inconsistent with that longstanding and important principle. Petitioner's conduct was intentional; the jury found that petitioner "realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident." App. 33 (trial court's instructions). Whether he knew which regulation he violated is beside the point.

---

tinction is not related to the actual holdings in those cases. The Court's opinion in *Boyce* and the concurrence in *Freed* do not discuss this consideration. And the Court's references to the dangerousness of the goods in *International Minerals* were directed to possible due process challenges to convictions without notice of criminality. 402 U. S., at 564–565. As today's majority acknowledges, *ante*, at 424, n. 6, there is no constitutional defect with the holding of the court below. The only issue here is one of congressional intent.

[7] Under a strict-liability statute, a defendant can be convicted even though he was unaware of the circumstances of his conduct that made it illegal. To take the example of a statute recently before the Court, a regulation forbidding hunting birds in a "baited" field can be read to have a scienter requirement, in which case it would be a defense to prove that one did not know the field was baited, or not, in which case someone hunting in such a field is guilty even if he did not know and could not have known that it was baited. See *Catlett* v. *United States*, *post*, at 1074 (WHITE, J., dissenting from denial of certiorari). I do not argue that the latter approach should be taken to this statute, nor would the statutory language allow it.

IMMIGRATION AND NATURALIZATION SERVICE *v.* RIOS-PINEDA ET AL.

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

No. 83–2032. Argued March 20, 1985—Decided May 13, 1985

Section 244(a)(1) of the Immigration and Nationality Act allows the Attorney General to suspend an alien's deportation if the alien has been present in the United States for a continuous period of at least seven years, is of good moral character, and demonstrates that deportation would result in extreme hardship to the alien or to the alien's spouse or child, who is a United States citizen. Even if these prerequisites are satisfied, the Attorney General has discretion to refuse to suspend deportation. While the Act itself does not provide for reopening suspension proceedings once suspension has been denied, the Attorney General has promulgated regulations under the Act providing that a motion to reopen will be denied unless reopening is sought on the basis of circumstances that have arisen subsequent to the original deportation hearing. The Attorney General has delegated his authority and discretion to suspend deportation to special inquiry officers of the Immigration and Naturalization Service (INS), whose decisions are subject to review by the Board of Immigration Appeals (BIA). Respondents husband and wife, citizens of Mexico, were smuggled illegally into the United States in 1974. Respondent husband was apprehended in 1978, and, although at his request he was granted permission to return voluntarily to Mexico in lieu of deportation, he refused to leave as promised. Deportation proceedings were then instituted against respondents, who by that time had a child, who, being born in the United States, was a United States citizen. Following a December 1978 hearing, an Immigration Judge denied respondents' request for suspension of deportation and ordered their deportation, and the BIA dismissed an appeal. After the Court of Appeals in 1982 had reversed the BIA's decision and remanded the case for further proceedings because respondents had accrued the requisite seven years' presence in the United States during the pendency of the appeal, respondents moved the BIA to reopen and requested suspension of deportation, in the meantime having had a second child born in the United States. The BIA denied the motion to reopen on the grounds, *inter alia*, that the seven years' presence and an additional child were available only because respondents had delayed departure by frivolous appeals and that respondents' conduct had shown a blatant disregard for

the immigration laws. The Court of Appeals reversed and directed the BIA to reopen the proceeding, holding, *inter alia*, that respondents had made out a prima facie case of hardship and that the factors relied on by the BIA did not justify its refusal to reopen.

Held: The refusal to reopen the suspension proceeding was within the Attorney General's discretion. If, as was required by the regulations, respondents' motion to reopen was based on intervening circumstances demonstrating 7-year residence and extreme hardship, the Attorney General, acting through the BIA, nevertheless had the authority to deny the motion. Although by the time the BIA denied the motion respondents had been in the United States for seven years, that was not the case when suspension of deportation was first denied; the seven years accrued during the pendency of respondents' baseless appeals. And the Attorney General did not abuse his discretion in denying reopening based on respondents' flagrant violation of the immigration laws in entering the United States, as well as respondent husband's willful failure to depart voluntarily after his request to do so was honored by the INS. Pp. 449–452.

720 F. 2d 529, reversed.

WHITE, 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 case.

Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *James A. Hunolt.*

Lawrence H. Rudnick argued the cause for respondents. With him on the brief was *Roman de la Campa.*

JUSTICE WHITE delivered the opinion of the Court.

Section 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1), allows the Attorney General to suspend the deportation of an alien. To warrant such action, the alien must have been physically present in the United States for a continuous period of at least seven years, be of good moral character, and demonstrate that deportation would result in extreme hardship to the alien, or the alien's "spouse, parent, or child,

who is a citizen of the United States or an alien lawfully admitted for permanent residence." *Ibid.* Even if these prerequisites are satisfied, it remains in the discretion of the Attorney General to suspend, or refuse to suspend, deportation. *INS* v. *Jong Ha Wang*, 450 U. S. 139, 144, n. 5 (1981); *Jay* v. *Boyd*, 351 U. S. 345, 353 (1956). Although Congress did not provide a statutory mechanism for reopening suspension proceedings once suspension has been denied, the Attorney General has promulgated regulations under the Act allowing for such a procedure. 8 CFR § 3.2 (1985). Under the regulations, a motion to reopen will be denied unless reopening is sought on the basis of circumstances which have arisen subsequent to the original hearing. *Ibid.* The Attorney General, authorized by Congress to do so, 8 U. S. C. § 1103, has delegated his authority and discretion to suspend deportation to special inquiry officers of the Immigration and Naturalization Service (INS), whose decisions are subject to review by the Board of Immigration Appeals (BIA). 8 CFR §§ 242.8, 242.21 (1985).

Respondents, a married couple, are natives and citizens of Mexico. Respondent husband illegally entered the United States in 1972. Apprehended, he returned to Mexico in early 1974 under threat of deportation. Two months later, he and respondent wife paid a professional smuggler $450 to transport them into this country, entering the United States without inspection through the smuggler's efforts. Respondent husband was again apprehended by INS agents in 1978. At his request, he was granted permission to return voluntarily to Mexico in lieu of deportation. He was also granted two subsequent extensions of time to depart, but he ultimately declined to leave as promised. INS then instituted deportation proceedings against both respondents. By that time, respondent wife had given birth to a child, who, born in the United States, was a citizen of this country. A deportation hearing was held in December 1978. Respondents conceded illegal entry, conceded deportability, but re-

quested suspension of deportation. The Immigration Judge, ruling that respondents were ineligible for suspension because they had not satisfied the requirement of seven years' continuous physical presence, ordered their deportation. Respondents appealed the order to the BIA, asserting a variety of arguments to establish that the deportation violated their rights or the rights of their child. The BIA rejected these arguments and dismissed the appeal.

In July 1980, respondents filed a petition for review in the Court of Appeals, which automatically stayed their deportation pursuant to 8 U. S. C. § 1105a(a)(3). Asking that the court order their deportation suspended, respondents asserted substantially the same claims rejected by the BIA: that the Immigration Judge should have given them *Miranda* warnings, that their deportation was an unlawful *de facto* deportation of their citizen child, and that respondent husband should have been considered present in the United States for seven years. In March 1982, 15 months after the briefs were filed, the Court of Appeals reversed the decision of the BIA and remanded the case for further proceedings. *Rios-Pineda* v. *United States Department of Justice*, 673 F. 2d 225 (CA8). The Court of Appeals was of the view that during the pendency of the appeals, respondents had accrued the requisite seven years' continuous physical presence in the United States. *Id.*, at 227. Because of this development, the court directed the BIA to allow respondents 60 days to file a motion to reopen their deportation proceeding and cautioned the BIA "to give careful and thorough consideration to the . . . motion to reopen if, indeed, one is filed." *Id.*, at 228, n. 5. During the pendency of the appeals, respondent wife gave birth to a second citizen child.

Respondents then moved the BIA to reopen and requested suspension of deportation. They alleged that deportation would result in extreme hardship in that their two citizen children would be deprived of their right to an education in United States schools and to social assistance. Respondents

also alleged general harm to themselves from their "low skills and educations" and the lower standard of living in Mexico.

The BIA denied the motion to reopen. First, the motion was not timely filed, as respondents had not served it on the proper official within the specified 60 days. Second, discretionary relief was unwarranted, since the additional facts—seven years' continuous physical presence and an additional child—were available only because respondents had delayed departure by frivolous appeals. Third, respondent husband's conduct in returning to the country only two months after his 1974 departure, respondents' payment to a professional smuggler to enter this country illegally, and respondent husband's refusal to depart voluntarily after promising to do so, all evinced a blatant disregard for the immigration laws, disentitling respondents to the favorable exercise of discretion.

The Court of Appeals reversed and directed the BIA to reopen the proceeding. *Rios-Pineda* v. *United States Department of Justice*, 720 F. 2d 529 (CA8 1983). The motion to reopen, the panel concluded, was timely filed,[1] respondents had made out a prima facie case of hardship, and the factors relied on by the BIA did not justify its refusal to reopen. Although the court did not find merit in any of the legal arguments respondents had pressed during their prior appeals, their appeals were not frivolous. Neither could the BIA deny a motion to reopen because of respondents' disregard of the immigration laws, since such disregard is present in some measure in all deportation cases. *Id.*, at 534.

We granted certiorari, 469 U. S. 1071 (1984), because this case involves important issues bearing on the scope of the Attorney General's discretion in acting on motions to reopen civil requests for suspension of deportation.

---

[1] The issue of whether the motion to reopen was timely filed is not before this Court, and we assume, without deciding, that timely filing was established by service of the motion on the wrong official within the period required by the Court of Appeals' first decision. See 720 F. 2d, at 532.

We have recently indicated that granting a motion to reopen is a discretionary matter with BIA. *INS* v. *Phinpathya*, 464 U. S. 183, 188, n. 6 (1984). Thus, even assuming that respondents' motion to reopen made out a prima facie case of eligibility for suspension of deportation, the Attorney General had discretion to deny the motion to reopen. *INS* v. *Jong Ha Wang*, 450 U. S. 139, 144, n. 5 (1981). We have also held that if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met. *INS* v. *Bagamasbad*, 429 U. S. 24 (1976); see also *Jong Ha Wang*, 450 U. S., at 143–144, n. 5.

Given the Attorney General's broad discretion in this context, we cannot agree with the Court of Appeals' holding that denial of the motion to reopen was an impermissible exercise of that discretion. If, as was required by the regulations, respondents' motion to reopen was based on intervening circumstances demonstrating 7-year residence and extreme hardship, the Attorney General, acting through the BIA, nevertheless had the authority to deny the motion for two separate and quite adequate reasons.

First, although by the time the BIA denied the motion, respondents had been in this country for seven years, that was not the case when suspension of deportation was first denied;[2] the seven years accrued during the pendency of

[2] Even prior to our decision in *INS* v. *Phinpathya*, 464 U. S. 183 (1984), while the administrative practice treated some minor absences as not breaking the continuous presence period, neither the courts nor the Attorney General had ever considered a departure under threat of deportation, coupled with a subsequent illegal entry after two months' absence, anything less than a meaningful interruption of the period. Not only had the Immigration Judge explained, both at the deportation hearing and in his written decision, App. to Pet. for Cert. 27a, that such an absence was an interruption of the period of continuous presence, the law itself was clear. See *Heitland* v. *INS*, 551 F. 2d 495, 503–504 (CA2), cert. denied, 434 U. S. 819 (1977); *Segura-Viachi* v. *INS*, 538 F. 2d 91, 92 (CA5 1976); *Barragan-Sanchez* v. *Rosenberg*, 471 F. 2d 758, 760 (CA9 1972); see generally *Phinpathya*, *supra*, at 193–194.

respondents' appeals. The BIA noted that respondents' issues on appeals were without merit and held that the 7-year requirement satisfied in this manner should not be recognized. In our view, it did not exceed its discretion in doing so.

The Court of Appeals thought the appeal had not been frivolous because it had resulted in further proceedings. But this was true only because seven years of residence had accrued during the pendency of the appeal. No substance was found in any of the points raised on appeal, in and of themselves, and we agree with the BIA that they were without merit. The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites. One illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible. See, *e. g.*, *Sung Ja Oum* v. *INS*, 613 F. 2d 51, 52–54 (CA4 1980); *Hibbert* v. *INS*, 554 F. 2d 17, 19–21 (CA2 1977). The Attorney General can, in exercising his discretion, legitimately avoid creating a further incentive for stalling by refusing to reopen suspension proceedings for those who became eligible for such suspension only because of the passage of time while their meritless appeals dragged on. See *Leblanc* v. *INS*, 715 F. 2d 685, 693 (CA1 1983); *Agustin* v. *INS*, 700 F. 2d 564, 566 (CA9 1983); *Balani* v. *INS*, 669 F. 2d 1157, 1160–1162 (CA6 1982); *Der-Rong Chour* v. *INS*, 578 F. 2d 464, 467–468 (CA2 1978), cert. denied, 440 U. S. 980 (1979); *Schieber* v. *INS*, 171 U. S. App. D. C. 312, 320–321, 520 F. 2d 44, 52–53 (1975).

The impact of any other rule is pointed out by this case. Respondents were apprehended in 1978, and they conceded deportability. Nonetheless, over six years later they remain in the United States by virtue of their baseless appeals. In administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without

the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process. Administering the 7-year requirement in this manner is within the authority of the Attorney General. The Act commits the definition of the standards in the Act to the Attorney General and his delegate in the first instance, "and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *INS* v. *Jong Ha Wang*, *supra*, at 144.

Second, we are sure that the Attorney General did not abuse his discretion in denying reopening based on respondents' flagrant violation of the federal law in entering the United States, as well as respondent husband's willful failure to depart voluntarily after his request to do so was honored by the INS. The Court of Appeals' rejection of these considerations as "irrelevant" is unpersuasive. While all aliens illegally present in the United States have, in some way, violated the immigration laws, it is untenable to suggest that the Attorney General has no discretion to consider their individual conduct and distinguish among them on the basis of the flagrancy and nature of their violations. There is a difference in degree between one who enters the country legally, staying beyond the terms of a visa, and one who enters the country without inspection. Nor does everyone who illegally enters the country do so repeatedly and with the assistance of a professional smuggler. Furthermore, the Attorney General can certainly distinguish between those who, once apprehended, comply with the laws, and those who refuse to honor previous agreements to report for voluntary departure. Accordingly, we are convinced that the BIA did not abuse its discretion in denying reopening because of respondents' prior conduct.

This case, therefore, does not involve the unreasoned or arbitrary exercise of discretion. Here the BIA's explanation of its decision was grounded in legitimate concerns about the

administration of the immigration laws and was determined on the basis of the particular conduct of respondents. In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review. See *Jong Ha Wang*, 450 U. S., at 144–145; *Phinpathya*, 464 U. S., at 195–196. Because we conclude that here the refusal to reopen the suspension proceeding was within the discretion of the Attorney General, we reverse the decision of the Court of Appeals.

So ordered.

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

UNITED STATES *v.* BENCHIMOL

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

No. 84–1165. Decided May 13, 1985

In 1976, respondent pleaded guilty in Federal District Court to a charge of mail fraud, pursuant to a plea bargain whereby the Government agreed to recommend probation on condition that restitution be made. However, the court disregarded the recommendation and sentenced respondent to six years of treatment and supervision under the Youth Corrections Act. After serving 18 months of his sentence, he was arrested for parole violation, but a few days before his arrest, he moved to withdraw his guilty plea or, in the alternative, to have his sentence vacated and be resentenced to the time already served, claiming that the Government had failed to comply with its part of the plea bargain. The District Court denied relief, but the Court of Appeals reversed, holding that the Government had breached its plea bargain because, although the Assistant United States Attorney, at the sentencing hearing, had agreed with defense counsel's statement that the Government recommended probation with restitution, he did not explain his reasons for the recommendation and left the impression of less than enthusiastic support for leniency.

Held: The Court of Appeals misconceived the effect of Federal Rule of Criminal Procedure 11(e), which governs plea bargaining, and of the applicable case law. Even assuming that the Government, in a particular case, may commit itself to make a certain recommendation to the sentencing court "enthusiastically" or to explain to the court its reasons for making the recommendation, there is no contention or finding that the Government had in fact undertaken to do either of such things here. The Court of Appeals erred in holding that under Rule 11(e) such an undertaking is to be implied as a matter of law from the Government's agreement to recommend a particular sentence. There was simply no default on the Government's part here.

Certiorari granted; 738 F. 2d 1001, reversed.

PER CURIAM.

In April 1976, respondent pleaded guilty in the United States District Court for the Northern District of California to an information charging him with one count of mail fraud in violation of 18 U. S. C. § 1341. Respondent pleaded pur-

suant to a plea bargain whereby the Government agreed to recommend probation on condition that restitution be made. The District Court disregarded the recommendation and sentenced respondent to six years of treatment and supervision under the Youth Corrections Act, 18 U. S. C. § 5010(b). He was released on parole after serving 18 months of his sentence, but a warrant for his arrest because of parole violation was issued in 1978, and he was eventually taken into custody on that warrant in October 1981. A few days before his arrest on this warrant, he filed a motion under Federal Rule of Criminal Procedure 32(d) and 28 U. S. C. § 2255 to withdraw his guilty plea or, in the alternative, to have his sentence vacated and be resentenced to the time already served. He claimed that the Government had failed to comply with its part of the plea bargain upon which his guilty plea was based.

The District Court that had received the guilty plea also heard respondent's application for collateral relief, and denied it. The Court of Appeals by a divided vote reversed that judgment, holding that "when the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it." 738 F. 2d 1001, 1002 (CA9 1984). There is some slight disagreement about the facts surrounding the terms of the plea bargain and its presentation to the District Court, a situation entirely understandable by reason of the lapse of more than five years between the entry of the guilty plea and the hearing on the request for collateral relief. The Court of Appeals had this view of the facts:

> "Benchimol agreed to plead guilty. The government concedes that in exchange for the guilty plea it promised to recommend probation with restitution. However, at the sentencing hearing, the presentence report incorrectly stated that the government would stand silent. Benchimol's counsel informed the court that the government instead recommended probation with restitution.

> The Assistant United States Attorney then stated: 'That is an accurate representation.'" *Ibid.*

The Court of Appeals concluded that the Government had breached its plea bargain because, although the Assistant United States Attorney concurred with defense counsel's statement that the Government recommended probation with restitution, it "made no effort to explain its reasons for agreeing to recommend a lenient sentence but rather left an impression with the court of less-than-enthusiastic support for leniency." *Ibid.*

We think this holding misconceives the effect of the relevant rules and of the applicable case law. Federal Rule of Criminal Procedure 11(e) provides an elaborate formula for the negotiation of plea bargains, which allows the attorney for the Government to agree to move for dismissal of other charges and to agree that a specific sentence is the appropriate disposition of the case. It also authorizes the Government attorney to make a recommendation for a particular sentence, or agree not to oppose the defendant's request for such a sentence, with the understanding that such recommendation or request shall not be binding upon the court.

It may well be that the Government in a particular case might commit itself to "enthusiastically" make a particular recommendation to the court, and it may be that the Government in a particular case might agree to explain to the court the reasons for the Government's making a particular recommendation. But respondent does not contend, nor did the Court of Appeals find, that the Government had in fact undertaken to do either of these things here. The Court of Appeals simply held that as a matter of law such an undertaking was to be implied from the Government's agreement to recommend a particular sentence. But our view of Rule 11(e) is that it speaks in terms of what the parties in fact agree to, and does not suggest that such implied-in-law terms as were read into this agreement by the Court of Appeals have any place under the Rule.

The Court of Appeals relied on cases such as *United States* v. *Grandinetti*, 564 F. 2d 723 (CA5 1977), and *United States* v. *Brown*, 500 F. 2d 375 (CA4 1974), for the conclusion it reached with respect to the requirement of "enthusiasm," but it appears to us that in each of these cases the Government attorney appearing personally in court at the time of the plea bargain expressed personal reservations about the agreement to which the Government had committed itself. This is quite a different proposition than an appellate determination from a transcript of the record made many years earlier that the Government attorney had "left an impression with the court of less-than-enthusiastic support for leniency." When the Government agrees pursuant to Rule 11(e) to make a recommendation with respect to sentence, it must carry out its part of the bargain by making the promised recommendation; but even if Rule 11(e) allows bargaining about degrees of enthusiasm, there appears to have been none here.

Rule 11(e) may well contemplate agreement by the Government in a particular case to state to the court its reasons for making the recommendation which it agrees to make. The Government suggests that spreading on the record its reasons for agreement to a plea bargain in a particular case—for example, that it did not wish to devote scarce resources to a trial of this particular defendant, or that it wished to avoid calling the victim as a witness—would frequently harm, rather than help, the defendant's quest for leniency. These may well be reasons why the defendant would not wish to exact such a commitment from the Government, but for purposes of this case it is enough that no such agreement was made in fact. Since Rule 11(e) speaks generally of the plea bargains that the parties make, it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon.

For these reasons, we conclude that there was simply no default on the part of the Government in this case, to say nothing of a default remediable on collateral attack under 28

U. S. C. § 2255 or under Federal Rule of Criminal Procedure 32(d), as in effect before August 1, 1983. See *Hill* v. *United States*, 368 U. S. 424, 428 (1962). The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is

*Reversed.**

JUSTICE STEVENS, concurring in the judgment.

Whether or not the Government complied with Federal Rule of Criminal Procedure 11(e), I agree that the error, if any, was not serious enough to support a collateral attack under Federal Rule of Criminal Procedure 32(d) or 28 U. S. C. § 2255. The error here is "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U. S. 424, 428 (1962). Nor has it resulted in "manifest injustice." Fed. Rule Crim. Proc. 32(d). If the Government erred in failing to recommend affirmatively the proper sentence, the time to object was at the sentencing hearing or on direct appeal. "[T]here is no basis here for allowing collateral attack 'to do service for an appeal.'" *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979) (quoting *Sunal* v. *Large*, 332 U. S. 174, 178 (1947)).

Accordingly, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today continues its unsettling practice of summarily reversing decisions rendered in favor of criminal defendants, based not on broad principle but on idiosyncratic

*Our summary reversals are not as one-sided as the dissent claims. See *per curiam* reversals in *Smith* v. *Illinois*, 469 U. S. 91 (1984); *Thompson* v. *Louisiana*, 469 U. S. 17 (1984); *Payne* v. *Virginia*, 468 U. S. 1062 (1984).

facts and without full briefing or oral argument. See, *e. g.*, *United States* v. *Gagnon*, 470 U. S. 522, 530–531 (1985) (BRENNAN, J., dissenting); *Florida* v. *Meyers*, 466 U. S. 380, 383 (1984) (STEVENS, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 50 (1982) (MARSHALL, J., dissenting). Because I find this one-sided practice of summary error correction* inappropriate, I would vote merely to deny this petition for certiorari. Accordingly, I respectfully dissent.

---

*There have been summary reversals in 27 noncapital cases involving criminal convictions over the last four Terms. Twenty-four of these favored the warden or the prosecutor. See *ante*, at 456–457; *United States* v. *Gagnon*, 470 U. S. 522 (1985) *(per curiam); United States* v. *Woodward* 469 U. S. 105 (1985) *(per curiam); Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam); Massachusetts* v. *Upton*, 466 U. S. 727 (1984) *(per curiam); Florida* v. *Meyers*, 466 U. S. 380, 386, and n. 3 (1984) *(per curiam)* (STEVENS, J., dissenting) (collecting cases).

HOPFMANN ET AL. *v.* CONNOLLY ET AL.

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

No. 84–1440. Decided May 13, 1985

Held: In federal-court proceedings wherein it was claimed that the Massachusetts Democratic Party's Charter, as enforced by a Massachusetts statute, violated the First and Fourteenth Amendments, the Court of Appeals erred in concluding, on the basis of *Hicks* v. *Miranda*, 422 U. S. 332, that the claim here was foreclosed by this Court's summary disposition of two appeals from the Massachusetts Supreme Judicial Court in *Langone* v. *Connolly*, 460 U. S. 1057. *Hicks* explained the precedential effect of a dismissal by this Court "for want of [a] substantial federal question" where this Court has jurisdiction over an appeal. However, in *Langone* this Court dismissed the appeals for lack of appellate jurisdiction and thus had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional statements. Nor did the denial of certiorari, upon treating the papers whereon the appeals were taken in *Langone* as petitions for certiorari, have any precedential effect.

Appeal dismissed for want of jurisdiction and, treating the papers as a petition for certiorari, certiorari granted; 746 F. 2d 97, vacated and remanded.

PER CURIAM.

Appeal from the United States Court of Appeals for the First Circuit is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, the petition is granted.

Hopfmann filed this action in the Federal District Court for the District of Massachusetts challenging a provision in the Charter of the Massachusetts Democratic Party. Among the theories he advanced was a claim that the provision, as enforced by Mass. Gen. Laws Ann., ch. 53, §§ 1–121 (West 1975 and Supp. 1985), violated the First and Fourteenth Amendments of the United States Constitution. Relying on *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975), the Court of Appeals held that the claim was foreclosed by this Court's

summary disposition of two appeals from the Supreme Judicial Court of Massachusetts in *Langone* v. *Connolly*, 460 U. S. 1057 (1983). See 746 F. 2d 97, 100–101 (1984).

In *Hicks*, the Court explained the precedential effect of the dismissal "for want of [a] substantial federal question" in *Miller* v. *California*, 418 U. S. 915 (1974):

> "*[Miller]* was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U. S. C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one." 422 U. S., at 343–344.

Because the Court had jurisdiction over the appeal in *Miller*, the dismissal involved a rejection of "the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) *(per curiam)*.

On the other hand, the order disposing of the appeals in *Langone* read:

> "Appeals from Sup. Jud. Ct. Mass. dismissed *for want of jurisdiction*. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 388 Mass. 185, 446 N. E. 2d 43 [1983]." 460 U. S., at 1057 (emphasis added).

Because the Court dismissed the appeals for lack of appellate jurisdiction, we had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional

statements. Nor did the denial of certiorari have any precedential effect. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of the petition for certiorari).

The judgment of the Court of Appeals is vacated to the extent it relied on the dismissal of the appeals in *Langone*, and the cause is remanded for further proceedings.

It is so ordered.

BURGER KING CORP. *v.* RUDZEWICZ

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

No. 83–2097. Argued January 8, 1985—Decided May 20, 1985

Appellant is a Florida corporation whose principal offices are in Miami. It conducts most of its restaurant business through a franchise operation, under which franchisees are licensed to use appellant's trademarks and service marks in leased standardized restaurant facilities for a period of 20 years. The governing contracts provide that the franchise relationship is established in Miami and governed by Florida law, and call for payment of all required monthly fees and forwarding of all relevant notices to the Miami headquarters. The Miami headquarters sets policy and works directly with the franchisees in attempting to resolve major problems. Day-to-day monitoring of franchisees, however, is conducted through district offices that in turn report to the Miami headquarters. Appellee is a Michigan resident who, along with another Michigan resident, entered into a 20-year franchise contract with appellant to operate a restaurant in Michigan. Subsequently, when the restaurant's patronage declined, the franchisees fell behind in their monthly payments. After extended negotiations among the franchisees, the Michigan district office, and the Miami headquarters proved unsuccessful in solving the problem, headquarters terminated the franchise and ordered the franchisees to vacate the premises. They refused and continued to operate the restaurant. Appellant then brought a diversity action in Federal District Court in Florida, alleging that the franchisees had breached their franchise obligations and requesting damages and injunctive relief. The franchisees claimed that, because they were Michigan residents and because appellant's claim did not "arise" within Florida, the District Court lacked personal jurisdiction over them. But the court held that the franchisees were subject to personal jurisdiction pursuant to Florida's long-arm statute, which extends jurisdiction to any person, whether or not a citizen or resident of the State, who breaches a contract in the State by failing to perform acts that the contract requires to be performed there. Thereafter, the court entered judgment against the franchisees on the merits. The Court of Appeals reversed, holding that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process."

Held: The District Court's exercise of jurisdiction pursuant to Florida's long-arm statute did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 471–487.

(a) A forum may assert specific jurisdiction over a nonresident defendant where an alleged injury arises out of or relates to actions by the defendant *himself* that are purposefully directed toward forum residents, and where jurisdiction would not otherwise offend "fair play and substantial justice." Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum. Pp. 471–478.

(b) An individual's contract with an out-of-state party cannot *alone* automatically establish sufficient minimum contacts in the other party's home forum. Instead, the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated to determine whether a defendant purposefully established minimum contacts within the forum. Pp. 478–479.

(c) Here, appellee established a substantial and continuing relationship with appellant's Miami headquarters, and received fair notice from the contract documents and the course of dealings that he might be subject to suit in Florida. The District Court found that appellee is an "experienced and sophisticated" businessman who did not act under economic duress or disadvantage imposed by appellant, and appellee has pointed to no other factors that would establish the *unconstitutionality* of Florida's assertion of jurisdiction. Pp. 479–487.

724 F. 2d 1505, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 487. POWELL, J., took no part in the consideration or decision of the case.

Joel S. Perwin argued the cause and filed briefs for appellant.

Thomas H. Oehmke argued the cause and filed a brief for appellee.

JUSTICE BRENNAN delivered the opinion of the Court.

The State of Florida's long-arm statute extends jurisdiction to "[a]ny person, whether or not a citizen or resident of this state," who, *inter alia*, "[b]reach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state," so long as the cause of action

arises from the alleged contractual breach. Fla. Stat. § 48.193 (1)(g) (Supp. 1984). The United States District Court for the Southern District of Florida, sitting in diversity, relied on this provision in exercising personal jurisdiction over a Michigan resident who allegedly had breached a franchise agreement with a Florida corporation by failing to make required payments in Florida. The question presented is whether this exercise of long-arm jurisdiction offended "traditional conception[s] of fair play and substantial justice" embodied in the Due Process Clause of the Fourteenth Amendment. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945).

I

A

Burger King Corporation is a Florida corporation whose principal offices are in Miami. It is one of the world's largest restaurant organizations, with over 3,000 outlets in the 50 States, the Commonwealth of Puerto Rico, and 8 foreign nations. Burger King conducts approximately 80% of its business through a franchise operation that the company styles the "Burger King System"—"a comprehensive restaurant format and operating system for the sale of uniform and quality food products." App. 46.[1] Burger King licenses its franchisees to use its trademarks and service marks for a period of 20 years and leases standardized restaurant facilities to them for the same term. In addition, franchisees acquire a variety of proprietary information concerning the "standards, specifications, procedures and methods for op-

[1] Burger King's standard Franchise Agreement further defines this system as "a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control . . . ." App. 43.

erating a Burger King Restaurant." *Id.*, at 52. They also receive market research and advertising assistance; ongoing training in restaurant management;[2] and accounting, cost-control, and inventory-control guidance. By permitting franchisees to tap into Burger King's established national reputation and to benefit from proven procedures for dispensing standardized fare, this system enables them to go into the restaurant business with significantly lowered barriers to entry.[3]

In exchange for these benefits, franchisees pay Burger King an initial $40,000 franchise fee and commit themselves to payment of monthly royalties, advertising and sales promotion fees, and rent computed in part from monthly gross sales. Franchisees also agree to submit to the national organization's exacting regulation of virtually every conceivable aspect of their operations.[4] Burger King imposes these standards and undertakes its rigid regulation out of conviction that "[u]niformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor." *Id.*, at 31.

Burger King oversees its franchise system through a two-tiered administrative structure. The governing contracts

---

[2] Mandatory training seminars are conducted at Burger King University in Miami and at Whopper College Regional Training Centers around the country. See *id.*, at 39; 6 Record 540–541.

[3] See App. 43–44. See generally H. Brown, Franchising Realities and Remedies 6–7, 16–17 (2d ed. 1978).

[4] See, *e. g.*, App. 24–25, 26 (range, "quality, appearance, size, taste, and processing" of menu items), 31 ("standards of service and cleanliness"), 32 (hours of operation), 47 ("official mandatory restaurant operating standards, specifications and procedures"), 48–50 (building layout, displays, equipment, vending machines, service, hours of operation, uniforms, advertising, and promotion), 53 (employee training), 55–56 (accounting and auditing requirements), 59 (insurance requirements). Burger King also imposes extensive standards governing franchisee liability, assignments, defaults, and termination. See *id.*, at 61–74.

provide that the franchise relationship is established in Miami and governed by Florida law, and call for payment of all required fees and forwarding of all relevant notices to the Miami headquarters.[5] The Miami headquarters sets policy and works directly with its franchisees in attempting to resolve major problems. See nn. 7, 9, *infra*. Day-to-day monitoring of franchisees, however, is conducted through a network of 10 district offices which in turn report to the Miami headquarters.

The instant litigation grows out of Burger King's termination of one of its franchisees, and is aptly described by the franchisee as "a divorce proceeding among commercial partners." 5 Record 4. The appellee John Rudzewicz, a Michigan citizen and resident, is the senior partner in a Detroit accounting firm. In 1978, he was approached by Brian MacShara, the son of a business acquaintance, who suggested that they jointly apply to Burger King for a franchise in the Detroit area. MacShara proposed to serve as the manager of the restaurant if Rudzewicz would put up the investment capital; in exchange, the two would evenly share the profits. Believing that MacShara's idea offered attractive investment and tax-deferral opportunities, Rudzewicz agreed to the venture. 6 *id.*, at 438–439, 444, 460.

Rudzewicz and MacShara jointly applied for a franchise to Burger King's Birmingham, Michigan, district office in the autumn of 1978. Their application was forwarded to Burger King's Miami headquarters, which entered into a preliminary agreement with them in February 1979. During the ensuing four months it was agreed that Rudzewicz and MacShara would assume operation of an existing facility in Drayton Plains, Michigan. MacShara attended the prescibed management courses in Miami during this period, see n. 2, *supra*, and the franchisees purchased $165,000 worth of restaurant equipment from Burger King's Davmor Industries division in

[5] See *id.*, at 10–11, 37, 43, 72–73, 113. See *infra*, at 481.

Miami. Even before the final agreements were signed, however, the parties began to disagree over site-development fees, building design, computation of monthly rent, and whether the franchisees would be able to assign their liabilities to a corporation they had formed.[6] During these disputes Rudzewicz and MacShara negotiated both with the Birmingham district office and with the Miami headquarters.[7] With some misgivings, Rudzewicz and MacShara finally obtained limited concessions from the Miami headquarters,[8] signed the final agreements, and commenced operations in June 1979. By signing the final agreements, Rudzewicz obligated himself personally to payments exceeding $1 million over the 20-year franchise relationship.

---

[6] The latter two matters were the major areas of disagreement. Notwithstanding that Burger King's franchise offering advised that minimum rent would be based on a percentage of "approximated capitalized site acquisition and construction costs," *id.*, at 23, Rudzewicz assumed that rent would be a function solely of renovation costs, and he thereby underestimated the minimum monthly rent by more than $2,000. The District Court found Rudzewicz' interpretation "incredible." 7 Record 649.

With respect to assignment, Rudzewicz and MacShara had formed RMBK Corp. with the intent of assigning to it all of their interest and liabilities in the franchise. Consistent with the contract documents, however, Burger King insisted that the two remain personally liable for their franchise obligations. See App. 62, 109. Although the franchisees contended that Burger King officials had given them oral assurances concerning assignment, the District Court found that pursuant to the parol evidence rule any such assurances "even if they had been made and were misleading were joined and merged" into the final agreement. 7 Record 648.

[7] Although Rudzewicz and MacShara dealt with the Birmingham district office on a regular basis, they communicated directly with the Miami headquarters in forming the contracts; moreover, they learned that the district office had "very little" decisionmaking authority and accordingly turned directly to headquarters in seeking to resolve their disputes. 5 *id.*, at 292. See generally App. 5–6; 5 Record 167–168, 174–179, 182–184, 198–199, 217–218, 264–265, 292–294; 6 *id.*, at 314–316, 363, 373, 416, 463, 496.

[8] They were able to secure a $10,439 reduction in rent for the third year. App. 82; 5 Record 222–223; 6 *id.*, at 500.

The Drayton Plains facility apparently enjoyed steady business during the summer of 1979, but patronage declined after a recession began later that year. Rudzewicz and MacShara soon fell far behind in their monthly payments to Miami. Headquarters sent notices of default, and an extended period of negotiations began among the franchisees, the Birmingham district office, and the Miami headquarters. After several Burger King officials in Miami had engaged in prolonged but ultimately unsuccessful negotiations with the franchisees by mail and by telephone,[9] headquarters terminated the franchise and ordered Rudzewicz and MacShara to vacate the premises. They refused and continued to occupy and operate the facility as a Burger King restaurant.

B

Burger King commenced the instant action in the United States District Court for the Southern District of Florida in May 1981, invoking that court's diversity jurisdiction pursuant to 28 U. S. C. § 1332(a) and its original jurisdiction over federal trademark disputes pursuant to § 1338(a).[10] Burger King alleged that Rudzewicz and MacShara had breached their franchise obligations "within [the jurisdiction of] this district court" by failing to make the required payments "at plaintiff's place of business in Miami, Dade County, Florida," ¶ 6, App. 121, and also charged that they were tortiously in-

[9] Miami's policy was to "deal directly" with franchisees when they began to encounter financial difficulties, and to involve district office personnel only when necessary. 5 *id.*, at 95. In the instant case, for example, the Miami office handled all credit problems, ordered cost-cutting measures, negotiated for a partial refinancing of the franchisees' debts, communicated directly with the franchisees in attempting to resolve the dispute, and was responsible for all termination matters. See 2 *id.*, at 59–69; 5 *id.*, at 84–89, 94–95, 97–98, 100–103, 116–128, 151–152, 158, 163; 6 *id.*, at 395–397, 436–438, 510–511, 524–525.

[10] Rudzewicz and MacShara were served in Michigan with summonses and copies of the complaint pursuant to Federal Rule of Civil Procedure 4. 2 *id.*, at 102–103.

fringing its trademarks and service marks through their continued, unauthorized operation as a Burger King restaurant, ¶¶ 35–53, App. 130–135. Burger King sought damages, injunctive relief, and costs and attorney's fees. Rudzewicz and MacShara entered special appearances and argued, *inter alia*, that because they were Michigan residents and because Burger King's claim did not "arise" within the Southern District of Florida, the District Court lacked personal jurisdiction over them. The District Court denied their motions after a hearing, holding that, pursuant to Florida's long-arm statute, "a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements." *Id.*, at 138. Rudzewicz and MacShara then filed an answer and a counterclaim seeking damages for alleged violations by Burger King of Michigan's Franchise Investment Law, Mich. Comp. Laws § 445.1501 *et seq.* (1979).

After a 3-day bench trial, the court again concluded that it had "jurisdiction over the subject matter and the parties to this cause." App. 159. Finding that Rudzewicz and MacShara had breached their franchise agreements with Burger King and had infringed Burger King's trademarks and service marks, the court entered judgment against them, jointly and severally, for $228,875 in contract damages. The court also ordered them "to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to Burger King Corporation," *id.*, at 163, found that they had failed to prove any of the required elements of their counterclaim, and awarded costs and attorney's fees to Burger King.

Rudzewicz appealed to the Court of Appeals for the Eleventh Circuit.[11] A divided panel of that Circuit reversed the

[11] MacShara did not appeal his judgment. See *Burger King Corp.* v. *MacShara*, 724 F. 2d 1505, 1506, n. 1 (CA11 1984). In addition, Rudzewicz entered into a compromise with Burger King and waived his right to

judgment, concluding that the District Court could not properly exercise personal jurisdiction over Rudzewicz pursuant to Fla. Stat. § 48.193(1)(g) (Supp. 1984) because "the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida." *Burger King Corp.* v. *MacShara*, 724 F. 2d 1505, 1513 (1984). Accordingly, the panel majority concluded that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." *Ibid.*

Burger King appealed the Eleventh Circuit's judgment to this Court pursuant to 28 U. S. C. § 1254(2), and we postponed probable jurisdiction. 469 U. S. 814 (1984). Because it is unclear whether the Eleventh Circuit actually held that Fla. Stat. § 48.193(1)(g) (Supp. 1984) *itself* is unconstitutional as applied to the circumstances of this case, we conclude that jurisdiction by appeal does not properly lie and therefore dismiss the appeal.[12] Treating the jurisdictional

---

appeal the District Court's finding of trademark infringement and its entry of injunctive relief. See 4 Record 804–816. Accordingly, we need not address the extent to which the tortious act provisions of Florida's long-arm statute, see Fla. Stat. § 48.193(1)(b) (Supp. 1984), may constitutionally extend to out-of-state trademark infringement. Cf. *Calder* v. *Jones*, 465 U. S. 783, 788–789 (1984) (tortious out-of-state conduct); *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 776 (1984) (same).

[12] The District Court had found both that Rudzewicz fell within the reach of Florida's long-arm statute and that the exercise of jurisdiction was constitutional. The Court of Appeals did not consider the statutory question, however, because, as Burger King acknowledged at argument, that court "accepted the parties' stipulation" that § 48.193 reached Rudzewicz "in lieu of [making] a determination of what Florida law provides." Tr. of Oral Arg. 12. Burger King contends that an appeal is proper "on the basis of the Circuit Court's holding that *given that stipulation* the statute was unconstitutional as applied." *Id.*, at 13 (emphasis added).

We disagree. Our "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration," *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 98 (1974) (construing 28 U. S. C. § 1253), would be

statement as a petition for a writ of certiorari, see 28 U. S. C. § 2103, we grant the petition and now reverse.

II

A

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a

---

threatened if litigants could obtain an appeal through the expedient of stipulating to a particular construction of state law where state law might in fact be in harmony with the Federal Constitution. Jurisdiction under 28 U. S. C. § 1254(2) is properly invoked only where a court of appeals *squarely* has "held" that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds. *Public Service Comm'n* v. *Batesville Telephone Co.*, 284 U. S. 6, 7 (1931) *(per curiam)*. Consistent with "our practice of strict construction" of § 1254(2), *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42, n. 1 (1970) *(per curiam)*, we believe that an appeal cannot lie where a court of appeals' judgment rests solely on the stipulated applicability of state law. Rather, it must be reasonably clear that the court independently concluded that the challenged statute governs the case and held the statute itself unconstitutional as so applied. The Court of Appeals did neither in this case, concluding simply that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." 724 F. 2d, at 1513.

Of course, if it were clear under Florida law that § 48.193(1)(g) governed every transaction falling within its literal terms, there could be no objection to a stipulation that merely recognized this established construction. But the Florida Supreme Court has not ruled on the breadth of § 48.193 (1)(g), and several state appellate courts have held that the provision extends only to the limits of the Due Process Clause. See, *e. g.*, *Scordilis* v. *Drobnicki*, 443 So. 2d 411, 412–414 (Fla. App. 1984); *Lakewood Pipe of Texas, Inc.* v. *Rubaii*, 379 So. 2d 475, 477 (Fla. App. 1979), appeal dism'd, 383 So. 2d 1201 (Fla. 1980); *Osborn* v. *University Society, Inc.*, 378 So. 2d 873, 874 (Fla. App. 1979). If § 48.193(1)(g) is construed and applied in accordance with due process limitations as a matter of state law, then an appeal is improper because the statute cannot be "invalid as repugnant to the Constitution . . . of the United States," 28 U. S. C. § 1254(2), since its boundaries are defined by, rather than being in excess of, the Due Process Clause. See, *e. g.*, *Calder* v. *Jones*, *supra*, at 787–788, n. 7; *Kulko* v. *California Superior Court*, 436 U. S. 84, 90, and n. 4 (1978).

forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co.* v. *Washington*, 326 U. S., at 319.[13] By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer* v. *Heitner*, 433 U. S. 186, 218 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980).

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there,[14] this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U. S. 408, 414

---

[13] Although this protection operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" rather than as a function "of federalism concerns." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702–703, n. 10 (1982).

[14] We have noted that, because the personal jurisdiction requirement is a waivable right, there are a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, *supra*, at 703. For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. See *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311 (1964). Where such forum-selection provisions have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 15 (1972), their enforcement does not offend due process.

(1984).[15] Thus "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 297–298. Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton* v. *Hustler Magazine, Inc.*, *supra;* see also *Calder* v. *Jones*, 465 U. S. 783 (1984) (suit against author and editor). And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643, 647 (1950). See also *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 222–223 (1957).

We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *Id.*, at 223; see also *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 776. Moreover, where individuals "purposefully derive benefit" from their interstate activities, *Kulko* v. *California Superior Court*,

---

[15] "Specific" jurisdiction contrasts with "general" jurisdiction, pursuant to which "a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U. S., at 414, n. 9; see also *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952).

436 U. S. 84, 96 (1978), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. *McGee* v. *International Life Insurance Co.*, *supra*, at 223.

Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. *International Shoe Co.* v. *Washington*, *supra*, at 316. Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require,[16] the Court has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 295. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.*, at 297. In defining when it is that a potential defendant should "reasonably anticipate" out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958):

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The appli-

---

[16] See, *e. g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 299 (1980) (BRENNAN, J., dissenting); *Shaffer* v. *Heitner*, 433 U. S. 186, 219 (1977) (BRENNAN, J., concurring in part and dissenting in part).

> cation of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S., at 774; *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 299, or of the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, *supra*, at 417.[17] Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee* v. *International Life Insurance Co.*, *supra*, at 223; see also *Kulko* v. *California Superior Court*, *supra*, at 94, n. 7.[18] Thus where the defendant "deliberately" has

---

[17] Applying this principle, the Court has held that the Due Process Clause forbids the exercise of personal jurisdiction over an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there, *World-Wide Volkswagen Corp.* v. *Woodson*, *supra;* over a divorced husband sued for child-support payments whose only affiliation with the forum was created by his former spouse's decision to settle there, *Kulko* v. *California Superior Court*, 436 U. S. 84 (1978); and over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there, *Hanson* v. *Denckla*, 357 U. S. 235 (1958). In such instances, the defendant has had no "clear notice that it is subject to suit" in the forum and thus no opportunity to "alleviate the risk of burdensome litigation" there. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 297.

[18] So long as it creates a "substantial connection" with the forum, even a single act can support jurisdiction. *McGee* v. *International Life Insurance Co.*, 355 U. S., at 223. The Court has noted, however, that "some single or occasional acts" related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" affiliation with the forum. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 318 (1945); *World-*

engaged in significant activities within a State, *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 781, or has created "continuing obligations" between himself and residents of the forum, *Travelers Health Assn.* v. *Virginia*, 339 U. S., at 648, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 774–775; see also *Calder* v. *Jones*, 465 U. S., at 788–790; *McGee* v. *International Life Insurance Co.*, 355 U. S., at 222–223. Cf. *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 317 (1943).

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U. S., at 320. Thus

---

Wide Volkswagen Corp. v. *Woodson*, 444 U. S., at 299. This distinction derives from the belief that, with respect to this category of "isolated" acts, *id.*, at 297, the reasonable foreseeability of litigation in the forum is substantially diminished.

courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 292. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. See, *e. g.*, *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 780; *Calder* v. *Jones*, *supra*, at 788–789; *McGee* v. *International Life Insurance Co.*, *supra*, at 223–224. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules.[19] Similarly, a defendant claiming substantial inconvenience may seek a change of venue.[20] Nevertheless, minimum requirements inherent in the concept of "fair play and substan-

---

[19] See *Allstate Insurance Co.* v. *Hague*, 449 U. S. 302, 307–313 (1981) (opinion of BRENNAN, J.). See generally Restatement (Second) of Conflict of Laws §§ 6, 9 (1971).

[20] See, *e. g.*, 28 U. S. C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"). This provision embodies in an expanded version the common-law doctrine of *forum non conveniens*, under which a court in appropriate circumstances may decline to exercise its jurisdiction in the interest of the "easy, expeditious and inexpensive" resolution of a controversy in another forum. See *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508–509 (1947).

tial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 292; see also Restatement (Second) of Conflict of Laws §§ 36–37 (1971). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 18 (1972) (*re* forum-selection provisions); *McGee* v. *International Life Insurance Co.*, *supra*, at 223–224.

B

(1)

Applying these principles to the case at hand, we believe there is substantial record evidence supporting the District Court's conclusion that the assertion of personal jurisdiction over Rudzewicz in Florida for the alleged breach of his franchise agreement did not offend due process. At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a "contact" for purposes of due process analysis.[21] If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co.* v. *Washington*, *supra*, at 319, or on "conceptualistic . . . theories of the place of contracting or of performance," *Hoopeston Canning Co.* v. *Cullen*,

[21] See, *e. g.*, *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U. S. 907, 909–910 (1980) (WHITE, J., dissenting from denial of certiorari) (collecting cases); Brewer, Jurisdiction in Single Contract Cases, 6 U. Ark. Little Rock L. J. 1, 7–11, 13 (1983); Note, Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?, 61 B. U. L. Rev. 375, 384–388 (1981).

318 U. S., at 316. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.*, at 316–317. It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami.[22] Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." *McGee* v. *International Life Insurance Co.*, 355 U. S., at 223 (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and

---

[22] The Eleventh Circuit held that MacShara's presence in Florida was irrelevant to the question of Rudzewicz' minimum contacts with that forum, reasoning that "Rudzewicz and MacShara never formed a partnership" and "signed the agreements in their individual capacities." 724 F. 2d, at 1513, n. 14. The two did jointly form a corporation through which they were seeking to conduct the franchise, however. See n. 6, *supra*. They were required to decide which one of them would travel to Florida to satisfy the training requirements so that they could commence business, and Rudzewicz participated in the decision that MacShara would go there. We have previously noted that when commercial activities are "carried on in behalf of" an out-of-state party those activities may sometimes be ascribed to the party, *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945), at least where he is a "primary participan[t]" in the enterprise and has acted purposefully in directing those activities, *Calder* v. *Jones*, 465 U. S., at 790. Because MacShara's matriculation at Burger King University is not pivotal to the disposition of this case, we need not resolve the permissible bounds of such attribution.

the manifold benefits that would derive from affiliation with a nationwide organization. *Travelers Health Assn.* v. *Virginia*, 339 U. S., at 647. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." *Hanson* v. *Denckla*, 357 U. S., at 253; *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S., at 774; *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 299. Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least, presumptively reasonable for Rudzewicz to be called to account there for such injuries.

The Court of Appeals concluded, however, that in light of the supervision emanating from Burger King's district office in Birmingham, Rudzewicz reasonably believed that "the Michigan office was for all intents and purposes the embodiment of Burger King" and that he therefore had no "reason to anticipate a Burger King suit outside of Michigan." 724 F. 2d, at 1511. See also *post*, at 488–489 (STEVENS, J., dissenting). This reasoning overlooks substantial record evidence indicating that Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida. The contract documents themselves emphasize that Burger King's operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there, and that the agreements were made in and enforced from Miami. See n. 5, *supra*. Moreover, the parties' actual course of dealing repeatedly confirmed that decisionmaking authority was vested in the Miami headquar-

ters and that the district office served largely as an intermediate link between the headquarters and the franchisees. When problems arose over building design, site-development fees, rent computation, and the defaulted payments, Rudzewicz and MacShara learned that the Michigan office was powerless to resolve their disputes and could only channel their communications to Miami. Throughout these disputes, the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the Miami headquarters that made the key negotiating decisions out of which the instant litigation arose. See nn. 7, 9, *supra*.

Moreover, we believe the Court of Appeals gave insufficient weight to provisions in the various franchise documents providing that all disputes would be governed by Florida law. The franchise agreement, for example, stated:

> "This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida." App. 72.

See also n. 5, *supra*. The Court of Appeals reasoned that choice-of-law provisions are irrelevant to the question of personal jurisdiction, relying on *Hanson* v. *Denckla* for the proposition that "the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction." 724 F. 2d, at 1511–1512, n. 10, citing 357 U. S., at 254. This reasoning misperceives the import of the quoted proposition. The Court in *Hanson* and subsequent cases has emphasized that choice-of-law *analysis*—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the thresh-

old solely on the defendant's purposeful connection to the forum.[23] Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there. As Judge Johnson argued in his dissent below, Rudzewicz "purposefully availed himself of the benefits and protections of Florida's laws" by entering into contracts expressly providing that those laws would govern franchise disputes. 724 F. 2d, at 1513.[24]

(2)

Nor has Rudzewicz pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the *unconstitutionality* of Florida's assertion of jurisdiction. We cannot conclude that Florida had no "legitimate interest in holding [Rudzewicz] answer-

---

[23] *Hanson* v. *Denckla*, 357 U. S., at 253–254. See also *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S., at 778; *Kulko* v. *California Superior Court*, 436 U. S., at 98; *Shaffer* v. *Heitner*, 433 U. S., at 215.

[24] In addition, the franchise agreement's disclaimer that the "choice of law designation does not *require* that all suits concerning this Agreement be filed in Florida," App. 72 (emphasis added), reasonably should have suggested to Rudzewicz that by negative implication such suits *could* be filed there.

The lease also provided for binding arbitration in Miami of certain condemnation disputes, *id.*, at 113, and Rudzewicz conceded the validity of this provision at oral argument, Tr. of Oral Arg. 37. Although it does not govern the instant dispute, this provision also should have made it apparent to the franchisees that they were dealing directly with the Miami headquarters and that the Birmingham district office was *not* "for all intents and purposes the embodiment of Burger King." 724 F. 2d, at 1511.

able on a claim related to" the contacts he had established in that State. *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S., at 776; see also *McGee* v. *International Life Insurance Co.*, 355 U. S., at 223 (noting that State frequently will have a "manifest interest in providing effective means of redress for its residents").[25] Moreover, although Rudzewicz has argued at some length that Michigan's Franchise Investment Law, Mich. Comp. Laws § 445.1501 *et seq.* (1979), governs many aspects of this franchise relationship, he has not demonstrated how Michigan's acknowledged interest might possibly render jurisdiction in Florida *unconstitutional*.[26] Finally, the Court of Appeals' assertion that the Florida litigation "severely impaired [Rudzewicz'] ability to call Michigan witnesses who might be essential to his defense and counterclaim," 724 F. 2d, at 1512–1513, is wholly without support in the record.[27] And even to the extent that it is inconvenient

---

[25] Complaining that "when Burger King is the plaintiff, you won't 'have it your way' because it sues all franchisees in Miami," Brief for Appellee 19, Rudzewicz contends that Florida's interest in providing a convenient forum is negligible given the company's size and ability to conduct litigation anywhere in the country. We disagree. Absent compelling considerations, cf. *McGee* v. *International Life Insurance Co.*, 355 U. S., at 223, a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth.

[26] Rudzewicz has failed to show how the District Court's exercise of jurisdiction in this case might have been at all inconsistent with Michigan's interests. To the contrary, the court found that Burger King had fully complied with Michigan law, App. 159, and there is nothing in Michigan's franchise Act suggesting that Michigan would attempt to assert exclusive jurisdiction to resolve franchise disputes affecting its residents. In any event, minimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 292, can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum. See n. 19, *supra*.

[27] The only arguable instance of trial inconvenience occurred when Rudzewicz had difficulty in authenticating some corporate records; the

for a party who has minimum contacts with a forum to litigate there, such considerations most frequently can be accommodated through a change of venue. See n. 20, *supra*. Although the Court has suggested that inconvenience may at some point become so substantial as to achieve *constitutional* magnitude, *McGee* v. *International Life Insurance Co.*, *supra*, at 223, this is not such a case.

The Court of Appeals also concluded, however, that the parties' dealings involved "a characteristic disparity of bargaining power" and "elements of surprise," and that Rudzewicz "lacked fair notice" of the potential for litigation in Florida because the contractual provisions suggesting to the contrary were merely "boilerplate declarations in a lengthy printed contract." 724 F. 2d, at 1511–1512, and n. 10. See also *post*, at 489–490 (STEVENS, J., dissenting). Rudzewicz presented many of these arguments to the District Court, contending that Burger King was guilty of misrepresentation, fraud, and duress; that it gave insufficient notice in its dealings with him; and that the contract was one of adhesion. See 4 Record 687–691. After a 3-day bench trial, the District Court found that Burger King had made no misrepresentations, that Rudzewicz and MacShara "were and are experienced and sophisticated businessmen," and that "at no time" did they "ac[t] under economic duress or disadvantage imposed by" Burger King. App. 157–158. See also 7 Record 648–649. Federal Rule of Civil Procedure 52(a) requires that "[f]indings of fact shall not be set aside unless clearly erroneous," and neither Rudzewicz nor the Court of Appeals has pointed to record evidence that would support a "definite and firm conviction" that the District Court's findings are mistaken. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also

---

court offered him as much time as would be necessary to secure the requisite authentication from the Birmingham district office, and Burger King ultimately stipulated to their authenticity rather than delay the trial. See 7 Record 574–575, 578–579, 582, 598–599.

Anderson v. *Bessemer City*, 470 U. S. 564, 573–576 (1985). To the contrary, Rudzewicz was represented by counsel throughout these complex transactions and, as Judge Johnson observed in dissent below, was himself an experienced accountant "who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million." 724 F. 2d, at 1514. Rudzewicz was able to secure a modest reduction in rent and other concessions from Miami headquarters, see nn. 8, 9, *supra;* moreover, to the extent that Burger King's terms were inflexible, Rudzewicz presumably decided that the advantages of affiliating with a national organization provided sufficient commercial benefits to offset the detriments.[28]

III

Notwithstanding these considerations, the Court of Appeals apparently believed that it was necessary to reject jurisdiction in this case as a prophylactic measure, reasoning that an affirmance of the District Court's judgment would result in the exercise of jurisdiction over "out-of-state consumers to collect payments due on modest personal purchases" and would "sow the seeds of default judgments against franchisees owing smaller debts." 724 F. 2d, at 1511. We share the Court of Appeals' broader concerns and therefore reject any talismanic jurisdictional formulas; "the

[28] We do not mean to suggest that the jurisdictional outcome will always be the same in franchise cases. Some franchises may be primarily intrastate in character or involve different decisionmaking structures, such that a franchisee should not reasonably anticipate out-of-state litigation. Moreover, commentators have argued that franchise relationships may sometimes involve unfair business practices in their inception and operation. See H. Brown, Franchising Realities and Remedies 4–5 (2d ed. 1978). For these reasons, we reject Burger King's suggestion for "a general rule, or at least a presumption, that participation in an interstate franchise relationship" represents consent to the jurisdiction of the franchisor's principal place of business. Brief for Appellant 46.

facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." *Kulko* v. *California Superior Court*, 436 U. S., at 92.[29] The "quality and nature" of an interstate transaction may sometimes be so "random," "fortuitous," or "attenuated"[30] that it cannot fairly be said that the potential defendant "should reasonably anticipate being haled into court" in another jurisdiction. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 297; see also n. 18, *supra*. We also have emphasized that jurisdiction may not be grounded on a contract whose terms have been obtained through "fraud, undue influence, or overweening bargaining power" and whose application would render litigation "so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S., at 12, 18. Cf. *Fuentes* v. *Shevin*, 407 U. S. 67, 94–96 (1972); *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311, 329 (1964) (Black, J., dissenting) (jurisdictional rules may not be employed against small consumers so as to "crippl[e] their defense"). Just as the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively "judgment proof" for the consequences of obligations they voluntarily assume in other States, *McGee* v. *International Life Insurance Co.*, 355 U. S., at 223, so too does it prevent rules that would unfairly enable them to obtain default judgments against unwitting customers. Cf. *United States* v. *Rumely*, 345 U. S. 41, 44 (1953) (courts must not be "'blind'" to what "'[a]ll others can see and understand'").

---

[29] This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair play and substantial justice" necessarily requires determinations "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'" *Kulko* v. *California Superior Court*, 436 U. S., at 92.

[30] *Hanson* v. *Denckla*, 357 U. S., at 253; *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S., at 774; *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 299.

For the reasons set forth above, however, these dangers are not present in the instant case. Because Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair, we conclude that the District Court's exercise of jurisdiction pursuant to Fla. Stat. § 48.193(1)(g) (Supp. 1984) did not offend due process. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

In my opinion there is a significant element of unfairness in requiring a franchisee to defend a case of this kind in the forum chosen by the franchisor. It is undisputed that appellee maintained no place of business in Florida, that he had no employees in that State, and that he was not licensed to do business there. Appellee did not prepare his French fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce "with the expectation that they [would] be purchased by consumers in" Florida. *Ante*, at 473. To the contrary, appellee did business only in Michigan, his business, property, and payroll taxes were payable in that State, and he sold all of his products there.

Throughout the business relationship, appellee's principal contacts with appellant were with its Michigan office. Notwithstanding its disclaimer, *ante*, at 478, the Court seems ultimately to rely on nothing more than standard boilerplate language contained in various documents, *ante*, at 481,

to establish that appellee "'purposefully availed himself of the benefits and protections of Florida's laws.'" *Ante*, at 482. Such superficial analysis creates a potential for unfairness not only in negotiations between franchisors and their franchisees but, more significantly, in the resolution of the disputes that inevitably arise from time to time in such relationships.

Judge Vance's opinion for the Court of Appeals for the Eleventh Circuit adequately explains why I would affirm the judgment of that court. I particularly find the following more persuasive than what this Court has written today:

> "Nothing in the course of negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.
>
> "The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes the embodiment

of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters. . . .

"Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state. . . .

"Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation. . . .

"The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, 'the franchisor normally occupies [the] dominant role'. . . .

"We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit in Florida. He signed a standard form contract whose terms were non-negotiable and which appeared

in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home. In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.

"In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process." 724 F. 2d 1505, 1511–1513 (1984) (footnotes omitted).

Accordingly, I respectfully dissent.

Syllabus

PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 83–1329. Argued January 9, 1985—Decided May 20, 1985

Respondent, a Massachusetts prison inmate, as a result of a fight that occurred in a prison office, was charged with violation of prison regulations. At the hearing on these charges, the disciplinary board refused to allow respondent to call witnesses whom he had requested, but the record of the hearing does not indicate the board's reason for such refusal. The board found respondent guilty, and 150 days of his "good time" credits were forfeited. Respondent then sought a writ of habeas corpus in a Massachusetts trial court, which sustained his claim that petitioner prison Superintendent had deprived him of the due process guaranteed by the Fourteenth Amendment, because petitioner advanced no reasons in court as to why respondent was not allowed to call the requested witnesses. The Massachusetts Supreme Judicial Court affirmed, holding that there must be some support in the administrative record to justify a decision not to call witnesses, and that since the administrative record in this case contained no such support, the state regulations governing presentation of proof in disciplinary hearings were unconstitutional to the extent that they did not require the administrative record to contain reasons supporting the board's denial of an inmate's witness request.

Held: The Due Process Clause of the Fourteenth Amendment does not require that prison officials' reasons for denying an inmate's witness request appear in the administrative record of the disciplinary hearing. While the Due Process Clause does require that the officials at some point state their reasons for refusing to call witnesses, they may do so either by making the explanation part of the administrative record or by later presenting testimony in court if the deprivation of a "liberty" interest, such as that afforded by "good time" credits, is challenged because of the refusal to call the requested witnesses. Pp. 495–500.

390 Mass. 399, 456 N. E. 2d 1111, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, and in all but the second paragraph of footnote 2 of which BLACKMUN and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part, in Part II of which

BLACKMUN, J., joined, *post*, p. 501. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 504. POWELL, J., took no part in the consideration or decision of the case.

Martin E. Levin, Assistant Attorney General of Massachusetts, argued the cause *pro hac vice* for petitioner. With him on the briefs were *Francis X. Bellotti*, Attorney General, and *Barbara A. H. Smith*, Assistant Attorney General.

Jonathan Shapiro argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

The Supreme Judicial Court of Massachusetts held that a prison disciplinary hearing which forfeited "good time" credits of respondent John Real was conducted in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because there did not appear in the administrative record of that hearing a statement of reasons as to why the disciplinary board refused to allow respondent to call witnesses whom he had requested. *Real* v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 399, 456 N. E. 2d 1111 (1983). We granted certiorari, 469 U. S. 814 (1984), to review this judgment because it seemed to us to go further than our pronouncement on this subject in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). While we agree with the Supreme Judicial Court of Massachusetts that the Due Process Clause of the Fourteenth Amendment requires that prison officials at some point state their reason for refusing to call witnesses requested by an inmate at a disciplinary hearing, we disagree with that court that such reasons or support for reasons must be placed in writing or otherwise exist as a part of the administrative record at the disciplinary hearing. We vacate the judgment of the Supreme Judicial Court, and remand the case to that court.

In 1981 respondent John Real was an inmate at the Massachusetts Correctional Institution at Walpole. In December

of that year he was working in the prison metal shop and heard a commotion in an adjacent office. He entered the office and observed another prisoner fighting with a corrections officer. A second corrections officer attempted to break up the fight, and ordered respondent and other inmates who were watching to disperse immediately. Respondent did not depart, and another corrections officer escorted him to his cell.

One week later respondent was charged with three violations of prison regulations as a result of this imbroglio. He notified prison officials, on a form provided for that purpose, that he wished to call four witnesses at the hearing which would be held upon these charges: two fellow inmates, the charging officer, and the officer who was involved in the fight. A hearing was held on the charges in February 1982. At this hearing the charging officer appeared and testified against respondent, but the board declined to call the other witnesses requested by respondent. Respondent was advised of no reason for the denial of his request to call the other witnesses, and apparently whatever record there may be of this disciplinary proceeding does not indicate the board's reason for declining to call the witnesses. The board found respondent guilty as charged, and after an administrative appeal in which penalties were reduced, respondent received the sanction of 25 days in isolation and the loss of 150 days of good-time credits.

Respondent challenged these sanctions by seeking a writ of habeas corpus in the Massachusetts trial court. That court sustained respondent's claim that petitioner Joseph Ponte, a Superintendent of the M. C. I. at Walpole, had deprived him of that due process guaranteed by the Fourteenth Amendment to the United States Constitution because no reasons whatsoever were advanced by petitioner in court as to why respondent was not allowed to call the requested witnesses at the hearing.

On appeal to the Supreme Judicial Court of Massachusetts, this judgment was affirmed but for different reasons. That court discussed our decision in *Wolff* v. *McDonnell*, *supra*, and noted that it "[l]eft unresolved . . . the question whether the Federal due process requirements impose a duty on the board to explain, in any fashion, at the hearing or later, why witnesses were not allowed to testify." 390 Mass., at 405, 456 N. E. 2d, at 1115. The court concluded that there must be some support in the "administrative record" to justify a decision not to call witnesses, and that the administrative record in this case was barren of any such support. Because of its conclusion, the court declared that the Massachusetts regulations governing the presentation of proof in disciplinary hearings, Mass. Admin. Code, Tit. 103, § 430.14 (1978)[1] were unconstitutional as to this point, because those regulations did not require that the administrative record contain

---

[1] Massachusetts Admin. Code, Tit. 103, § 430.14 (1978), provides in part:

"(4) If the inmate requests the presence of the reporting officer . . . the reporting officer shall attend the hearing except when the chairman determines in writing that the reporting officer is unavailable for prolonged period of time *[sic]* as a result of illness or other good cause. . . .

"(5) The inmate shall be allowed but shall not be compelled to make an oral statement or to present a written statement in his own defense or in mitigation of punishment.

"(6) The inmate shall be allowed to question the reporting officer, to question other witnesses, to call witnesses in his defense, or to present other evidence, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's questioning of witnesses, offer of other evidence, or request to call witnesses shall include, but shall not be limited to, the following:

"(a) Relevance

"(b) Cumulative testimony

"(c) Necessity

"(d) Hazards presented by an individual case.

. . . . .

"(7) the inmate shall be allowed to present relevant, non-cumulative documentary evidence in his defense."

facts or reasons supporting the board's denial of an inmate's witness request. 390 Mass., at 405–407, 456 N. E. 2d, at 1116, citing *Hayes* v. *Thompson*, 637 F. 2d 483, 487–489 (CA7 1980).

Petitioner does not dispute that respondent possessed a "liberty" interest, by reason of the provisions of Massachusetts state law, affording him "good time" credits, an interest which could not be taken from him in a prison disciplinary hearing without the minimal safeguards afforded by the Due Process Clause of the Fourteenth Amendment. The touchstone of due process is freedom from arbitrary governmental action, *Wolff*, 418 U. S., at 558, but "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Id.*, at 556. Chief among the due process minima outlined in *Wolff* was the right of an inmate to call and present witnesses and documentary evidence in his defense before the disciplinary board. We noted in *Wolff* and repeated in *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), that ordinarily the right to present evidence is basic to a fair hearing, but the inmate's right to present witnesses is necessarily circumscribed by the penological need to provide swift discipline in individual cases. This right is additionally circumscribed by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff. We described the right to call witnesses as subject to the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution . . . ." *Baxter*, *supra*, at 321, citing *Wolff*, *supra*, at 556.

Thus the prisoner's right to call witnesses and present evidence in disciplinary hearings could be denied if granting the request would be "unduly hazardous to institutional safety or correctional goals." *Wolff*, *supra*, at 566; *Baxter*, *supra*, at 321. See also *Hughes* v. *Rowe*, 449 U. S. 5, 9, and n. 6 (1980). As we stated in *Wolff:*

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the [disciplinary board] to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." 418 U. S., at 566.

See *Baxter*, *supra*, at 321. Notwithstanding our suggestion that the board give reasons for denying an inmate's witness request, nowhere in *Wolff* or *Baxter* did we require the disciplinary board to explain why it denied the prisoner's request, nor did we require that those reasons otherwise appear in the administrative record.

Eleven years of experience since our decision in *Wolff* does not indicate to us any need to now "prescribe" as constitutional doctrine that the disciplinary board must state in writing at the time of the hearing its reasons for refusing to call a witness. Nor can we conclude that the Due Process Clause of the Fourteenth Amendment may only be satisfied if the administrative record contains support or reasons for the board's refusal. We therefore disagree with the reasoning of the Supreme Judicial Court of Massachusetts in this case. But we also disagree with petitioner's intimation, Brief for Petitioner 53, that courts may only inquire into the reasons for denying witnesses when an inmate points to "substantial evidence" in the record that shows prison officials had ignored our requirements set forth in *Wolff*. We further disagree with petitioner's contention that an inmate may not successfully challenge the board unless he can show a pattern or practice of refusing all witness requests. Nor do we agree with petitioner that "across-the-board" policies denying witness requests are invariably proper. Brief for Petitioner 53–55, n. 9.

The question is exactly that posed by the Supreme Judicial Court in its opinion: "whether the Federal due process requirements impose a duty on the board to explain, in any fashion, at the hearing or later, why witnesses were not allowed to testify." 390 Mass., at 405, 456 N. E. 2d, at 1115. We think the answer to that question is that prison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, but that they may do so either by making the explanation a part of the "administrative record" in the disciplinary proceeding, or by presenting testimony in court if the deprivation of a "liberty" interest is challenged because of that claimed defect in the hearing. In other words, the prison officials may choose to explain their decision at the hearing, or they may choose to explain it "later." Explaining the decision at the hearing will of course not immunize prison officials from a subsequent court challenge to their decision, but so long as the reasons are logically related to preventing undue hazards to "institutional safety or correctional goals," the explanation should meet the due process requirements as outlined in *Wolff*.

We have noted in *Wolff*, *supra*, and in *Baxter*, *supra*, that prison disciplinary hearings take place in tightly controlled environments peopled by those who have been unable to conduct themselves properly in a free society. Many of these persons have scant regard for property, life, or rules of order, *Wolff*, 418 U. S., at 561–562, and some might attempt to exploit the disciplinary process for their own ends. *Id.*, at 563. The requirement that contemporaneous reasons for denying witnesses and evidence be given admittedly has some appeal, and it may commend itself to prison officials as a matter of choice: recollections of the event will be fresher at the moment, and it seems a more lawyerlike way to do things.[2]

[2] JUSTICE MARSHALL's dissent maintains that a rule requiring contemporaneous reasons which are not made available to the prisoner is the only one permitted by the United States Constitution. If indeed this rule is as beneficial to all concerned as the dissent claims, we may eventually see it

But the primary business of prisons is the supervision of inmates, and it may well be that those charged with this responsibility feel that the additional administrative burdens which would be occasioned by such a requirement detract from the ability to perform the principal mission of the institution. While some might see an advantage in building up a sort of "common law of the prison" on this subject, others might prefer to deal with later court challenges on a case-by-case basis. We hold that the Constitution permits either approach.

But to hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched for the denial of that right, either in the disciplinary proceeding itself or if that proceeding be later challenged in court, would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board. We think our holding in *Wolff* meant

---

universally adopted without the necessity of constitutionally commanding it. But we think that, as we indicate in this opinion, there are significant arguments in favor of allowing a State to follow *either* the approach advocated by the dissent or the approach described in this opinion. While the dissent seems to criticize our alternative as one which forces inmates to go to court to learn the basis for witness denials, it is difficult if not impossible to see how inmates under the dissent's approach which requires contemporaneous reasons kept under seal would be able to get these reasons without the same sort of court proceeding.

We think the dissent's approach would very likely lead to an increasing need for lawyers attached to each prison in order to advise the correctional officials; words such as "irrelevant" or "cumulative," offered by the dissent as possible bases for contemporary denials, *post*, at 517, are essentially lawyer's words. We think that the process of preparing contemporary written reasons for exclusion of testimony is very likely to require more formality and structure than a practice which requires bringing in an attorney only when a lawsuit is filed. The former may be ideally suited to a heavily populated State of relatively small area such as Massachusetts, but the latter may be more desirable in a sparsely populated State of large area such as Nevada. We think the Constitution permits either alternative.

something more than that. We recognized there that the right to call witnesses was a limited one, available to the inmate "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.*, at 566. We further observed that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." *Ibid.*

Given these significant limitations on an inmate's right to call witnesses, and given our further observation in *Wolff* that "[w]e should not be too ready to exercise oversight and put aside the judgment of prison administrators," *ibid.*, it may be that a constitutional challenge to a disciplinary hearing such as respondent's in this case will rarely, if ever, be successful. But the fact that success may be rare in such actions does not warrant adoption of petitioner's position, which would in effect place the burden of proof on the inmate to show why the action of the prison officials in refusing to call witnesses was arbitrary or capricious. These reasons are almost by definition not available to the inmate; given the sort of prison conditions that may exist, there may be a sound basis for refusing to tell the inmate what the reasons for denying his witness request are.

Indeed, if prison security or similar paramount interests appear to require it, a court should allow at least in the first instance a prison official's justification for refusal to call witnesses to be presented to the court *in camera*. But there is no reason for going further, and adding another weight to an already heavily weighted scale by requiring an inmate to produce evidence of which he will rarely be in possession, and of which the superintendent will almost always be in possession. See *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5 (1957); *Campbell* v. *United States*,

365 U. S. 85, 96 (1961); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 332 (1966).

Respondent contends that he is entitled to an affirmance even though we reject the Massachusetts Supreme Judicial Court's holding that § 340.14(6) is unconstitutional. Respondent argues that the Supreme Judicial Court affirmed the trial court on two independent grounds: (1) the trial court's simple finding that petitioner's failure to rebut the allegations in respondent's complaint entitled respondent to relief; and (2) the unconstitutionality of § 340.14(6) because due process requires administrative record support for denial of witnesses. We think that the Supreme Judicial Court affirmed only on the second ground, and that is the issue for which we granted certiorari. This Court's Rule 21.1(a); see also Rule 15.1(a). Respondent is of course entitled to urge affirmance of the judgment of the Supreme Judicial Court on a ground not adopted by that court, but whether the Supreme Judicial Court would have affirmed the judgment of the trial court on the reasoning we set forth today is, we think, too problematical for us to decide.[3] It is a question best left to that court.

The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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

---

[3] The record in this case is exceedingly thin, and shows that some confusion existed at trial concerning respondent's habeas petition seeking review of the February 1982 disciplinary hearing and another unrelated petition arising out of a 1980 disciplinary hearing. The trial court also apparently granted incomplete relief, which was only corrected 10 months later by another judge who then stayed the relief. Moreover, the Supreme Judicial Court did not just affirm the trial court, but remanded to permit petitioner, at his option, to conduct another disciplinary hearing. Given the state of this record, we think it wise to remand for further proceedings.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins as to Part II, concurring in part.

On March 10, 1983, this case was submitted to the Supreme Judicial Court of Massachusetts along with four others.[1] In each case, prisoners in state correctional institutions challenged the procedural fairness of recurring practices in the prison disciplinary process. The five opinions were all assigned to the same justice, who eight months later delivered five unanimous opinions for the court interpreting the minimum procedural requirements of state regulations and the Federal Constitution in the prison context. The evident deliberation of the Massachusetts court in these cases suggests a careful effort to establish workable rules for prison disciplinary proceedings in that State.

I

The Court candidly states that it granted certiorari to review the judgment of the Supreme Judicial Court of Massachusetts because that judgment "seem[s] to us to go further than our pronouncement on this subject in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974)." *Ante*, at 492. As JUSTICE MARSHALL points out, that is a manifestly insufficient reason for adding this case to our argument docket. See *post*, at 522–523, n. 21. The merits of an isolated case have only an oblique relevance to the question whether a grant of

---

[1] *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 456 N. E. 2d 1100 (1983); *Real* v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 399, 456 N. E. 2d 1111 (1983) (case below); *Lamoureux* v. *Superintendent, Massachusetts Correctional Institution, Walpole*, 390 Mass. 409, 456 N. E. 2d 1117 (1983); *Cassesso* v. *Commissioner of Correction*, 390 Mass. 419, 456 N. E. 2d 1123 (1983); *Royce* v. *Commissioner of Correction*, 390 Mass. 425, 456 N. E. 2d 1127 (1983). The court did not reach the constitutional questions presented in *Royce* since it resolved the controversy in favor of the prisoner on the basis of state regulations.

certiorari is consistent with the sound administration of this Court's discretionary docket.[2]

When the prison Superintendent petitioned for certiorari, he had a heavy burden of explaining why this Court should intervene in what amounts to a controversy between the Supreme Judicial Court of Massachusetts and that State's prison officials.[3] In determining what process is due in the prison context under the Federal Constitution, the Court emphasizes that we must be cautious to ensure that those requirements will be fair to all parties in the varying conditions found in each of the 50 States and the District of Columbia. *Ante*, at 497–498, n. 2. The Court's display of caution would have been more relevant in deciding whether to exercise discretionary jurisdiction in the first place. The denial of certiorari would have left the decision below in effect for the State of Massachusetts, but would have left other jurisdictions to explore the contours of *Wolff*, in the light of local conditions.

---

[2] Cf. *Watt* v. *Alaska*, 451 U. S. 259, 276 (1981) (STEVENS, J., concurring) ("My disagreement in these cases with the Court's management of its docket does not, of course, prevent me from joining [the Court's opinion] on the merits"); *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 246–247 (1983) (STEVENS, J., concurring in judgment).

[3] "Because the Supreme Judicial Court of Massachusetts—rather than another branch of state government—invoked the Federal Constitution in imposing an expense on the City of Revere, this Court has the authority to review the decision. But is it a sensible exercise of discretion to wield that authority? I think not. There is 'nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts.' *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 479 (1981) (STEVENS, J., dissenting). No individual right was violated in this case. The underlying issue of federal law has never before been deemed an issue of national significance. Since, however, the Court did (unwisely in my opinion) grant certiorari, I join its judgment." *Revere* v. *Massachusetts General Hospital*, 463 U. S., at 247 (STEVENS, J., concurring in judgment) (footnote omitted). See also *Michigan* v. *Long*, 463 U. S. 1032, 1067–1068 (1983) (STEVENS, J., dissenting); *post*, at 522–523, n. 21 (MARSHALL, J., dissenting).

The imprudence of the Court's decision to grant certiorari in this case is aggravated by the substantial probability that the Massachusetts court will, on remand, reinstate its original judgment on the basis of the State Constitution.[4] In that event, the Court's decision—as applied to the State of Massachusetts—will prove to be little more than a futile attempt to convince a State Supreme Court that a decision it has carefully made is somehow lacking in wisdom as applied to conditions in that State. "As long as the Court creates unnecessary work for itself in this manner, its expressions of concern about the overburdened federal judiciary will ring with a hollow echo." *Watt* v. *Alaska*, 451 U. S. 259, 274 (1981) (STEVENS, J., concurring).

II

Having granted the petition for certiorari, however, each of us has a duty to address the merits. All of us agree that prison officials may not arbitrarily refuse to call witnesses requested by an inmate at a disciplinary hearing. It is

---

[4] In a series of recent cases, this Court has reversed a state-court decision grounded on a provision in the Federal Bill of Rights only to have the state court reinstate its judgment, on remand, under a comparable guarantee contained in the State Constitution. See, *e. g.*, *Massachusetts* v. *Upton*, 466 U. S. 727 (1984), on remand, *Commonwealth* v. *Upton*, 394 Mass. 363, 370–373, 476 N. E. 2d 548, 554–556 (1985); *California* v. *Ramos*, 463 U. S. 992 (1983), on remand, *People* v. *Ramos*, 37 Cal. 3d 136, 150–159, 689 P. 2d 430, 437–444 (1984), cert. denied, *post*, p. 1119; *South Dakota* v. *Neville*, 459 U. S. 553 (1983), on remand, *State* v. *Neville*, 346 N. W. 2d 425, 427–429 (SD 1984); *Washington* v. *Chrisman*, 455 U. S. 1 (1982), on remand, *State* v. *Chrisman*, 100 Wash. 2d 814, 817–822, 676 P. 2d 419, 422–424 (1984) (en banc). This development supports Justice Jackson's observation that "reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (concurring in result).

therefore obvious that even if the reason for the refusal is not recorded contemporaneously, it must exist at the time the decision is made.

Moreover, as the Court expressly holds, *ante*, at 499, the burden of proving that there was a valid reason for the refusal is placed on prison officials rather than the inmate. In many cases, that burden will be difficult to discharge if corrections officers elect to rely solely upon testimonial recollection that is uncorroborated by any contemporaneous documentation. For that reason, the allocation of the burden of proof, together with the policy considerations summarized by JUSTICE MARSHALL, will surely motivate most, if not all, prison administrators to adopt "the prevailing practice in federal prisons and in state prisons throughout the country." *Post*, at 518 (MARSHALL, J., dissenting). Because I am not persuaded that the Federal Constitution prescribes a contemporaneous written explanation as the only permissible method of discharging the prison officials' burden of proving that they had a legitimate reason for refusing to call witnesses requested by an inmate, I join the Court's opinion.[5]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The court below held there must be "some support in the record" for the denial of an inmate's right to call witnesses at a prison disciplinary hearing. Rejecting this position, the Court today concludes that the Constitution requires only that prison officials explain in court, many months or years after a disciplinary hearing, why they refused to hear particular witnesses. I cannot accept that alleged denials of the vital constitutional right to present witnesses are to be reviewed, not on the basis of an administrative record, but rather on the basis of *post hoc* courtroom rationalizations. I believe the Constitution requires that a contemporaneous-record explanation for such a denial be prepared at the time

[5] I do not, however, agree with the second paragraph in n. 2, *ante*, at 498.

of the hearing. The record need not be disclosed to the inmate but would be available to a court should judicial review later be sought. Upon a proper showing that security or other needs of prison officials so require, the court could review the contemporaneous-record explanation *in camera.* That this process is compatible with the prison setting is demonstrated by the fact that the recording of contemporaneous reasons for denying requests to call witnesses is the current practice in federal prisons and in most state prisons in this country.

I

The facts of this case, which the Court declines to relate in full, highlight the importance of the right to call witnesses at disciplinary hearings. As the Court describes, respondent John Real was among a group of inmates who left the prison metal shop to observe a fight between an inmate and guard that had broken out in an adjacent office. A supervising officer, John Baleyko, ordered Real and the others to leave the area. The Court blandly observes that Real "did not depart." *Ante,* at 493. Real's version of the events, however, is considerably more detailed. According to Real, as he began to leave, a dozen or so correctional officers entered the office, one of whom, Officer Doolin, stopped Real for a brief shakedown search and questioning. Officer Baleyko then looked up and noticed that Real was still in the office despite the order to leave. When Real tried to explain that he had been unable to leave because he had been stopped by the other officer, Officer Baleyko cut short Real's explanation and ordered him locked up. On its face, Real's explanation for his failure to obey the order to leave is perfectly plausible, internally consistent, and does not contradict any of the undisputed facts.

Real's disciplinary hearing, then, involved a classic swearing match: Officer Baleyko offered one version of the facts, and Real countered with another version. Under these circumstances, testimony from observers of the incident would

seem highly relevant to, and perhaps even dispositive of, the question of Real's responsibility for his failure to obey the order to leave. Real therefore requested that three witnesses be produced for the disciplinary hearing: two inmates who had allegedly been present in the metal shop at the time of the incident and a correctional officer.[1] The disciplinary board, composed of three correctional officials, refused to hear any of these witnesses. No reason for excluding this seemingly highly relevant testimony was given at the time. No reason can be deciphered from the record, and indeed no explanation has ever been offered for the refusal to hear these witnesses. Real was found guilty and eventually was deprived of 150 days of good-time credit—a near 5-month prison term on a charged offense against which his only opportunity to defend was to offer his word against that of a prison guard.

II

The Court acknowledges that Real had a constitutional right to present his defense witnesses unless his disciplinary board had a legitimate basis for excluding them. This much is clear from *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). Drawing on longstanding principles of due process embodied in the Fifth, Sixth, and Fourteenth Amendments,[2] the Court in *Wolff* recognized what might be called a "qualified" constitutional right to call witnesses:

> "[T]he inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.*, at 566.

See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 321 (1976). This qualified right was one element in what the Court

---

[1] Real appears not to have pursued in the lower courts the failure to produce the correctional officer.

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

described as an overall effort to create a "reasonable" and "mutual accommodation" between the "provisions of the Constitution" and "the needs of the institution" in the context of disciplinary hearings. 418 U. S., at 556, 572.

Wolff did not consider how best to strike that reasonable accommodation with respect to implementing the right to call witnesses.[3] Two options are presented today. The first would require disciplinary boards to enter on the record contemporaneous written reasons for their exclusion of witnesses; these explanations, while not necessarily available to the inmate, would be subject to judicial review to assure that exclusion of witnesses was not arbitrary but rather was based on permissible factors. The second option would only require disciplinary boards to offer *post hoc*, courtroom rationalizations for a board's refusal to hear requested witnesses; these rationalizations would constitute attempts to justify the board's actions, many months, or years, after a witness had been excluded.

Inexplicably, the Court, with only passing consideration of the first option, chooses the second. But no basis for this choice can be found in the principle of "mutual accommodation" announced in *Wolff*. If *Wolff*'s principle of mutual accommodation means, as the State contends, that an inmate "is entitled only to those facets of procedural due process which are consistent with the demands of prison security,"[4] it surely also means that the inmate is entitled to *all* the facets of due process that are consistent with the demands of prison security. Contemporaneous explanations for excluding witnesses are an important element of due process at disciplinary hearings and, as long as prison officials have the option of keeping these explanations from the inmate, a requirement that such explanations be recorded would not

---

[3] *Wolff* did eliminate one possibility: that the Constitution might require disclosure to the inmate, at the time of the hearing, of a board's reasons for refusing to allow requested witnesses to be called. 418 U. S., at 566.

[4] Brief for Petitioner 13–14.

intrude on the "institutional needs and objectives" of prisons that *Wolff* identified. In the face of this readily available means of enforcing the inmate's right, the Court's decision instead to choose the second option, that of after-the-fact courtroom explanations, gratuitously dilutes the constitutional rights of prison inmates and fulfills my previously expressed fear that the "noble holdings" of *Wolff* would become "little more than empty promises." *Wolff*, *supra*, at 581 (opinion of MARSHALL, J.). I therefore dissent.

III

A contemporaneous-explanation requirement would strike the proper balance between the inmate's right to present defense witnesses and the institutional needs recognized in *Wolff*. As a general matter, it is now well understood that contemporaneous-explanation requirements serve two important functions. First, they promote a decisionmaking process in which the decisionmaker must consciously focus on the relevant statutory criteria of decision.[5] Knowledge that a decision will be tested against the justifications contemporaneously given for it increases the prospect that fair and nonarbitrary decisions will be made initially.

Second, judicial review is most meaningful when based on a record compiled before litigation began. *Post hoc* rationalizations of counsel for administrative action "have traditionally been found to be an inadequate basis for review." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 419 (1971):

> "[A]n advocate's hypothesis that an administrative decision-maker *did in fact* conclude thus-and-such because

[5] See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970); see also *Dorszynski* v. *United States*, 418 U. S. 424, 455 (1974) (MARSHALL, J., concurring in judgment); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 40 (1979) (MARSHALL, J., dissenting); *Hewitt* v. *Helms*, 459 U. S. 460, 479 (1983) (STEVENS, J., dissenting); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 468 (1981) (STEVENS, J., dissenting).

> the record shows that he *could reasonably have concluded* thus-and-such, is not likely to be highly impressive. The courts prefer to appraise the validity of an order by examining the grounds *shown by the record* to have been the basis of decision." W. Gellhorn, C. Byse, & P. Strauss, Administrative Law 361 (7th ed., 1979).

Indeed, even when decisionmakers themselves have been willing to submit affidavits to explain with hindsight the basis of their previous decisions, we have refused to consider such offers of proof for fear that they serve as merely "*post hoc* rationalizations." *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168–169 (1962). The best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision.*

The considerations that call for contemporaneous-explanation requirements in some contexts apply with particular force in the setting of prison disciplinary hearings. A contemporaneous-explanation requirement would force boards to take the inmate's constitutional right to present witnesses seriously. And when inmates are allowed to call witnesses, the fairness and accuracy of disciplinary board findings are significantly affected, not only because witnesses are often crucial to the presentation of a defense,[6] but particularly because an inmate "obviously faces a severe credibility problem when trying to disprove the charges of a prison

---

[6] "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). As the Court said in *Washington* v. *Texas*, 388 U. S. 14, 19 (1967):

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [factfinder] so it may decide where the truth lies. . . . This right is a fundamental element of due process of law."

See also *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 875 (1982) (O'CONNOR, J., concurring) ("[T]he right to compulsory process is essential to a fair trial"); *In re Oliver*, 333 U. S. 257, 273 (1948).

guard." 418 U. S., at 583 (opinion of MARSHALL, J.). Many of the other procedural due process rights recognized in *Wolff*—for example, the right to advance notice of the charges, to a hearing, and to a statement of evidence and reasoning relied on—make sense only if the inmate is allowed to present his or her version of the facts through witnesses and evidence. Apart from such witnesses and evidence, inmates have little else with which to attempt to prove their case or disprove that of the charging officer; they have no constitutional right to confront and cross-examine adverse witnesses, and counsel is typically not present at these hearings to marshal the inmate's case. *Wolff*, 418 U. S., at 568; see also *Baxter*, 425 U. S., at 321–322. That so much hinges on the right to present witnesses is a particularly compelling reason for assuring, through a requirement of written reasons when witnesses are excluded, that the right is being scrupulously honored. See *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 472 (1981) (STEVENS, J., dissenting);[7] cf. *Harris* v. *Rivera*, 454 U. S. 339, 344–345, n. 11 (1981) *(per curiam)* ("[W]hen other procedural safeguards have minimized the risk of unfairness, there is a diminished justification for requiring a judge to explain his rulings").

Moreover, *post hoc* rationalizations are unlikely to be of any practical use in this context. Board officials may well not remember, long after the fact, the actual reasons they refused to hear a particular witness in any given case.[8] As

---

[7] "Whether the refusal to provide the inmates with a statement of reasons is a procedural shortcoming of constitutional magnitude is, admittedly, fairly debatable. Judges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error. But the ordinary litigant has other substantial procedural safeguards against arbitrary decisionmaking in the courtroom. The prison inmate has few such protections. . . . Many of us believe that . . . statements of reasons provid[e] a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon." 452 U. S., at 472.

[8] In 1980, Massachusetts correctional institutions conducted 6,914 disciplinary hearings. Brief for Petitioner 63, n. 12.

one Court of Appeals has concluded, "[t]he requirement of support in the administrative record is central to the effectiveness of judicial review in insuring that a prisoner has not been subjected to arbitrary action by prison officials." *Hayes* v. *Thompson*, 637 F. 2d 483, 488 (CA7 1980).

These very reasons have led the Court to impose a contemporaneous-explanation requirement when virtually identical procedural rights, guaranteed by the Constitution, were at stake.[9] *Vitek* v. *Jones*, 445 U. S. 480 (1980), is an example directly on point. There the Court held that an inmate being considered for transfer to a mental institution has a constitutional right to a pretransfer hearing and to present witnesses at that hearing. To this point, *Vitek* is on all fours with this case; inmates in both proceedings have a right to a hearing and to witnesses. Yet in *Vitek* the Court further recognized that witnesses could not be excluded except upon a legitimate record finding of good cause—the very requirement the Court today chooses not to extend to disciplinary hearings.[10] Similarly, *Gagnon* v. *Scarpelli*, 411 U. S. 778

---

[9] Even the Court acknowledges that a requirement of contemporaneous reasons "admittedly has some appeal . . . : recollections of the event will be fresher at the moment, and it seems a more lawyerlike way to do things." *Ante*, at 497. Of course, the essence of procedural due process is that institutions adopt "lawyerlike" procedures to assure that decisions are fair, rational, and carefully made.

[10] The Court in *Vitek* stated that the right to call witnesses could not be denied "'*except upon a finding, not arbitrarily made*, of good cause for not permitting such presentation . . . .'" 445 U. S., at 494–495 (quoting court below, *Miller* v. *Vitek*, 437 F. Supp. 569, 575 (Neb. 1977)) (emphasis added).

The importance of record explanations for excluding witnesses from disciplinary hearings is probably even greater than in *Vitek*, for there the key witness against an inmate was a neutral physician or psychologist, 445 U. S., at 483. A prison guard, who both charges an inmate and is the main witness against him, is significantly more likely to have his own personal reasons, including vindictive or retaliatory ones, for wanting to see the inmate convicted. If contemporaneous explanations for excluding witnesses were required in *Vitek*, surely due process requires similar explanations here.

(1973), recognized a due process right to counsel under some circumstances at parole and probation revocation hearings. To assure that this important right was faithfully honored, we further held that "[i]n every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record." *Id.*, at 791. See also *North Carolina* v. *Pearce*, 395 U. S. 711, 726 (1969) (written reasons required when more severe sentence imposed on defendant after second trial); *Gagnon*, *supra* (written reasons required for probation revocation); *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (same for parole revocation decisions); *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970) (written reasons for termination of public assistance payments); *Kent* v. *United States*, 383 U. S. 541, 561 (1966) (written reason required when juvenile court waives jurisdiction, subjecting defendant to trial as adult).

Ignoring these precedents, the Court seems to view the question simply as one of policy; the Court is content that "significant arguments" can be made in favor either of its "approach" or of the result I believe is required. The question, however, is not whether sound penological practice favors one result or the other, but rather what minimal elements of fair process are required in this setting to satisfy the Constitution. Due process requires written reasons for decisions, or for steps in the decisionmaking process, when the individual interest at stake makes the contribution of such reasons to the fairness and reliability of the hearing sufficient to outweigh whatever burdens such a requirement would impose on the government. See *Black* v. *Romano*, *post*, at 617–619 (MARSHALL, J., concurring) (collecting cases); see generally *Mathews* v. *Eldridge*, 424 U. S. 319, 335, 343 (1976).

Applying this principle here, there can be little doubt that due process requires disciplinary boards to provide written reasons for refusing to hear witnesses. The liberty interests at stake in these hearings are, of course, of serious magni-

tude, and the right to call witnesses is integral to assuring the fairness and accuracy of these hearings. Moreover, the reality that disciplinary boards, composed of correctional officials, may be overly inclined to accept the word of prison guards and refuse without reason to hear witnesses cannot be ignored. These hearings include only skeletal due process protections to begin with, which makes judicial review essential to assuring the fairness and reliability of the process as a whole. Yet because extra-record judicial review is likely to be so meaningless a protection of the constitutional right to call witnesses, the process due an inmate requires witness exclusions to be justified with contemporaneous explanations. The Court simply fails to come to grips with the issue of constitutional right posed by this case.

Established principles of procedural due process compel the conclusion that contemporaneous explanations are required for refusals of disciplinary boards to hear requested witnesses. At least in the absence of convincing considerations otherwise, that much should be clear. I turn, then, to consider whether such convincing considerations can be found.

IV

The Court in *Wolff* identified two considerations that limit the due process rights inmates otherwise have: "institutional safety and correctional goals." 418 U. S., at 566. The proposal offered by respondent—sealed contemporaneous explanations followed by *in camera* review—would satisfy these concerns fully. At the same time, this proposal maximizes the ability of the inmate to enjoy his or her constitutional right to present defense witnesses. The proposal therefore constitutes a perfectly sensible, "reasonable accommodation" to the concerns identified in *Wolff*.

A. Institutional Hazards and the Threat of Reprisal

The primary factor that caused the Court in *Wolff* to qualify and restrict the right to call witnesses was said to be "in-

stitutional safety." Fearing that inmates might be "subject to the unwritten code that exhorts immates not to inform on a fellow prisoner," *id.*, at 562, and concerned that honoring a witness request might subject the witness to "a risk of reprisal or [might] undermine authority," the Court concluded that the "hazards presented in individual cases" of "reprisal" against testifying inmates made dangerous the disclosure to a charged inmate of a board's reasons for refusing to hear his witnesses. *Id.*, at 566. Again today, the Court relies on "the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." *Ante*, at 495. Presumably, the Court's concern is that an inmate will intimidate or coerce defense witnesses into testifying falsely, and that a witness who goes to officials to disclose such threats will be the target of retaliation if a disciplinary board announces that "institutional safety" precludes it from hearing the witness.[11]

The option of sealed files, subject to later judicial review *in camera*,[12] would fully protect against the threat of reprisal and intimidation by allowing prison officials to refuse to disclose to the inmate those record statements they feared would compromise institutional safety. The *in camera* solu-

---

[11] I have stated previously my view that the Court's fears are exaggerated in this context. The prospect of intimidation and later retaliation is much more real when it comes to confrontation of adverse witnesses than "in the context of an inmate's right to call *defense* witnesses." *Wolff*, 418 U. S., at 584 (opinion of MARSHALL, J.). Indeed, the Court recognized as much in *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), observing that, "in comparison to the right to call witnesses, '[c]onfrontation and cross-examination present greater hazards to institutional interests.'" *Id.*, at 321. "Confrontation and cross-examination . . . stand on a different footing [than the right to call witnesses] because of their inherent danger and the availability of adequate bases of decision without them." *Id.*, at 322.

[12] As the Court's *in camera* discussion acknowledges, *ante*, at 499, following inspection *in camera* of the relevant statements a court might, under some circumstances, conclude that no basis existed for failing to disclose the statements to the inmate.

tion has been widely recognized as the appropriate response to a variety of analogous disclosure clashes involving individual rights and government secrecy needs. For example, after this Court in *McCray* v. *Illinois*, 386 U. S. 300 (1967), held that the identity of informants relied on by the police need not always be disclosed to the defense at suppression hearings, lower courts turned to *in camera* hearings to "protect the interests of both the government and the defendant." W. LaFave, Search and Seizure § 3.3, p. 583 (1978). Through such hearings into informant identity, "the government can be protected from any significant, unnecessary impairment of secrecy, yet the defendant can be saved from what could be serious police misconduct." *United States* v. *Moore*, 522 F. 2d 1068, 1073 (CA9 1975).[13] Similarly, Congress specifically invoked *in camera* review to balance the policies of disclosure and confidentiality contained in the exemptions to the Freedom of Information Act. 5 U. S. C. § 552(a)(4)(B). Congress stated that *in camera* review would "plainly be [the] necessary and appropriate" means in many circumstances to assure that the proper balance between secrecy and disclosure is struck. S. Rep. No. 93–1200, p. 9 (1974). Other examples in which Congress has turned to similar procedures abound, such as the federal wiretapping statute[14] and the Foreign Intelligence Surveillance Act of 1978,[15] both of which rely on closed judicial process to balance individual rights and Government secrecy needs in determining whether wiretapping is justified.

If the compelling Government secrecy needs in all these settings can be safeguarded fully through closed judicial proc-

---

[13] See also *United States* v. *Alexander*, 559 F. 2d 1339, 1340 (CA5 1977) ("[I]n camera hearing may be helpful in balancing those interests"); *United States* v. *Anderson*, 509 F. 2d 724 (CA9 1974); *United States* v. *Hurse*, 453 F. 2d 128 (CA8 1971); *United States* v. *Jackson*, 384 F. 2d 825 (CA3 1967); *People* v. *Darden*, 34 N. Y. 2d 177, 313 N. E. 2d 49 (1974).

[14] See 18 U. S. C. § 2518.

[15] 50 U. S. C. § 1801 *et seq.*

ess, it can hardly be gainsaid that the interest of prison officials in keeping confidential the basis for refusing to hear witnesses will be fully protected by the same process. Indeed, the *in camera* solution protects the institutional concerns with which the Court purports to be concerned just as well as does the Court's solution. Under the Court's approach, "prison officials at some point [must] state their reason for refusing to call witnesses . . . ." *Ante*, at 492. But if institutional safety or reprisal threats formed the basis for the refusal, stating that reason[16] in open court would create hazards similar to those the Court relies on to eschew a requirement that these reasons be disclosed at the disciplinary hearing. Recognizing this fact, the Court holds that, "if prison security or similar paramount interests appear to require it," *ante*, at 499, the courtroom justifications for refusing to hear a witness can "in the first instance," *ibid.*, be presented *in camera*.[17] Yet once the Court acknowledges that *in camera* review adequately protects the "institutional safety" concerns discussed in *Wolff*, such concerns simply evaporate in the consideration of whether due process demands a contemporaneous-record explanation for the refusal to hear witnesses. As even the Court acknowledges, then, the combination of sealed files and *in camera* review more than adequately protects "institutional safety," the primary factor that justified *Wolff*'s qualification of the inmate's right to present defense witnesses.

B. Other Correctional Goals

To restrict the right to call witnesses, the Court in *Wolff* also relied, although less centrally, on vaguely defined "cor-

---

[16] The Court does not state whether the bare recitation of "institutional safety" is sufficient to withstand review, or whether some explanation supporting this assertion must be provided. I too see no need to decide that question today.

[17] I would not decide today whether defense counsel has a right to be present at the *in camera* proceedings. Cf. *United States* v. *Anderson*, 509 F. 2d 724 (CA9 1974).

rectional goals" that seemed to amount to the need for "swift punishment." 418 U. S., at 566. Again today, the Court invokes the "need to provide swift discipline in individual cases," *ante*, at 495, as a basis for refusing to require that prison officials provide a record statement of reasons for declining to hear requested witnesses.

These statements provide unconvincing support for refusing to require a written explanation when witness requests are denied. If swift discipline is a legitimate overriding concern, then why hold hearings at all? And if the imperatives of swift discipline preclude the calling of witnesses in any particular case, stating that reason would suffice.

More generally, the twinkling of an eye that it would take for a board to offer brief, contemporaneous reasons for refusing to hear witnesses would hardly interfere with any valid correctional goals. Indeed, the requirement of stated reasons for witness denials would be particularly easy to comply with at disciplinary hearings, for *Wolff* already requires provision of a "'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." 418 U. S., at 564 (citation omitted). To include in this statement a brief explanation of the reason for refusing to hear a witness, such as why proffered testimony is "irrelevant" or "cumulative," could not credibly be said to burden disciplinary boards in any meaningful way in their task of completing disciplinary report forms.

I have expressed previously my view that:

> "[I]t is not burdensome to give reasons when reasons exist. . . .
>
> ". . . As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary." *Board of Regents* v. *Roth*, 408 U. S. 564, 591 (1972) (dissenting).

If ever that view is true, it is surely true here. See also *Hewitt* v. *Helms*, 459 U. S. 460, 495 (1983) (STEVENS, J., dis-

senting) ("[A] requirement of written reasons [for keeping inmates in segregation] would [not] impose an undue burden on prison officials").

Ironically, the Court's shortsighted approach will likely do more to undermine other "correctional goals" with which the Court purports to be concerned than would respondent's approach. According to the Court, prison officials must come to court, many months or years after a disciplinary hearing, to "state their reason for refusing to call witnesses . . . ." *Ante*, at 492. The burdens of discovery and cross-examination could well be part of that litigation process.[18] In contrast, under respondent's approach, once a contemporaneous record was prepared, judicial review would normally be limited to review of that record. Cf. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). Thus, whatever the proper bearing of other "correctional goals" on the inmate's constitutional right to call witnesses, reliance on those goals to hold that prison officials must explain their refusal to hear witnesses in court, rather than in the record, is simply misplaced.

V

In the end, the Court's decision rests more on abstract generalities about the demands of "institutional safety and other correctional goals" rather than on any attempt to come to grips with the specific mechanics of the way in which the principle established below would operate. Yet even these abstract generalities founder on the concrete practical experience of those charged with the continuing implementation of *Wolff*. The requirement the Court declines to adopt today is the prevailing practice in federal prisons and in state prisons throughout the country. Regulations promulgated

---

[18] See, *e. g.*, *Woods* v. *Marks*, 742 F. 2d 770 (CA3 1984) (summary judgment against inmate inappropriate when based on affidavit offering reason for excluding witness).

by the Federal Bureau of Prisons provide that an inmate in federal prison has

> "the right to submit names of requested witnesses and have them called to testify . . . provided the calling of witnesses . . . does not jeopardize or threaten institutional or an individual's security. . . . *The chairman shall document reasons for declining to call requested witnesses in the [Institutional Disciplinary Committee] report.*" 28 CFR § 541.17 (c) (1984) (emphasis added).

Similarly, at least 29 States and the District of Columbia require their disciplinary boards to provide a record statement of reasons for the refusal to hear requested witnesses.[19]

---

[19] Alaska Dept. of Corrections, 22 AAC05.430.(c) Completion Instructions § 20 (1984); Ala. Dept. of Corrections, Admin. Regulation No. 403, Part IV 10(g) (1983); Ark. Dept. of Correction, Disciplinary Policy and Procedures ¶ V(C)(2) (1983); Cal. Penal Code Ann. § 2932(a)(3) (West 1985); Colo. Dept. of Corrections, Code of Penal Discipline ¶ 7e(3), p. 27 (1981); D. C. Dept. of Corrections, Lorton Regulations Approval Act of 1982, § 110.2, p. 16 (1982); Fla. Dept. of Corrections, Rules ¶ 33–22.07(5) (1984); Ga. Dept. of Offender Rehabilitation, State-Wide Disciplinary Plan ¶ 6(c) (1985), and Ga. State Prison, Discipline Procedure ¶¶ 8(c), 14 (1983); Haw. Dept of Social Services & Housing, Corrections Div., Inmate Handbook § 17–201–17(e)(3) (1983) (Board "encouraged" to give written reasons); Ill. Dept. of Corrections, Rules, § 504.80(i)(3) (1984); Ind. Dept. of Corrections, Policies and Procedures, State Form 39586R, Completion Form § 20; Iowa Dept. of Corrections, Inmate Activity, Disciplinary Policy and Procedure §§ II (Procedure) (D)(3), II (Procedure) (E)(5) (1984); Kan. Admin. Reg. § 44–13–405a(g) (Supp. 1984); Ky. Corrections Cabinet, Policy No. 15.6, ¶ VI(E)(1)(e) (1985); Md. Dept. of Public Safety and Correctional Services, Division of Correction, Regulation No. 105–2, § IV–B(2)(b) (1982); Mich. Dept. of Corrections, Hearings Handbook § II–B(3), p. 4 (1981); Miss. Dept. of Corrections, Rules and Regulations § XII(D)(1), p. 11 (1975); Mont. Dept. of Institutions, Inmate Disciplinary Procedures, Conduct of Hearing § 2–PD85–216, pp. 10–11 (1985); Neb. Dept. of Correctional Services, Rule 6(6)(e), p. 6–3 (1984); N. H. State Prison, Major Disciplinary Hearing Procedures ¶ 6 (1978), and Added Instructions for Handling Inmate Witness Requests ¶ 2(C); N. J. Dept. of Corrections, Disciplinary Standard 254.18 (1984); N. M. Penitentiary, Policy No. PNM 090301,

In addition, the practice of preparing contemporaneous explanations for the refusal to hear witnesses is favored by experts who have devoted substantial time and resources to studying the problem and who know quite well what the needs of institutional safety are in this context. For example, the American Correctional Association (ACA), after a study funded by the Department of Justice, has adopted the following standard as an "essential" element of disciplinary-hearing procedures:

> "Written policy and procedure provide that the inmate is given an opportunity to make a statement and present documentary evidence, and may request witnesses on his/her behalf; *reasons for the denial of such a request are stated in writing*" (emphasis added). ACA Standards for Adult Correctional Institutions, Standard 2–4363 (2d ed. 1981).

Similarly, the National Conference of Commissioners on Uniform State Laws (NCUSL) has determined that whenever an inmate's request for a witness is denied, the hearing officer must make "a written factual finding that to [call the witness] would subject a person to a substantial risk of physical harm." NCUSL, Model Sentencing and Correction Act § 4–507 (1979). A third study of this problem reached the same conclusion: "Reasons for disallowing prisoners' requests

---

¶ II(C)(8) (1983); N. Y. Dept. of Correctional Services, Rules and Regulations § 253.5(a) (1983); N. C. Dept. of Correction, Policies and Procedures § .0201(c)(4) (1984); Okla. Bd. of Corrections, Policy Statement No. OP–060401, ¶ 2(C)(1)(c) (1985); Ore. Dept. of Human Resources Corrections Division, Rule Governing Inmate Prohibited Conduct, and Procedures for Processing Disciplinary Actions §§ VI(G)(4)(a) and VI(G)(6)(d) (1982); Tenn. Dept. of Correction, Administrative Policies and Procedures, Index No. 502.01, ¶ VI(D)(2)(d) (Dec. 1981); Tex. Dept. of Corrections, Disciplinary Rules and Procedures § V(B)(4) (1984); Utah State Prison, Disciplinary Procedures ¶ III(D)(2)(g) (1984); Wis. Admin. Code, note following § HHS 303.81 (1985).

Some of these States explicitly require that the record be disclosed to the inmate; in other States, it is unclear whether the inmate is entitled to view the statements or how judicial review of these explanations is carried out.

for appearance of witnesses should be recorded for purposes of future review." ABA Standards for Criminal Justice 23–3.2, p. 23·41, n. 14 (2d ed. 1980) (as added 1983).

These authorities testify to the fact that, as penological experts have implemented *Wolff* over the last 11 years, significantly more has been learned about the sorts of due process protections at disciplinary hearings that are compatible with institutional needs. Recognizing that it was taking a tentative first step in this area, the Court in *Wolff* acknowledged that events in future years might "require further consideration and reflection of this Court." 418 U. S., at 572. At the time of *Wolff*, the only option considered by both the majority and dissenting opinions was whether disciplinary boards ought to be required to "state" their reasons for refusing to hear requested witnesses, see *id.*, at 584 (opinion of MARSHALL, J.); *id.*, at 597–598 (opinion of Douglas, J.); this option seemingly implied disclosure to the inmate. But neither the Court nor the dissenting opinions considered the middle-ground alternative respondent proposes today: that a contemporaneous record be prepared and preserved in case of later legal challenge but not be available to the inmate. The failure to consider this alternative is not surprising, for at the time of *Wolff* the relevant question was simply whether inmates had any right at all to present witnesses; no federal court had yet considered whether reasons had to be given for denying this right, let alone whether such reasons could be recorded but preserved in a file to which the inmate would not have access. *Id.*, at 572, n. 20.[20] Nor was the process of *in camera* review, upon which respondent's alternative depends, as common a solution to clashes between individual rights and government secrecy needs as it is today. Yet despite these developments, and despite *Wolff*'s expectation that future developments would make clearer the proper balance between due process and institutional concerns, the

[20] Neither the parties nor any of the many *amici curiae* offered such a suggestion in the voluminous briefs filed in the case. See briefs in *Wolff* v. *McDonnell*, O. T. 1973, No. 73–679.

Court today inexplicably ignores the evolution of legal approaches and penological policy in this area.[21]

VI

The Court's decision leaves the inmate's constitutional right to present defense witnesses dangling in the wind.

---

[21] No doubt the Court's sparse reasoning in this case and the utter lack of empirical foundation for its bald assertions is in part a product of the fact that *not a single lower court, state or federal,* appears to have considered the alternative of sealed records and *in camera* review that the Court today forecloses. This Court is often called on to strike difficult balances between individual rights and institutional needs, but by precipitately rushing into voids left by lower courts, the Court decreases the likelihood that the balance at which it arrives will properly account for all the relevant interests and available options. In this case, the State simply cried *Wolff,* and, despite the absence of any clear conflict, the Court responded. But hastily granting certiorari every time an inmate or criminal defendant prevails below, as the current Court seems wont to do, deprives us of the insight lower court judges could offer on the issues and of the experiential basis that implementation of lower court decisions provides. The result, often as not, is the sort of decision rendered today. Once again, "[p]remature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles." *California* v. *Carney, ante,* at 399 (STEVENS, J., dissenting).

In light of current discussion over the Court's workload, it is worth noting further that, in the absence of any conflict in the lower courts, the decision to grant certiorari in this case is virtually unfathomable. At most, a state court had imposed more stringent due process requirements on its own institutions than this Court had previously recognized. I continue to believe the justifications for review in this Court are at their weakest in such cases, where no individual rights are alleged to be violated and where a state court speaks to its own institutions. See, *e. g., Oregon* v. *Hass,* 420 U. S. 714, 726 (1975) (MARSHALL, J., dissenting); see also *Michigan* v. *Long,* 463 U. S. 1032, 1065 (1983) (STEVENS, J., dissenting); see generally Developments in the Law, 95 Harv. L. Rev., 1342–1347 (1982). This case should therefore be added to the mounting list of examples that disprove claims that the Court is overburdened; "[m]uch of the Court's 'burdensome' workload is a product of its own aggressiveness" in rushing headlong to grant, often prematurely, the overstated petitions of State

Perhaps that is the virtue to the Court of its decision, for I certainly can discern no other basis, grounded in principle or sound reasoning, for it. *Wolff* may give prison officials a privilege to dispense with certain due process rights, but, as always, "[t]he scope of a privilege is limited by its underlying purpose." *Roviaro* v. *United States*, 353 U. S. 53, 60 (1957). The underlying purposes of the privilege recognized in *Wolff*—the promotion of "institutional safety and correctional goals"—can be realized fully by contemporaneous explanations not disclosed to the inmate. For that reason, the privilege recognized in *Wolff* ought to evaporate in the face of this means of accommodating the inmate's due process rights. That is the conclusion of penological officials and experts throughout the country and my conclusion as well. The Court, however, concludes otherwise. I therefore dissent.

Attorneys General distraught with the performance of their own state institutions. *Carney*, *ante*, at 396 (STEVENS, J., dissenting). Reserving the argument docket for cases of truly national import would go far toward alleviating any workload problems allegedly facing the Court.

CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

No. 83–2136. Argued March 27, 1985—Decided May 20, 1985

The Medicaid Act does not cover services performed for patients between the ages of 21 and 65 in an "institution for mental diseases" (IMD). In the absence of a statutory definition, the Secretary of Health and Human Services (Secretary) has promulgated a regulation defining an IMD as "an institution that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases" and providing that whether an institution is an IMD is determined by its "overall character." The Middletown Haven Rest Home in Connecticut is an "intermediate care facility" (ICF) that provides care for persons with mental illness as well as other diseases. Between January 1977 and September 1979, Connecticut paid Middletown Haven for services it provided to Medicaid eligible patients, including those between the ages of 21 and 65 who had been transferred there from state mental hospitals. Under the Medicaid program, the State received federal reimbursement for those payments. At the completion of an audit by the Department of Health and Human Services, the State was notified that the federal reimbursement was not allowable because Middletown Haven had been identified as an IMD. On administrative review, the Department's Grant Appeals Board upheld the disallowance. The State then filed an action in Federal District Court, which set aside the disallowance, but the Court of Appeals reversed.

Held: An ICF may be an IMD, and the terms are not mutually exclusive. The Act's express authorization for coverage of services performed for individuals 65 or over uses language that plainly indicates that a hospital, a skilled nursing facility, or an ICF may be an IMD. Moreover, the Secretary's interpretation of the Act comports with the Act's plain language. And the legislative history does not reveal any clear expression of contrary congressional intent. Pp. 528–538.

731 F. 2d 1052, affirmed.

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

Charles A. Miller argued the cause for petitioner. With him on the briefs were *Joseph I. Lieberman*, Attorney General of Connecticut, *Donald M. Longley*, Assistant Attorney General, and Michael A. Roth.

Kathryn A. Oberly argued the cause for respondents. With her on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, and *Howard S. Scher.**

JUSTICE STEVENS delivered the opinion of the Court.

Services performed for patients between the ages of 21 and 65 in an "institution for mental diseases" (IMD) are not covered by the Medicaid Act. The Secretary of Health and Human Services has adopted a definition of that term that is broad enough to encompass an "intermediate care facility" (ICF). The Middletown Haven Rest Home is an ICF that provides care for persons with mental illness as well as other diseases. The narrow question presented by this case is whether Middletown Haven is an IMD within the meaning of the Act. The broader question is whether the Secretary's definition of an IMD, which permits an ICF to be classified as an IMD, is consistent with the intent of Congress.

During the period between January 1977 and September 1979, the State of Connecticut paid Middletown Haven for the services it provided to Medicaid eligible patients, includ-

---

*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General of Illinois, *Jill Wine-Banks*, Solicitor General, *James C. O'Connell* and *Barbara L. Greenspan*, Special Assistant Attorneys General, *John K. Van de Kamp*, Attorney General of California, *Thomas E. Warriner*, Assistant Attorney General, *Elisabeth C. Brandt*, Deputy Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Beverly Jones Heydinger*, Assistant Attorney General; for the Commonwealth of Massachusetts by *Francis X. Bellotti*, Attorney General, and *Thomas A. Barnico* and *William L. Pardee*, Assistant Attorneys General; and for the American Psychiatric Association et al. by *Joel I. Klein*, *Paul M. Smith*, and *R. Emmett Poundstone III*.

ing those between the ages of 21 and 65 who had been transferred to Middletown Haven from state mental hospitals. Under the Medicaid program, the State received federal reimbursement of $1,634,655 for those payments.

After receiving information that Connecticut was discharging large numbers of mental patients from state mental institutions into ICFs and skilled nursing facilities, and after numerous meetings with state officials, the Department of Health and Human Services selected Middletown Haven, which is certified by the State as an ICF, for review and audit. The Department believed that the State was receiving federal financial aid in violation of applicable regulations that prohibited aid to IMDs.

Middletown Haven is a privately owned, 180-bed facility that is licensed by the Connecticut State Department of Health as a "Rest Home with Nursing Supervision" with authority "to care for persons with certain psychiatric conditions."[1] During the years 1977–1979 over 77% of its patients suffered from a major mental illness, and over half of its patients were transferees from state mental hospitals.[2] Middletown Haven employed a professional staff, including three psychiatrists, that specialized in the care of the mentally ill;[3] they viewed it as a psychiatric facility.[4] In sum, there was ample evidence for the review team's conclusion that Middletown was "primarily engaged" in providing diag-

---

[1] App. 35a–37a.

[2] *Id.*, at 17a.

[3] *Id.*, at 22a–23a.

[4] *Id.*, at 14a. Although Middletown Haven did not hold itself out to the media as a mental institution, and although the level of care provided to patients at the facility was less restrictive than that provided in a typical mental hospital, Middletown Haven did hold itself out as a facility specializing in the treatment of mental diseases to sources of referral. *Id.*, at 15a. Moreover, Middletown Haven cared for individuals that could have been admitted into mental institutions and had a patient population uncharacteristic of nursing homes. *Id.*, at 20a.

nostic treatment and care for persons with mental diseases within the meaning of the applicable regulations.[5]

After the completion of its audit, the Department gave notice to the State that the federal reimbursement of $1,634,655 was not allowable because Middletown Haven had been identified as an IMD and because payments for services to the mentally ill between the ages of 21 and 65 in IMDs were not eligible for federal financial participation.[6] The State's

---

[5] The Secretary's regulations, 42 CFR § 435.1009(e) (1984), define an IMD as follows:

"an institution that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, including medical attention, nursing care and related services. Whether an institution is an institution for mental diseases is determined by its overall character as that of a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such."

The Secretary has developed criteria designed to focus on what constitutes "primarily engaged" and "overall character." The review team utilized the following criteria when evaluating Middletown Haven:

1. That a facility is licensed as a mental institution;
2. That it advertises or holds itself out as a mental institution;
3. That more than 50% of the patients have a disability in mental functioning;
4. That it is used by mental hospitals for alternative care;
5. That patients who may have entered a mental hospital are accepted directly from the community;
6. That the facility is in proximity to a state mental institution (within a 25-mile radius);
7. That the age distribution is uncharacteristic of nursing home patients;
8. That the basis of Medicaid eligibility for patients under 65 is due to a mental disability, exclusive of services in an institution for mental disease;
9. That the facility hires staff specialized in the care of the mentally ill; and
10. That independent professional reviews conducted by state teams report a preponderance of mental patients in the facility. App. 12a–13a, 22a–23a.

[6] *Id.*, at 1e–6e. The letter stated that, because federal financial participation "is not available in payments to IMDs for persons aged 21 to 64, and

request for administrative review of the disallowance decision was consolidated with similar requests by the States of Illinois, Minnesota, and California. The Department's Grant Appeals Board upheld the disallowance.[7]

The State then obtained judicial review by filing this action.[8] The United States District Court for the District of Connecticut held that the Secretary's decision was not supported by the statute and set aside the disallowance. *Connecticut* v. *Schweiker*, 557 F. Supp. 1077 (1983). The Court of Appeals for the Second Circuit reversed, 731 F. 2d 1052 (1984), expressly rejecting the contrary reasoning of the Eighth Circuit. See *Minnesota* v. *Heckler*, 718 F. 2d 852 (1983). The square conflict on an important question of statutory construction prompted us to grant certiorari. 469 U. S. 929 (1984).

Connecticut contends that the same institution cannot be both an "institution for mental diseases" and an "intermediate care facility"; in other words, IMDs and ICFs are mutually exclusive categories. Because the Secretary acknowledges that Middletown Haven is an ICF, the State concludes that it cannot be an IMD. In our view, however, the State's position is foreclosed by the plain language of the statute, by the Secretary's reasonable and longstanding interpretation of the Act, and by the Act's legislative history. We therefore affirm.

I

In 1965 Congress authorized the Medicaid program by adding Title XIX to the Social Security Act;[9] the program was established "for the purpose of providing federal financial

---

because the State plan does not cover services by such facilities to individuals under 21 or over 65, no payments to IMDs are eligible" for federal financial participation. *Id.*, at 2e.

[7] App. to Pet. for Cert. 40d–44d.

[8] In addition to filing in District Court, the State sought direct appellate review. The Court of Appeals dismissed for want of jurisdiction. 731 F. 2d 1052, 1055 (CA2 1984).

[9] 79 Stat. 343.

assistance to States that choose to reimburse certain costs of medical treatment for needy persons."[10] The program offers the financial assistance to States that submit and have approved by the Secretary plans for "medical assistance."[11] In its present form, the Act authorizes reimbursement for 18 categories of medical assistance.[12]

For three types of covered medical services—inpatient hospital services, skilled nursing facilities services, and, most importantly, intermediate care facility services—the definition contains an express exception for services performed in IMDs.[13] The thrice-repeated exclusion demonstrates that Congress did not intend the ICF and IMD categories to be mutually exclusive; if Congress had intended separate categories, the IMD exclusion from services in other types of facilities would be unnecessary and illogical.

Other provisions of the Act make it clear that services performed for the mentally ill may be covered, provided the services are performed in a hospital, a skilled nursing facility, or an ICF that is not an IMD. Thus, the definition of an ICF expressly describes persons "who because of their mental or

---

[10] *Harris* v. *McRae*, 448 U. S. 297, 301 (1980).

[11] 42 U. S. C. §§ 1396, 1396a.

[12] See § 1905(a) of the Act, 42 U. S. C. § 1396d(a) (1982 ed. and Supp. III), as further amended by the Medicare and Medicaid Budget Reconciliation Amendments of 1984, Pub. L. 98–369, § 2335(f), 98 Stat. 1091.

[13] The definitions of these three categories of service read as follows:

"The term 'medical assistance' means payment of part or all of the cost of the following care and services . . . for individuals[:] . . .

. . . . . .

"(1) inpatient hospital services *(other than services in an institution for mental diseases);*

. . . . . .

"(4)(A) skilled nursing facility services *(other than services in an institution for mental diseases)* for individuals 21 years of age or older . . . ;

. . . . . .

"(15) intermediate care facility services *(other than such services in an institution for mental diseases)* for individuals who are determined . . . to be in need of such care. . . ." 42 U. S. C. §§ 1396d(a)(1), (a)(4)(A), (a)(15) (1982 ed., Supp. III) (emphasis added).

physical condition" require institutional care but do not need the level of services provided by a skilled nursing facility or a hospital.[14] And § 1396d(a)(18)(B) prohibits medical assistance for services to individuals under 65 who are patients in IMDs, while another provision, § 1396d(a)(14), also allows such payments for "inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for mental diseases." To accept the State's interpretation would render the language of § 1396d(a)(14) unnecessary and would render lifeless Congress' approval of ICF services for persons 65 or over in IMDs.[15]

Thus, there is ample textual support for the conclusion that an ICF may be an IMD.

II

In the absence of a statutory definition of the term "institution for mental diseases," it is appropriate to consider the Secretary's interpretation of that term.[16]

---

[14] Section 1905(c) of the Act, as set forth in 42 U. S. C. § 1396d(c), provides in part:

"For purposes of this subchapter the term 'intermediate care facility' means an institution which (1) is licensed under State law to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities . . . . The term 'intermediate care facility' also includes any skilled nursing facility or hospital which meets the requirements of the proceeding *[sic]* sentence. . . . With respect to services furnished to individuals under age 65, the term 'intermediate care facility' shall not include, except as provided in subsection (d) of this section, any public institution or distinct part thereof for mental diseases or mental defects."

[15] It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute. See, *e. g.*, *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979).

[16] Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–845 (1984). The Act expressly provides the Secre-

The Secretary's initial definition was provided shortly after the Medicaid program was enacted in 1965. It stated:

> "Any individual who has not attained 65 years of age and is a patient in an institution for . . . mental diseases; *i. e., an institution whose overall character is that of a facility established and maintained primarily for the care and treatment of individuals with . . . mental diseases (whether or not it is licensed).*"[17] (Emphasis added.)

A few years later, the Secretary promulgated the following:

> "Whether an institution is one for . . . mental diseases will be determined by whether its overall character is that of a facility established and maintained primarily for the care and treatment of individuals with . . . mental diseases (whether licensed or not) . . . .
>
> . . . . . .
>
> "'Institution for mental diseases' means an institution which is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, including medical attention, nursing care and related services."[18]

---

tary with authority to "make and publish such rules and regulations, not inconsistent with" the Act "as may be necessary [for its] efficient administration." 42 U. S. C. § 1302.

[17] U. S. Dept. of Health, Education & Welfare, Handbook of Public Assistance Administration, Supplement D—Medical Assistance Programs Under Title XIX of the Social Security Act, ¶ D–4620.2 (1966). Regulations fashioned shortly thereafter restated the essence of this definition: covered "'[i]npatient hospital services' are those items and services ordinarily furnished by the hospital for the care and treatment of inpatients . . . in an institution maintained primarily for treatment and care of patients with disorders *other than . . . mental diseases.*" 45 CFR § 249.10(b)(1) (1970) (emphasis added); see also § 249.10(b)(4)(i) (skilled nursing home services are "those items and services furnished by a skilled nursing home maintained primarily for the care and treatment of inpatients with disorders other than . . . mental diseases").

[18] 45 CFR §§ 248.60(a)(3)(ii) and (b)(7) (1972).

The current definition[19]—like the earlier versions—is essentially the same as the original definition developed almost two decades ago.[20] In both the earliest and the later interpretations of "institution for mental diseases," the Secretary consistently emphasized the "overall character" of the facility when defining an IMD.

Congress has never indicated dissatisfaction with the Secretary's undeviating construction. "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982). Moreover, the agency's construction need not be the only reasonable one in order to gain judicial approval.[21] It follows that the Secretary was authorized to determine that medical assistance is not available if the overall character of a facility discloses that it is maintained primarily for the care and treatment of individuals with mental diseases. We must therefore reject the State's suggestion that ICFs and skilled nursing facilities that are primarily engaged in the care of the mentally ill are not "institutions for mental diseases" within the meaning of the Act.[22]

---

[19] See n. 5, *supra*.

[20] The State recognizes that the "substance of these provisions has not changed materially since their first adoption." Brief for Petitioner 8.

[21] See *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 153 (1946); see also *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U. S. 402, 423 (1983) ("We need only conclude that [the agency's interpretation] is a reasonable interpretation of the relevant provisions").

[22] The State also contends that the disallowance undermines the cooperative federalism concept on which the public assistance programs are based. More specifically, the State argues that the disallowance was based on an interpretation of the Act that did not crystallize until after it had received and spent the federal money. In our view, the Secretary's position has been established with sufficient clarity at least since the 1972 regulations to make this argument untenable. The general policy of federal-state cooperation that underlies the entire program does favor a liberal interpretation of the eligibility provisions of the Act, but as is true of the policy favoring the development of less restrictive treatment programs for

III

The Medicaid program as enacted in 1965 provided coverage for elderly patients in IMDs, but also contained an express exclusion for patients under 65 years of age in IMDs.[23] The Report of the Senate Committee on Finance made it clear that the IMD exclusion applied to both public and private mental institutions, and explained that it was based on the view that long-term care in mental institutions was a state responsibility.[24]

The Committee Report also explained that the decision to provide federal financial assistance to the mentally ill who were 65 years of age or over was based in part on the requirement that the state plan would include adequate provision for individual review of a patient's needs.[25] Moreover, the

---

the mentally ill that is reflected in the "Long Amendment," see *infra*, this page and 534, we must nevertheless respect the apparent limits that Congress has placed on its own decision to fund the implementation of sound policy.

[23] 79 Stat. 352. The statute provided that the term "medical assistance" did not include

"(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

"(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases." *Ibid.*

The statute also contained a prohibition against payments for certain services rendered in IMDs. *Id.*, at 351–352.

[24] The Report stated:

"Since the enactment of the Social Security Act, patients in public mental and tuberculosis hospitals have not been eligible under the public assistance titles of the Social Security Act, and only prior to 1951 were individuals eligible who were patients in private mental and tuberculosis hospitals. The reason for this exclusion was that long-term care in such hospitals had traditionally been accepted as a responsibility of the States." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 144 (1965).

See also H. R. Rep. No. 213, 89th Cong., 1st Sess., 126 (1965).

[25] The Senate Report continued:

"A second safeguard, under the committee's bill, is a provision that the State plan include a provision for an individual plan for each patient in

Report stated that States had to develop and to implement comprehensive mental health programs.[26] These latter conditions are components of the "Long Amendment," and provide support for the State's contention that federal policy favors the transfer of patients—at least the elderly—from IMDs to less restrictive treatment facilities.[27]

---

the mental hospital to assure that the care provided to him is in his best interests and that there will be initial and periodic review of his medical and other needs. The committee is particularly concerned that the patient receive care and treatment designed to meet his particular needs. Thus, under the committee bill, the State plan would also need to assure that the medical care needed by the patient will be provided him and that other needs considered essential will be met and that there will be periodic redetermination of the need for the individual to be in the hospital.

. . . . . .

"The committee believes that responsibility for the treatment of persons in mental hospitals—whether or not they be assistance recipients—is that of the mental health agency of the State." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, pp. 145–146 (1965).

See also H. R. Rep. No. 213, 89th Cong., 1st Sess., 128 (1965).

[26] The Report further stated:

"The committee believes it is important that States move ahead promptly to develop comprehensive mental health plans as contemplated in the Community Mental Health Centers Act of 1963. In order to make certain that the planning required by the committee's bill will become a part of the overall State mental health planning under the Community Mental Health Centers Act of 1963, the committee's bill makes the approvability of a State's plan for assistance for aged individuals in mental hospitals dependent upon a showing of satisfactory progress toward developing and implementing a comprehensive mental health program—including utilization of community mental health centers, nursing homes, and other alternative forms of care." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 146 (1965).

See also H. R. Rep. No. 213, 89th Cong., 1st Sess., 129 (1965).

[27] See 110 Cong. Rec. 21346–21348 (1964); 79 Stat. 347; 42 U. S. C. §§ 1396a(a)(20), 1396a(a)(21). Commenting on the "Long Amendment," the Senate Report stated, in part:

"The committee bill provides for the development in the State of alternative methods of care and requires that the maximum use be made of the existing resources in the community which offer ways of caring for the

In 1967, without amending the Medicaid statute, Congress expanded the aid programs for the aged, blind, and disabled by authorizing federal reimbursement for the cost of services in ICFs.[28] The 1967 amendments do not expressly mention IMDs.[29] Four years later, in 1971, Congress adopted the amendment to the Medicaid statute that enlarged the definition of covered medical services to include services performed by ICFs. The amendments retained the IMD exclusion, an exclusion that remains in the Act today.[30]

The next year, Congress added coverage for "inpatient psychiatric hospital services for individuals under 21."[31] In its deliberations on the 1972 amendments, Congress also considered the desirability of extending Medicaid "mental hospi-

---

mentally ill who are not in hospitals. This is intended to include provision for persons who no longer need care in hospitals and who can, with financial help and social services to the extent needed, make their way in the community." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 146 (1965). See also H. R. Rep. No. 213, 89th Cong., 1st Sess., 128 (1965).

[28] 81 Stat. 920–921.

[29] The amendments did, however, provide:

"(d) Except when inconsistent with the purposes of this section or contrary to any provision of this section, any modification, pursuant to this section, of an approved State plan shall be subject to the same conditions, limitations, rights, and obligations as obtain with respect to such approved State plan." *Id.*, at 920.

The amendments were not actually signed until January 2, 1968, but are generally described as the "1967 amendments."

[30] 85 Stat. 809. The amendment also contained a definition of the term "intermediate care facility" that largely tracks the language contained in the 1967 amendments. That definition, however, contained this comment on services for persons under age 65:

"With respect to services furnished to individuals under age 65, the term 'intermediate care facility' shall not include, except as provided in subsection (d), any public institution or distinct part thereof for mental diseases or mental defects." *Ibid.*

A straightforward reading of this sentence strongly implies that a *private* institution for mental diseases may qualify as an ICF.

[31] 86 Stat. 1460–1461.

tal coverage" to persons between the ages of 21 and 65, but decided not to do so.[32] See *Schweiker* v. *Wilson*, 450 U. S. 221, 236 (1981).[33]

The State points to several aspects of this lengthy legislative history to support its argument that the exception for IMDs should be narrowly construed to encompass only traditional custodial mental hospitals. It places special emphasis on the "Long Amendment," which surely indicates that federal policy favors the transfer of mentally ill patients to alternative and less restrictive care facilities when feasible. It also notes that when federal assistance for ICFs was first authorized in 1967, no express exclusion for IMDs was made, and that the text of the Act plainly contemplates that ICF services will be provided for the mentally ill. Finally, it points to a number of comments by legislators indicating that they assumed that the IMD exclusion only referred to traditional mental hospitals.

The history on which the State relies does clearly establish that an individual is not ineligible for Medicaid simply because his need for care is based on a diagnosis of mental illness. Moreover, it is perfectly clear that hospitals, skilled nursing facilities, and intermediate care facilities are not ineligible simply because they provide care and treatment for mentally ill patients. However, the legislative history also

---

[32] The Senate Report on the bill contains this statement:

"The committee also believes that the potential social and economic benefits of extending medicaid inpatient mental hospital coverage to mentally ill persons between the ages of 21 and 65 deserves to be evaluated and has therefore authorized demonstration projects for this purpose." S. Rep. No. 92–1230, p. 281 (1972).

See also *id.*, at 57. The proposal was, however, rejected in conference. H. R. Conf. Rep. No. 92–1605, p. 65 (1972).

[33] Although the history of the IMD exclusion in various amendments to the Act suggests that Congress may have assumed that it would refer primarily to public institutions, the State does not argue that it is so confined. We are confident that Congress would have used the term "public" if it had not intended the exclusion to encompass private institutions as well.

demonstrates that Congress has thrice since 1965 not accepted proposals to lift the IMD exclusion for persons under 65.[34] But most damaging to the State's position is a statement by Congress from the legislative history of the 1972 amendments, which authorized Medicaid funding *for ICF services for the elderly in IMDs.*[35] In explaining this amendment, the Conference Report stated:

> "The Senate amendment added a new section to the House bill which provided that when a State chooses to cover individuals age 65 and over in institutions for . . . mental diseases it must cover such care in intermediate care facilities as well as in hospitals and skilled nursing homes."[36]

This statement of congressional intent is consistent with the plain language of the statute and with the Secretary's longstanding administrative interpretation: hospitals, skilled nursing facilities, and ICFs can be IMDs and the terms are not mutually exclusive.

The State has persuasively argued that its position represents sound and enlightened policy. It has not, however, established that Congress has only excluded "hospitals" in which a mental illness is treated instead of "*institutions* for

---

[34] See Social Security Amendments of 1971: Hearings on H. R. 1 before the Senate Committee on Finance, 92d Cong., 1st and 2d Sess., pt. 2, pp. 924–941 (1972) (statements of Dr. Jonathan Leopold, Commissioner, Vermont Dept. of Mental Health, and Dr. Kenneth Gaver, Commissioner, Ohio Dept. of Mental Hygiene and Corrections); Social Security Amendments of 1970: Hearings on H. R. 17550 before the Senate Committee on Finance, 91st Cong., 2d Sess., pt. 2, pp. 500–550 (1970); Social Security Amendments of 1967: Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pt. 3, p. 1741 (1967) (statement of Dr. Robert W. Gibson, American Psychiatric Association).

[35] The 1971 amendments were technically corrected to explain that the IMD exclusion did not prevent reimbursement for ICF services provided to the elderly in IMDs. 86 Stat. 1329, 1459–1460; S. Rep. No. 92–1230, pp. 320–321 (1972).

[36] H. R. Conf. Rep. No. 92–1605, p. 64 (1972).

mental diseases." The express authorization for coverage of individuals 65 years of age or over uses language that plainly indicates that a hospital, a skilled nursing facility, or an ICF may be an IMD; this indication is unambiguously confirmed by the fact that the same parenthetical exclusion for IMDs applies to all three types of facilities. Moreover, the Secretary's interpretation of "institution for mental diseases" comports with the plain language of the statute. Finally, the legislative history does not reveal any clear expression of contrary congressional intent.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

HARPER & ROW, PUBLISHERS, INC., ET AL. *v.* NATION ENTERPRISES ET AL.

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

No. 83–1632. Argued November 6, 1984—Decided May 20, 1985

In 1977, former President Ford contracted with petitioners to publish his as yet unwritten memoirs. The agreement gave petitioners the exclusive first serial right to license prepublication excerpts. Two years later, as the memoirs were nearing completion, petitioners, as the copyright holders, negotiated a prepublication licensing agreement with Time Magazine under which Time agreed to pay $25,000 ($12,500 in advance and the balance at publication) in exchange for the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. Shortly before the Time article's scheduled release, an unauthorized source provided The Nation Magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of The Nation produced a 2,250-word article, at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expression taken from the manuscript. It was timed to "scoop" the Time article. As a result of the publication of The Nation's article, Time canceled its article and refused to pay the remaining $12,500 to petitioners. Petitioners then brought suit in Federal District Court against respondent publishers of The Nation, alleging, *inter alia*, violations of the Copyright Act (Act). The District Court held that the Ford memoirs were protected by copyright at the time of The Nation publication and that respondents' use of the copyrighted material constituted an infringement under the Act, and the court awarded actual damages of $12,500. The Court of Appeals reversed, holding that The Nation's publication of the 300 to 400 words it identified as copyrightable expression was sanctioned as a "fair use" of the copyrighted material under § 107 of the Act. Section 107 provides that notwithstanding the provisions of § 106 giving a copyright owner the exclusive right to reproduce the copyrighted work and to prepare derivative works based on the copyrighted work, the fair use of a copyrighted work for purposes such as comment and news reporting is not an infringement of copyright. Section 107 further provides that in determining whether the use was fair the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the

copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work.

Held: The Nation's article was not a "fair use" sanctioned by § 107. Pp. 542–569.

(a) In using generous verbatim excerpts of Mr. Ford's unpublished expression to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right. Pp. 545–549.

(b) Though the right of first publication, like other rights enumerated in § 106, is expressly made subject to the fair use provisions of § 107, fair use analysis must always be tailored to the individual case. The nature of the interest at stake is highly relevant to whether a given use is fair. The unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use. And under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use. Pp. 549–555.

(c) In view of the First Amendment's protections embodied in the Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, there is no warrant for expanding, as respondents contend should be done, the fair use doctrine to what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use. Pp. 555–560.

(d) Taking into account the four factors enumerated in § 107 as especially relevant in determining fair use, leads to the conclusion that the use in question here was not fair. (i) The fact that news reporting was the general purpose of The Nation's use is simply one factor. While The Nation had every right to be the first to publish the information, it went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a "news event" out of its unauthorized first publication. The fact that the publication was commercial as opposed to nonprofit is a separate factor tending to weigh against a finding of fair use. Fair use presupposes good faith. The Nation's unauthorized use of the undisseminated manuscript had not merely the incidental effect but the *intended purpose* of supplanting the copyright holders' commercially valuable right of first publication. (ii) While there may be a greater need to disseminate works of fact than works of fiction, The Nation's taking of copyrighted expression exceeded that necessary to disseminate the facts and infringed the copyright holders' interests in confidentiality and creative control over the first public appearance of the work. (iii) Although the verbatim quotes

in question were an insubstantial portion of the Ford manuscript, they qualitatively embodied Mr. Ford's distinctive expression and played a key role in the infringing article. (iv) As to the effect of The Nation's article on the market for the copyrighted work, Time's cancellation of its projected article and its refusal to pay $12,500 were the direct effect of the infringing publication. Once a copyright holder establishes a causal connection between the infringement and loss of revenue, the burden shifts to the infringer to show that the damage would have occurred had there been no taking of copyrighted expression. Petitioners established a prima facie case of actual damage that respondents failed to rebut. More important, to negate a claim of fair use it need only be shown that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work. Here, The Nation's liberal use of verbatim excerpts posed substantial potential for damage to the marketability of first serialization rights in the copyrighted work. Pp. 560–569.

723 F. 2d 195, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 579.

Edward A. Miller argued the cause for petitioners. With him on the briefs were *Barbara Hufham* and *David Otis Fuller, Jr.*

Floyd Abrams argued the cause for respondents. With him on the brief were *Devereux Chatillon, Carol E. Rinzler, Andrew L. Deutsch,* and *Leon Friedman.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider to what extent the "fair use" provision of the Copyright Revision Act of 1976 (here-

*Briefs of *amici curiae* urging reversal were filed for the Association of American Publishers, Inc., by *Jon A. Baumgarten* and *Charles H. Lieb;* and for Volunteer Lawyers for the Arts, Inc., by *I. Fred Koenigsberg.*

Briefs of *amici curiae* urging affirmance were filed for the Pen American Center by *Stephen Gillers;* and for Gannett Co., Inc., et al. by *Melville B. Nimmer, Benjamin W. Heineman, Jr., Alice Neff Lucan,* and *Robert C. Lobdell.*

inafter the Copyright Act), 17 U. S. C. § 107, sanctions the unauthorized use of quotations from a public figure's unpublished manuscript. In March 1979, an undisclosed source provided The Nation Magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the purloined manuscript, an editor of The Nation produced a short piece entitled "The Ford Memoirs—Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in Time Magazine. Time had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row), and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of The Nation article, Time canceled its agreement. Petitioners brought a successful copyright action against The Nation. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that The Nation's act was sanctioned as a "fair use" of the copyrighted material. We granted certiorari, 467 U. S. 1214 (1984), and we now reverse.

I

In February 1977, shortly after leaving the White House, former President Gerald R. Ford contracted with petitioners Harper & Row and Reader's Digest, to publish his as yet unwritten memoirs. The memoirs were to contain "significant hitherto unpublished material" concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon and "Mr. Ford's reflections on this period of history, and the morality and personalities involved." App. to Pet. for Cert. C–14—C–15. In addition to the right to publish the Ford memoirs in book form, the agreement gave petitioners the exclusive right to license prepublication excerpts, known in the trade as "first serial rights." Two years later, as the memoirs were nearing completion, petitioners negotiated a prepublication licensing agreement with Time, a weekly news magazine. Time agreed to pay $25,000, $12,500 in advance and an

additional $12,500 at publication, in exchange for the right to excerpt 7,500 words from Mr. Ford's account of the Nixon pardon. The issue featuring the excerpts was timed to appear approximately one week before shipment of the full length book version to bookstores. Exclusivity was an important consideration; Harper & Row instituted procedures designed to maintain the confidentiality of the manuscript, and Time retained the right to renegotiate the second payment should the material appear in print prior to its release of the excerpts.

Two to three weeks before the Time article's scheduled release, an unidentified person secretly brought a copy of the Ford manuscript to Victor Navasky, editor of The Nation, a political commentary magazine. Mr. Navasky knew that his possession of the manuscript was not authorized and that the manuscript must be returned quickly to his "source" to avoid discovery. 557 F. Supp. 1067, 1069 (SDNY 1983). He hastily put together what he believed was "a real hot news story" composed of quotes, paraphrases, and facts drawn exclusively from the manuscript. *Ibid.* Mr. Navasky attempted no independent commentary, research or criticism, in part because of the need for speed if he was to "make news" by "publish[ing] in advance of publication of the Ford book." App. 416–417. The 2,250-word article, reprinted in the Appendix to this opinion, appeared on April 3, 1979. As a result of The Nation's article, Time canceled its piece and refused to pay the remaining $12,500.

Petitioners brought suit in the District Court for the Southern District of New York, alleging conversion, tortious interference with contract, and violations of the Copyright Act. After a 6-day bench trial, the District Judge found that "A Time to Heal" was protected by copyright at the time of The Nation publication and that respondents' use of the copyrighted material constituted an infringement under the Copyright Act, §§ 106(1), (2), and (3), protecting respectively the right to reproduce the work, the right to license preparation of derivative works, and the right of first distribution of

the copyrighted work to the public. App. to Pet. for Cert. C–29—C–30. The District Court rejected respondents' argument that The Nation's piece was a "fair use" sanctioned by § 107 of the Act. Though billed as "hot news," the article contained no new facts. The magazine had "published its article for profit," taking "the heart" of "a soon-to-be published" work. This unauthorized use "caused the *Time* agreement to be aborted and thus diminished the value of the copyright." 557 F. Supp., at 1072. Although certain elements of the Ford memoirs, such as historical facts and memoranda, were not *per se* copyrightable, the District Court held that it was "the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation, [and] this . . . totality . . . is protected by the copyright laws." *Id.*, at 1072–1073. The court awarded actual damages of $12,500.

A divided panel of the Court of Appeals for the Second Circuit reversed. The majority recognized that Mr. Ford's verbatim "reflections" were original "expression" protected by copyright. But it held that the District Court had erred in assuming the "coupling [of these reflections] with uncopyrightable fact transformed that information into a copyrighted 'totality.'" 723 F. 2d 195, 205 (1983). The majority noted that copyright attaches to expression, not facts or ideas. It concluded that, to avoid granting a copyright monopoly over the facts underlying history and news, "'expression' [in such works must be confined] to its barest elements—the ordering and choice of the words themselves." *Id.*, at 204. Thus similarities between the original and the challenged work traceable to the copying or paraphrasing of uncopyrightable material, such as historical facts, memoranda and other public documents, and quoted remarks of third parties, must be disregarded in evaluating whether the second author's use was fair or infringing.

> "When the uncopyrighted material is stripped away, the article in *The Nation* contains, at most, approxi-

mately 300 words that are copyrighted. These remaining paragraphs and scattered phrases are all verbatim quotations from the memoirs which had not appeared previously in other publications. They include a short segment of Ford's conversations with Henry Kissinger and several other individuals. Ford's impressionistic depictions of Nixon, ill with phlebitis after the resignation and pardon, and of Nixon's character, constitute the major portion of this material. It is these parts of the magazine piece on which [the court] must focus in [its] examination of the question whether there was a 'fair use' of copyrighted matter." *Id.*, at 206.

Examining the four factors enumerated in § 107, see *infra*, at 547, n. 2, the majority found the purpose of the article was "news reporting," the original work was essentially factual in nature, the 300 words appropriated were insubstantial in relation to the 2,250-word piece, and the impact on the market for the original was minimal as "the evidence [did] not support a finding that it was the very limited use of expression *per se* which led to Time's decision not to print the excerpt." The Nation's borrowing of verbatim quotations merely "len[t] authenticity to this politically significant material . . . complementing the reporting of the facts." 723 F. 2d, at 208. The Court of Appeals was especially influenced by the "politically significant" nature of the subject matter and its conviction that it is not "the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a democratic state" or "chill the activities of the press by forbidding a circumscribed use of copyrighted words." *Id.*, at 197, 209.

II

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for

fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors. *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975).

Article I, § 8, of the Constitution provides:

> "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

As we noted last Term: "[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984). "The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Id.*, at 477 (dissenting opinion). This principle applies equally to works of fiction and nonfiction. The book at issue here, for example, was two years in the making, and began with a contract giving the author's copyright to the publishers in exchange for their services in producing and marketing the work. In preparing the book, Mr. Ford drafted essays and word portraits of public figures and participated in hundreds of taped interviews that were later distilled to chronicle his personal viewpoint. It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.

Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright.[1] Under the Copy-

[1] Section 106 provides in pertinent part:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and authorize any of the following:

right Act, these rights—to publish, copy, and distribute the author's work—vest in the author of an original work from the time of its creation. § 106. In practice, the author commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author's work. The copyright owner's rights, however, are subject to certain statutory exceptions. §§ 107–118. Among these is § 107 which codifies the traditional privilege of other authors to make "fair use" of an earlier writer's work.[2] In addition, no author may copyright facts or ideas. § 102. The copyright is limited to those aspects of the work—termed "expression"—that display the stamp of the author's originality.

Creation of a nonfiction work, even a compilation of pure fact, entails originality. See, *e. g.*, *Schroeder* v. *William Morrow & Co.*, 566 F. 2d 3 (CA7 1977) (copyright in gardening directory); cf. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 58 (1884) (originator of a photograph may claim copyright in his work). The copyright holders of "A Time to Heal" complied with the relevant statutory notice and reg-

---

"(1) to reproduce the copyrighted work in copies . . . ;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies . . . of the copyrighted work to the public . . . ."

[2] Section 107 states:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

istration procedures. See §§ 106, 401, 408; App. to Pet. for Cert. C–20. Thus there is no dispute that the unpublished manuscript of "A Time to Heal," as a whole, was protected by § 106 from unauthorized reproduction. Nor do respondents dispute that verbatim copying of excerpts of the manuscript's original form of expression would constitute infringement unless excused as fair use. See 1 M. Nimmer, Copyright § 2.11[B], p. 2–159 (1984) (hereinafter Nimmer). Yet copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions. *Ibid.*; A. Latman, Fair Use of Copyrighted Works (1958), reprinted as Study No. 14 in Copyright Law Revision Studies Nos. 14–16, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 7 (1960) (hereinafter Latman). Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole. Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression. Compare *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d 91 (CA2 1977) (protection accorded author's analysis, structuring of material and marshaling of facts), with *Hoehling* v. *Universal City Studios, Inc.*, 618 F. 2d 972 (CA2 1980) (limiting protection to ordering and choice of words). See, *e. g.*, 1 Nimmer § 2.11[D], at 2–164—2–165.

We need not reach these issues, however, as The Nation has admitted to lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of The Nation article. In using generous

verbatim excerpts of Mr. Ford's unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right. For the reasons set forth below, we find that this use of the copyrighted manuscript, even stripped to the verbatim quotes conceded by The Nation to be copyrightable expression, was not a fair use within the meaning of the Copyright Act.

III

A

Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property 260 (1944) (hereinafter Ball). The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine. 3 Nimmer § 13.05. Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94–1476, p. 66 (1976) (hereinafter House Report).

"[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained." Ball 260. Professor Latman, in a study of the doctrine of fair use commissioned by Congress for the revision effort, see *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 462–463, n. 9 (dissenting opinion), summarized prior law as turning on the "importance

of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?" Latman 15.[3]

As early as 1841, Justice Story gave judicial recognition to the doctrine in a case that concerned the letters of another former President, George Washington.

> "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Folsom* v. *Marsh*, 9 F. Cas. 342, 344–345 (No. 4,901) (CC Mass.)

As Justice Story's hypothetical illustrates, the fair use doctrine has always precluded a use that "supersede[s] the use of the original." *Ibid.* Accord, S. Rep. No. 94–473, p. 65 (1975) (hereinafter Senate Report).

Perhaps because the fair use doctrine was predicated on the author's implied consent to "reasonable and customary" use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges

---

[3] Professor Nimmer notes: "[Perhaps] no more precise guide can be stated than Joseph McDonald's clever paraphrase of the Golden Rule: 'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.'" 3 Nimmer § 13.05[A], at 13–66, quoting McDonald, Non-infringing Uses, 9 Bull. Copyright Soc. 466, 467 (1962). This "equitable rule of reason," *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 448, "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F. 2d 57, 60 (CA2 1980). See generally L. Seltzer, Exemptions and Fair Use in Copyright 18–48 (1978).

of copying from an author's as yet unpublished works.[4] Under common-law copyright, "the property of the author . . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same." *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 299 (1907); 2 Nimmer § 8.23, at 8–273. This absolute rule, however, was tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent through *de facto* publication on performance or dissemination of a work may tip the balance of equities in favor of prepublication use. See Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U. S. Copyright Law, 88th Cong., 1st Sess., 27 (H. R. Comm. Print 1963) (discussion suggesting works disseminated to the public in a form not constituting a technical "publication" should nevertheless be subject to fair use); 3 Nimmer § 13.05, at 13–62, n. 2. But it has never been seriously disputed that "the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use." *Ibid.* Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works.[5]

---

[4] See Latman 7; Strauss, Protection of Unpublished Works (1957), reprinted as Study No. 29 in Copyright Law Revision Studies Nos. 29–31, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 4, n. 32 (1961) (citing cases); R. Shaw, Literary Property in the United States 67 (1950) ("[T]here can be no 'fair use' of unpublished material"); Ball 260, n. 5 ("[T]he doctrine of fair use does not apply to unpublished works"); A. Weil, American Copyright Law § 276, p. 115 (1917) (the author of an unpublished work "has, probably, the right to prevent even a 'fair use' of the work by others"). Cf. M. Flint, A User's Guide to Copyright ¶ 10.06 (1979) (United Kingdom) ("no fair dealing with unpublished works"); *Beloff* v. *Pressdram Ltd.*, [1973] All E. R. 241, 263 (Ch. 1972) (same).

[5] See, *e. g.*, *Wheaton* v. *Peters*, 8 Pet. 591, 657 (1834) (distinguishing the author's common-law right to "obtain redress against anyone who . . . by improperly obtaining a copy [of his unpublished work] endeavors to realize

Respondents contend, however, that Congress, in including first publication among the rights enumerated in § 106, which are expressly subject to fair use under § 107, intended that fair use would apply *in pari materia* to published and unpublished works. The Copyright Act does not support this proposition.

The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine. See *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 159–160 (1985); *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 462–463, n. 9 (dissenting opinion). Among its other innovations, it eliminated publication "as a dividing line between common law and statutory protection," House Report, at 129, extending statutory protection to all works from the time of their creation. It also recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works. The Report of the House Committee on the Judiciary confirms that "Clause (3) of section 106, establishes the exclusive right of publications . . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work." *Id.*, at 62.

Though the right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107, fair use analysis must always be tailored to the individual case. *Id.*, at 65; 3 Nimmer § 13.05[A]. The

---

a profit by its publication" from rights in a published work, which are prescribed by statute); *Press Publishing Co.* v. *Monroe*, 73 F. 196, 199 (CA2), writ of error dism'd, 164 U. S. 105 (1896); *Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal. 2d 653, 660–661, 221 P. 2d 73, 77–78 (1950) (en banc); *Golding* v. *RKO Radio Pictures, Inc.*, 193 P. 2d 153, 162 (Cal. App. 1948) ("An unauthorized appropriation of [an unpublished work] is not to be neutralized on the plea that 'it is such a little one'"), aff'd, 35 Cal. 2d 690, 221 P. 2d 95 (1950); *Fendler* v. *Morosco*, 253 N. Y. 281, 291, 171 N. E. 56, 59 ("Since plaintiff had not published or produced her play, perhaps any use that others made of it might be unfair"), rehearing denied, 254 N. Y. 563, 173 N. E. 867 (1930).

nature of the interest at stake is highly relevant to whether a given use is fair. From the beginning, those entrusted with the task of revision recognized the "overbalancing reasons to preserve the common law protection of undisseminated works until the author or his successor chooses to disclose them." Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., 41 (Comm. Print 1961). The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

The Senate Report confirms that Congress intended the unpublished nature of the work to figure prominently in fair use analysis. In discussing fair use of photocopied materials in the classroom the Committee Report states:

> "A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it . . . . The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's 'right of first publication' would outweigh any needs of reproduction for classroom purposes." Senate Report, at 64.

Although the Committee selected photocopying of classroom materials to illustrate fair use, it emphasized that "the same

general standards of fair use are applicable to all kinds of uses of copyrighted material." *Id.*, at 65. We find unconvincing respondents' contention that the absence of the quoted passage from the House Report indicates an intent to abandon the traditional distinction between fair use of published and unpublished works. It appears instead that the fair use discussion of photocopying of classroom materials was omitted from the final Report because educators and publishers in the interim had negotiated a set of guidelines that rendered the discussion obsolete. House Report, at 67. The House Report nevertheless incorporates the discussion by reference, citing to the Senate Report and stating: "The Committee has reviewed this discussion, and considers it still has value as an analysis of various aspects of the [fair use] problem." *Ibid.*

Even if the legislative history were entirely silent, we would be bound to conclude from Congress' characterization of § 107 as a "restatement" that its effect was to preserve existing law concerning fair use of unpublished works as of other types of protected works and not to "change, narrow, or enlarge it." *Id.*, at 66. We conclude that the unpublished nature of a work is "[a] key, though not necessarily determinative, factor" tending to negate a defense of fair use. Senate Report, at 64. See 3 Nimmer § 13.05, at 13–62, n. 2; W. Patry, The Fair Use Privilege in Copyright Law 125 (1985) (hereinafter Patry).

We also find unpersuasive respondents' argument that fair use may be made of a soon-to-be-published manuscript on the ground that the author has demonstrated he has no interest in nonpublication. This argument assumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination. It is true that common-law copyright was often enlisted in the service of personal privacy. See Brandeis & Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 198–199 (1890). In its commercial guise, however, an author's right to choose when he will publish is no less deserving of pro-

tection. The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the "right to control the first public distribution" of his work, House Report, at 62, echos the common law's concern that the author or copyright owner retain control throughout this critical stage. See generally Comment, The Stage of Publication as a "Fair Use" Factor: *Harper & Row, Publishers v. Nation Enterprises*, 58 St. John's L. Rev. 597 (1984). The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term "news value" to be gained from premature publication of the author's expression. See Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983, 1004–1006 (1970) (The absolute protection the common law accorded to soon-to-be published works "[was] justified by [its] brevity and expedience"). The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing. See *Belushi* v. *Woodward*, 598 F. Supp. 36 (DC 1984) (successful marketing depends on coordination of serialization and release to public); Marks, Subsidiary Rights and Permissions, in What Happens in Book Publishing 230 (C. Grannis ed. 1967) (exploitation of subsidiary rights is necessary to financial success of new books). Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use.

B

Respondents, however, contend that First Amendment values require a different rule under the circumstances of this case. The thrust of the decision below is that "[t]he scope of [fair use] is undoubtedly wider when the information

conveyed relates to matters of high public concern." *Consumers Union of the United States, Inc.* v. *General Signal Corp.*, 724 F. 2d 1044, 1050 (CA2 1983) (construing 723 F. 2d 195 (1983) (case below) as allowing advertiser to quote Consumer Reports), cert. denied, 469 U. S. 823 (1984). Respondents advance the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use—the piracy of verbatim quotations for the purpose of "scooping" the authorized first serialization. Respondents explain their copying of Mr. Ford's expression as essential to reporting the news story it claims the book itself represents. In respondents' view, not only the facts contained in Mr. Ford's memoirs, but "the precise manner in which [he] expressed himself [were] as newsworthy as what he had to say." Brief for Respondents 38–39. Respondents argue that the public's interest in learning this news as fast as possible outweighs the right of the author to control its first publication.

The Second Circuit noted, correctly, that copyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." 723 F. 2d, at 203. No author may copyright his ideas or the facts he narrates. 17 U. S. C. § 102(b). See, *e. g.*, *New York Times Co.* v. *United States*, 403 U. S. 713, 726, n. (1971) (BRENNAN, J., concurring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed); 1 Nimmer § 1.10[B][2]. As this Court long ago observed: "[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day." *International News Service* v. *Associated Press*, 248 U. S. 215, 234 (1918). But copyright assures those who write and publish factual narratives such as "A Time to Heal" that

they may at least enjoy the right to market the original expression contained therein as just compensation for their investment. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 575 (1977).

Respondents' theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book. See *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d 91 (CA2 1977), cert. denied, 434 U. S. 1014 (1978).

Nor do respondents assert any actual necessity for circumventing the copyright scheme with respect to the types of works and users at issue here.[6] Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication. The fact that the words the author has chosen to clothe his narrative may of themselves be "newsworthy" is not an independent justification for unauthorized copying of the author's expression prior to publication. To paraphrase another recent Second Circuit decision:

> "[Respondent] possessed an unfettered right to use any factual information revealed in [the memoirs] for the purpose of enlightening its audience, but it can claim

---

[6] It bears noting that Congress in the Copyright Act recognized a public interest warranting specific exemptions in a number of areas not within traditional fair use, see, *e. g.*, 17 U. S. C. § 115 (compulsory license for records); § 105 (no copyright in Government works). No such exemption limits copyright in personal narratives written by public servants after they leave Government service.

> no need to 'bodily appropriate' [Mr. Ford's] 'expression' of that information by utilizing portions of the actual [manuscript]. The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.*, 621 F. 2d 57, 61 (1980) (citations omitted).

Accord, *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (SDNY 1980) ("newsworthiness" of material copied does not justify copying), aff'd, 672 F. 2d 1095 (CA2), cert. denied, 459 U. S. 826 (1982); *Quinto* v. *Legal Times of Washington, Inc.*, 506 F. Supp. 554 (DC 1981) (same).

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. This Court stated in *Mazer* v. *Stein*, 347 U. S. 201, 209 (1954):

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

And again in *Twentieth Century Music Corp.* v. *Aiken:*

> "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good." 422 U. S., at 156.

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. "[T]o propose that fair use be imposed whenever the 'social value [of dissemination] . . . outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1615 (1982). And as one commentator has noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading." Sobel, Copyright and the First Amendment: A Gathering Storm?, 19 ASCAP Copyright Law Symposium 43, 78 (1971). See generally Comment, Copyright and the First Amendment; Where Lies the Public Interest?, 59 Tulane L. Rev. 135 (1984).

Moreover, freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (BURGER, C. J.). We do not suggest this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts. But in the words of New York's Chief Judge Fuld:

> "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Estate of Hemingway* v. *Random House, Inc.*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968).

Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value. See *Schnapper* v. *Foley*, 215 U. S. App. D. C. 59, 667 F. 2d 102 (1981), cert. denied, 455 U. S. 948 (1982); 1 Nimmer § 1.10[B], at 1–70, n. 24; Patry 140–142.

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use.

IV

Fair use is a mixed question of law and fact. *Pacific & Southern Co.* v. *Duncan*, 744 F. 2d 1490, 1495, n. 8 (CA11 1984). Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work." *Id.*, at 1495. Thus whether The Nation article constitutes fair use under § 107 must be reviewed in light of the principles discussed above. The factors enumerated in the section are not meant to be exclusive: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." House Report, at 65. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as

a whole; (4) the effect on the potential market for or value of the copyrighted work. We address each one separately.

Purpose of the Use. The Second Circuit correctly identified news reporting as the general purpose of The Nation's use. News reporting is one of the examples enumerated in § 107 to "give some idea of the sort of activities the courts might regard as fair use under the circumstances." Senate Report, at 61. This listing was not intended to be exhaustive, see *ibid.*; § 101 (definition of "including" and "such as"), or to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis. See H. R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967); Patry 477, n. 4. "[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." Senate Report, at 62. The fact that an article arguably is "news" and therefore a productive use is simply one factor in a fair use analysis.

We agree with the Second Circuit that the trial court erred in fixing on whether the information contained in the memoirs was actually new to the public. As Judge Meskill wisely noted, "[c]ourts should be chary of deciding what is and what is not news." 723 F. 2d, at 215 (dissenting). Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 345–346 (1974). "The issue is not what constitutes 'news,' but whether a claim of newsreporting is a valid fair use defense to an infringement of *copyrightable expression.*" Patry 119. The Nation has every right to seek to be the first to publish information. But The Nation went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a "news event" out of its unauthorized first publication of a noted figure's copyrighted expression.

The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 451. In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. See *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp., at 1144; 3 Nimmer § 13.05[A][1], at 13–71, n. 25.3.

In evaluating character and purpose we cannot ignore The Nation's stated purpose of scooping the forthcoming hardcover and Time abstracts.[7] App. to Pet. for Cert. C–27. The Nation's use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication. See *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 690 (SDNY) (purpose of text was to compete with original), aff'd, 500 F. 2d 1221 (CA2 1974). Also relevant to the "character" of the use is "the propriety of the defendant's conduct." 3 Nimmer § 13.05[A], at 13–72. "Fair use presupposes 'good faith' and 'fair dealing.'" *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130, 146 (SDNY 1968), quoting

[7] The dissent excuses The Nation's unconsented use of an unpublished manuscript as "standard journalistic practice," taking judicial notice of New York Times articles regarding the memoirs of John Erlichman, John Dean's "Blind Ambition," and Bernstein and Woodward's "The Final Days" as proof of such practice. *Post*, at 590–593, and n. 14. *Amici curiae* sought to bring this alleged practice to the attention of the Court of Appeals for the Second Circuit, citing these same articles. The Court of Appeals, at Harper & Row's motion, struck these exhibits for failure of proof at trial, Record Doc. No. 19; thus they are not a proper subject for this Court's judicial notice.

Schulman, Fair Use and the Revision of the Copyright Act, 53 Iowa L. Rev. 832 (1968). The trial court found that The Nation knowingly exploited a purloined manuscript. App. to Pet. for Cert. B–1, C–20—C–21, C–28—C–29. Unlike the typical claim of fair use, The Nation cannot offer up even the fiction of consent as justification. Like its competitor newsweekly, it was free to bid for the right of abstracting excerpts from "A Time to Heal." Fair use "distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit.'" *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d, at 94, quoting from Hearings on Bills for the General Revision of the Copyright Law before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pt. 3, p. 1706 (1966) (statement of John Schulman).

Nature of the Copyrighted Work. Second, the Act directs attention to the nature of the copyrighted work. "A Time to Heal" may be characterized as an unpublished historical narrative or autobiography. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy. See Gorman, Fact or Fancy? The Implications for Copyright, 29 J. Copyright Soc. 560, 561 (1982).

> "[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case." *Id.*, at 563.

Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the "smoking gun" is perhaps so integral to the idea expressed as to be inseparable from it. Cf. 1 Nimmer § 1.10[C]. But The Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression. Such

use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts.

The fact that a work is unpublished is a critical element of its "nature." 3 Nimmer § 13.05[A]; Comment, 58 St. John's L. Rev., at 613. Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

In the case of Mr. Ford's manuscript, the copyright holders' interest in confidentiality is irrefutable; the copyright holders had entered into a contractual undertaking to "keep the manuscript confidential" and required that all those to whom the manuscript was shown also "sign an agreement to keep the manuscript confidential." App. to Pet. for Cert. C–19—C–20. While the copyright holders' contract with Time required Time to submit its proposed article seven days before publication, The Nation's clandestine publication afforded no such opportunity for creative or quality control. *Id.*, at C–18. It was hastily patched together and contained "a number of inaccuracies." App. 300b–300c (testimony of Victor Navasky). A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to characterize as "fair."

Amount and Substantiality of the Portion Used. Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of "A Time to Heal." The District Court, however, found that "[T]he Nation took what was

essentially the heart of the book." 557 F. Supp., at 1072. We believe the Court of Appeals erred in overruling the District Judge's evaluation of the qualitative nature of the taking. See, *e. g.*, *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp., at 1145 (taking of 55 seconds out of 1 hour and 29-minute film deemed qualitatively substantial). A Time editor described the chapters on the pardon as "the most interesting and moving parts of the entire manuscript." Reply Brief for Petitioners 16, n. 8. The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters. He testified that he used verbatim excerpts because simply reciting the information could not adequately convey the "absolute certainty with which [Ford] expressed himself," App. 303; or show that "this comes from President Ford," *id.*, at 305; or carry the "definitive quality" of the original, *id.*, at 306. In short, he quoted these passages precisely because they qualitatively embodied Ford's distinctive expression.

As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the *infringing* work. As Judge Learned Hand cogently remarked, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 56 (CA2), cert. denied, 298 U. S. 669 (1936). Conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.

Stripped to the verbatim quotes,[8] the direct takings from the unpublished manuscript constitute at least 13% of the in-

---

[8] See Appendix to this opinion, *post*, p. 570. The Court of Appeals found that only "approximately 300 words" were copyrightable but did not specify which words. The court's discussion, however, indicates it

fringing article. See *Meeropol* v. *Nizer*, 560 F. 2d 1061, 1071 (CA2 1977) (copyrighted letters constituted less than 1% of infringing work but were prominently featured). The Nation article is structured around the quoted excerpts which serve as its dramatic focal points. See Appendix to this opinion, *post*, p. 570. In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the "magazine took a meager, indeed an infinitesimal amount of Ford's original language." 723 F. 2d, at 209.

Effect on the Market. Finally, the Act focuses on "the effect of the use upon the potential market for or value of the copyrighted work." This last factor is undoubtedly the single most important element of fair use.[9] See 3 Nimmer § 13.05[A], at 13–76, and cases cited therein. "Fair use, when properly applied, is limited to copying by others which

---

excluded from consideration those portions of The Nation's piece that, although copied verbatim from Ford's manuscript, were quotes attributed by Ford to third persons and quotations from Government documents. At oral argument, counsel for The Nation did not dispute that verbatim quotes and very close paraphrase could constitute infringement. Tr. of Oral Arg. 24–25. Thus the Appendix identifies as potentially infringing only verbatim quotes or very close paraphrase and excludes from consideration Government documents and words attributed to third persons. The Appendix is not intended to endorse any particular rule of copyrightability but is intended merely as an aid to facilitate our discussion.

[9] Economists who have addressed the issue believe the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero. See, *e. g.*, T. Brennan, *Harper & Row* v. *The Nation*, Copyrightability and Fair Use, Dept. of Justice Economic Policy Office Discussion Paper 13–17 (1984); Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1615 (1982). As the facts here demonstrate, there is a fully functioning market that encourages the creation and dissemination of memoirs of public figures. In the economists' view, permitting "fair use" to displace normal copyright channels disrupts the copyright market without a commensurate public benefit.

does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D], at 1–87. The trial court found not merely a potential but an actual effect on the market. Time's cancellation of its projected serialization and its refusal to pay the $12,500 were the direct effect of the infringement. The Court of Appeals rejected this fact-finding as clearly erroneous, noting that the record did not establish a causal relation between Time's nonperformance and respondents' unauthorized publication of Mr. Ford's *expression* as opposed to the facts taken from the memoirs. We disagree. Rarely will a case of copyright infringement present such clear-cut evidence of actual damage. Petitioners assured Time that there would be no other authorized publication of *any* portion of the unpublished manuscript prior to April 23, 1979. *Any* publication of material from chapters 1 and 3 would permit Time to renegotiate its final payment. Time cited The Nation's article, which contained verbatim quotes from the unpublished manuscript, as a reason for its nonperformance. With respect to apportionment of profits flowing from a copyright infringement, this Court has held that an infringer who commingles infringing and noninfringing elements "must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 406 (1940). Cf. 17 U. S. C. § 504(b) (the infringer is required to prove elements of profits attributable to other than the infringed work). Similarly, once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression. See 3 Nimmer § 14.02, at 14–7—14–8.1. Petitioners established a prima facie case of actual damage that respondents failed to rebut. See *Stevens Linen Associates*,

Inc. v. *Mastercraft Corp.*, 656 F. 2d 11, 15 (CA2 1981). The trial court properly awarded actual damages and accounting of profits. See 17 U. S. C. § 504(b).

More important, to negate fair use one need only show that if the challenged use "should become widespread, it would adversely affect the *potential* market for the copyrighted work." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 451 (emphasis added); *id.*, at 484, and n. 36 (collecting cases) (dissenting opinion). This inquiry must take account not only of harm to the original but also of harm to the market for derivative works. See *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F. 2d 57 (CA2 1980); *Meeropol* v. *Nizer, supra,* at 1070; *Roy Export* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp., at 1146. "If the defendant's work adversely affects the value of any of the rights in the copyrighted work (in this case the adaptation [and serialization] right) the use is not fair." 3 Nimmer § 13.05[B], at 13–77—13–78 (footnote omitted).

It is undisputed that the factual material in the balance of The Nation's article, besides the verbatim quotes at issue here, was drawn exclusively from the chapters on the pardon. The excerpts were employed as featured episodes in a story about the Nixon pardon—precisely the use petitoners had licensed to Time. The borrowing of these verbatim quotes from the unpublished manuscript lent The Nation's piece a special air of authenticity—as Navasky expressed it, the reader would know it was Ford speaking and not The Nation. App. 300c. Thus it directly competed for a share of the market for prepublication excerpts. The Senate Report states:

> "With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." Senate Report, at 65.

Placed in a broader perspective, a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general. "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Ibid.*

V

The Court of Appeals erred in concluding that The Nation's use of the copyrighted material was excused by the public's interest in the subject matter. It erred, as well, in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use. Finally, in finding the taking "infinitesimal," the Court of Appeals accorded too little weight to the qualitative importance of the quoted passages of original expression. In sum, the traditional doctrine of fair use, as embodied in the Copyright Act, does not sanction the use made by The Nation of these copyrighted materials. Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. See *Pacific & Southern Co.* v. *Duncan*, 744 F. 2d, at 1499–1500. But Congress has not designed, and we see no warrant for judicially imposing, a "compulsory license" permitting unfettered access to the unpublished copyrighted expression of public figures.

The Nation conceded that its verbatim copying of some 300 words of direct quotation from the Ford manuscript would constitute an infringement unless excused as a fair use. Because we find that The Nation's use of these verbatim excerpts from the unpublished manuscript was not a fair use, 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.

APPENDIX TO OPINION OF THE COURT

The portions of The Nation article which were copied verbatim from "A Time to Heal," excepting quotes from Government documents and quotes attributed by Ford to third persons, are identified in boldface in the text. See *ante*, at 562, n. 7. The corresponding passages in the Ford manuscript are footnoted.

THE FORD MEMOIRS BEHIND THE NIXON PARDON

In his memoirs, *A Time To Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Rockefeller for Vice President, and that he regretted his **"cowardice"**[1] in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that sur-

---

[1] I was angry at myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller, whatever the consequences." p. 496.

rounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the **"smoking gun"**[2] and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revelation: **"Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view."**[3] Ford had believed him, but he let Haig explain the President's alternatives.

He could **"ride it out"**[4] or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that **Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him.**[5] Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, **"Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."**[6]

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

---

[2] [I]t contained the so-called smoking gun. p. 3.

[3] [O]ver the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view. p. 7.

[4] The first [option] was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. p. 4.

[5] Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President—Gerald Ford—would pardon him. p. 5.

[6] Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power. pp. 5–6.

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that **the mere mention of a pardon "could cause a lot of trouble."**[7]

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that **the President was not guilty of an impeachable offense. "Had I said otherwise at that moment,"** he writes, **"the whole house of cards might have collapsed."**[8]

In justifying the pardon, Ford goes out of his way to assure the reader that **"compassion for Nixon as an individual**

---

[7] Only after I had finished did [Bryce Harlow] let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead. p. 18.

[8] During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. p. 21.

hadn't prompted my decision at all." [9] Rather, he did it because he had **"to get the monkey off my back one way or the other."** [10]

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some **"crucial" information** [11]—*i. e.*, that Nixon was under investigation in ten separate areas, and that **the court process could "take years."** [12] Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Ford decided that court proceedings against Nixon might take six years, that **Nixon "would not spend time quietly in San Clemente,"** [13] and **"it would be virtually impossible for me to direct public attention on anything else."** [14]

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

---

[9] But compassion for Nixon as an individual hadn't prompted my decision at all. p. 266.

[10] I had to get the monkey off my back one way or another. p. 236.

[11] Jaworski gave Phil several crucial pieces of information. p. 246.

[12] And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. p. 248.

[13] The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. p. 238.

[14] It would be virtually impossible for me to direct public attention on anything else. p. 239.

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response. Nixon was not likely to yield. **"His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."** [15]

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Lets get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that **"no statement would be better than that."** [16] They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he

---

[15] But [Miller] wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. p. 246.

[16] When Zeigler asked Becker what he thought of it, Becker replied that *no* statement would be better than that. p. 251.

felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. **"I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible."** [17]

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. **"If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion."** [18] Ford went:

He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. [19]

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

---

[17] Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible. p. 256.

[18] My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out it had begun. Of course I would go. p. 298.

[19] He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. p. 299.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. **"Henry,"** he said, **"I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."** [20]

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. **"I know we'll get along."** Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, **"I don't want to make any change. I think it's worked out well, so let's keep it that way."** [21]

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had **"no ambition to hold office after January 1977."** [22] Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

---

[20] "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you." p. 46.

[21] "We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." p. 46.

[22] I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. p. 155.

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez.* At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. **"Massive airstrikes would constitute overkill,"** Ford decided. **"It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."** [23]

---

[23] Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets in the vicinity of Kompong Som. p. 416.

On Nixon's Character. **Nixon's flaw**, according to Ford, **was "pride." "A terribly proud man,"** writes Ford, **"he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"** [24]

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, **"His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong,"** [25] all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that **"Nixon was out of touch with reality."** [26]

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H. R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post's* feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the

---

[24] In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) p. 53.

[25] His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. p. 54.

[26] The speech lasted fifteen minutes, and at the end I was convinced Nixon was out of touch with reality. p. 57.

courts, and that "There is a fundamental journalistic principle here—a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

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

The Court holds that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance—the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting "the economic incentive to create and disseminate ideas," *ante*, at 558, this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U. S. C. § 107. I therefore respectfully dissent.

I

A

This case presents two issues. First, did The Nation's use of material from the Ford manuscript in forms other than direct quotation from that manuscript infringe Harper & Row's copyright. Second, did the quotation of approximately 300 words from the manuscript infringe the copyright because this quotation did not constitute "fair use" within the mean-

ing of § 107 of the Copyright Act. 17 U. S. C. § 107. The Court finds no need to resolve the threshold copyrightability issue. The use of 300 words of quotation was, the Court finds, beyond the scope of fair use and thus a copyright infringement.[1] Because I disagree with the Court's fair use holding, it is necessary for me to decide the threshold copyrightability question.

B

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909). Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product. The challenge of copyright is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984).

The "originality" requirement now embodied in § 102 of the Copyright Act is crucial to maintenance of the appropriate balance between these competing interests.[2] Properly in-

[1] In bypassing the threshold issue, the Court certainly does not intimate that The Nation's use of ideas and information other than the quoted material would constitute a violation of the copyright laws. At one point in its opinion the Court correctly states the governing principles with respect to the copyrightability question. See *ante*, at 556 ("No author may copyright his ideas or the facts he narrates").

[2] Section 102(b) states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such

terpreted in the light of the legislative history, this section extends copyright protection to an author's literary form but permits free use by others of the ideas and information the author communicates. See S. Rep. No. 93–983, pp. 107–108 (1974) ("Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary . . . form in which the author expressed intellectual concepts"); H. R. Rep. No. 94–1476, pp. 56–57 (1976) (same); *New York Times Co.* v. *United States*, 403 U. S. 713, 726, n. (1971) (BRENNAN, J., concurring) ("[T]he copyright laws, of course, protect only the form of expression and not the ideas expressed"). This limitation of protection to literary form precludes any claim of copyright in facts, including historical narration.

> "It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const., Art I, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it." *International News Service* v. *Associated Press*, 248 U. S. 215, 234 (1918).

Accord, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 309 (CA2 1966), cert. denied, 385 U. S. 1009 (1967). See 1 Nimmer § 2.11[A], at 2–158.[3]

---

work." 17 U. S. C. § 102(b). The doctrines of fair use, see 17 U. S. C. § 107, and substantial similarity, see 3 M. Nimmer, Copyright § 13.05 (1984) (hereinafter Nimmer), also function to accommodate these competing considerations. See generally Gorman, Fact or Fancy? The Implications for Copyright, 29 J. Copyright Soc. 560 (1982).

[3] By the same token, an author may not claim copyright in statements made by others and reported verbatim in the author's work. See *Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 148 (DC 1980); *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 USPQ 155, 161 (SDNY 1978).

The "promotion of science and the useful arts" requires this limit on the scope of an author's control. Were an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors. See *Hoehling* v. *Universal City Studios, Inc.*, 618 F. 2d 972, 979 (CA2 1980). This limitation on copyright also ensures consonance with our most important First Amendment values. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 577, n. 13 (1977). Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), leaves no room for a statutory monopoly over information and ideas. "The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained." *Lee* v. *Runge*, 404 U. S. 887, 893 (1971) (Douglas, J., dissenting from denial of certiorari). A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are "the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.[4]

It follows that infringement of copyright must be based on a taking of literary form, as opposed to the ideas or information contained in a copyrighted work. Deciding whether an infringing appropriation of literary form has occurred is difficult for at least two reasons. First, the distinction between

---

[4] It would be perverse to prohibit government from limiting the financial resources upon which a political speaker may draw, see *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480 (1985), but to permit government to limit the intellectual resources upon which that speaker may draw.

literary form and information or ideas is often elusive in practice. Second, infringement must be based on a *substantial* appropriation of literary form. This determination is equally challenging. Not surprisingly, the test for infringement has defied precise formulation.[5] In general, though, the inquiry proceeds along two axes: *how closely* has the second author tracked the first author's particular language and structure of presentation; and *how much* of the first author's language and structure has the second author appropriated.[6]

In the present case the infringement analysis must be applied to a historical biography in which the author has chronicled the events of his White House tenure and commented on those events from his unique perspective. Apart from the quotations, virtually all of the material in The Nation's article indirectly recounted Mr. Ford's factual narrative of the Nixon resignation and pardon, his latter-day reflections on some events of his Presidency, and his perceptions of the personalities at the center of those events. See *ante*, at 570–579. No copyright can be claimed in this information *qua* information. Infringement would thus have to be based

---

[5] The protection of literary form must proscribe more than merely word-for-word appropriation of substantial portions of an author's work. Otherwise a plagiarist could avoid infringement by immaterial variations. *Nichols* v. *Universal Pictures Corp.*, 45 F. 2d 119, 121 (CA2 1930). The step beyond the narrow and clear prohibition of wholesale copying is, however, a venture onto somewhat uncertain terrain. Compare *Hoehling* v. *Universal City Studios, Inc.*, 618 F. 2d 972, 974 (CA2 1980), with *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d 91 (CA2 1977). See also 1 Nimmer § 1.10B, at 1–73—1–74 ("It is the particular selection and arrangement of ideas, as well as a given specificity in the form of their expression, which warrants protection"); Chafee, Reflections on the Law of Copyright: I, 45 Colum. L. Rev. 503, 513 (1945) ("[T]he line . . . lie[s] somewhere between the author's idea and the precise form in which he wrote it down. . . . [T]he protection covers the 'pattern' of the work"); Gorman, *supra*, at 593 ("too literal and substantial copying and paraphrasing of . . . language").

[6] The inquiry into the substantiality of appropriation has a quantitative and a qualitative aspect.

on too close and substantial a tracking of Mr. Ford's expression of this information.[7]

The Language. Much of the information The Nation conveyed was not in the form of paraphrase at all, but took the form of synopsis of lengthy discussions in the Ford manuscript.[8] In the course of this summary presentation, The

[7] Neither the District Court nor the dissent in the Court of Appeals approached the question in this way. Despite recognizing that this material was not "per se copyrightable," the District Court held that the "totality of these facts and memoranda collected together with Mr. Ford's reflections . . . is protected by the copyright laws." 557 F. Supp. 1067, 1072–1073 (SDNY 1983). The dissent in the Court of Appeals signaled approval of this approach. 723 F. 2d 195, 213–214 (CA2 1983) (Meskill, J., dissenting). Such an approach must be rejected. Copyright protection cannot be extended to factual information whenever that information is interwoven with protected expression (purportedly in this case Mr. Ford's reflections) into an expressive "totality." Most works of history or biography blend factual narrative and reflective or speculative commentary in this way. Precluding subsequent use of facts so presented cannot be squared with the specific legislative intent, expressed in both House and Senate Reports, that "[c]opyright does not preclude others from using the . . . information revealed by the author's work." See S. Rep. No. 93–983, pp. 107–108 (1974); H. R. Rep. No. 94–1476, pp. 56–57 (1976). The core purposes of copyright would be thwarted and serious First Amendment concerns would arise. An author could obtain a monopoly on narration of historical events simply by being the first to discuss them in a reflective or analytical manner.

[8] For example, the Ford manuscript expends several hundred words discussing relations between Mr. Ford and Ronald Reagan in the weeks before the Republican Convention of 1976:

"About a month before the convention, my aides had met with Reagan's representatives to discuss the need for party unity. And they had reached an agreement. At the end of the Presidential balloting, the winner would go to the loser's hotel suite and congratulate his opponent for waging a fine campaign. Together, they would appear at a press conference and urge all Republicans to put aside their differences and rally behind the ticket. That was the only way we could leave Kansas City with a hope of victory. When it appeared I was going to win, Sears contacted Cheney and refined the scenario. He insisted on two conditions. The first was that I had to see Reagan alone; there could be no aides from either camp in the room. Secondly, under no circumstances should I offer him the nomination to be

Nation did use occasional sentences that closely resembled language in the original Ford manuscript.[9] But these linguistic similarities are insufficient to constitute an infringement for three reasons. First, some leeway must be given to subsequent authors seeking to convey facts because those "wishing to express the ideas contained in a factual work

---

Vice President. Reagan had said all along that he wasn't interested in the job. He had meant what he said. If I tried to talk him out of it, he would have to turn me down, and that would be embarrassing because it would appear that he was refusing to help the GOP. When Cheney relayed those conditions to me, I agreed to go along with them. I would need Reagan's assistance in the fall campaign. It would be stupid to anger him or his followers at this moment.

"Later I was told that just before my arrival at the Californian's hotel, one of his closest advisors, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate, Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. Had I been aware of the Dart-Reagan conversation, would I have chosen him? I can't say for sure—I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's policies—but I certainly would have considered him." App. 628–629.

The Nation encapsulated this discussion in the following sentence: "Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate." *Id.*, at 627. In most other instances, a single sentence or brief paragraph in The Nation's article similarly conveys the gist of a discussion in the Ford manuscript that runs into the hundreds of words. See generally Addendum B to Defendant's Post-Trial Memorandum, *id.*, at 627–704.

[9] For example, at one point The Nation's article reads: "Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense." *Ante*, at 572. The portion of the Ford manuscript discussed stated: "Representative Thad Cochran . . . escorted me to a luncheon at the Jackson Hilton Hotel. During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense." App. 649. In several other places the language in The Nation's article parallels Mr. Ford's original expression to a similar degree. Compare *ante*, at 570–579, with App. 627–704.

often can choose from only a narrow range of expression." *Landsberg* v. *Scrabble Crossword Game Players, Inc.*, 736 F. 2d 485, 488 (CA9 1984). Second, much of what The Nation paraphrased was material in which Harper & Row could claim no copyright.[10] Third, The Nation paraphrased nothing approximating the totality of a single paragraph, much less a chapter or the work as a whole. At most The Nation paraphrased disparate isolated sentences from the original. A finding of infringement based on paraphrase generally requires far more close and substantial a tracking of the original language than occurred in this case. See, *e. g.*, *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d 91 (CA2 1977).

The Structure of Presentation. The article does not mimic Mr. Ford's structure. The information The Nation presents is drawn from scattered sections of the Ford work and does not appear in the sequence in which Mr. Ford presented it.[11] Some of The Nation's discussion of the pardon does roughly track the order in which the Ford manuscript presents information about the pardon. With respect to this similarity, however, Mr. Ford has done no more than present the facts

---

[10] Often the paraphrasing was of statements others had made to Mr. Ford. *E. g.*, *ante*, at 571 ("He could 'ride it out' or he could resign, Haig said"). See generally *ante*, at 570–579. No copyright can be asserted in the verbatim representation of such statements of others. 17 U. S. C. § 102. See *Suid* v. *Newsweek Magazine*, 503 F. Supp., at 148; *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 USPQ, at 161. Other paraphrased material came from Government documents in which no copyright interest can be claimed. For example, the article quotes from a memorandum prepared by Henry S. Ruth, Jr., in his official capacity as assistant to Watergate Special Prosecutor Leon Jaworski. See *ante*, at 573. This document is a work of the United States Government. See 17 U. S. C. § 105.

[11] According to an exhibit Harper & Row introduced at trial the pages in the Ford manuscript that correspond to consecutive sections of the article are as follows: 607–608, 401, 44, 496, 1, 2–3, 4, 8, 7, 4–5, 5, 5–6, 8, 14, 15, 16, 16, 18, 19, 21, 266, 236, 246, 248, 249, 238–239, 239, 243, 245, 246, 250, 250–251, 251, 252, 253, 254, 256, 298, 299, 46, 494, 537, 155–156, 216, 415, 416, 416, 53–54, 57. See App. to Pet. for Cert. E–1 to E–41.

chronologically and cannot claim infringement when a subsequent author similarly presents the facts of history in a chronological manner. Also, it is difficult to suggest that a 2,000-word article could bodily appropriate the structure of a 200,000-word book. Most of what Mr. Ford created, and most of the history he recounted, were simply not represented in The Nation's article.[12]

When The Nation was not quoting Mr. Ford, therefore, its efforts to convey the historical information in the Ford manuscript did not so closely and substantially track Mr. Ford's language and structure as to constitute an appropriation of literary form.

II

The Nation is thus liable in copyright only if the quotation of 300 words infringed any of Harper & Row's exclusive rights under § 106 of the Act. Section 106 explicitly makes the grant of exclusive rights "[s]ubject to section 107 through 118." 17 U. S. C. § 106. Section 107 states: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright." The question here is whether The Nation's

---

[12] In one sense The Nation "copied" Mr. Ford's selection of facts because it reported on only those facts Mr. Ford chose to select for presentation. But this tracking of a historian's selection of facts generally should not supply the basis for a finding of infringement. See *Myers* v. *Mail & Express Co.*, 36 Copyright Off. Bull. 478 (SDNY 1919) (L. Hand, J.). To hold otherwise would be to require a second author to duplicate the research of the first author so as to avoid reliance on the first author's judgment as to what facts are particularly pertinent. "'It is just such wasted effort that the proscription against the copyright of ideas and facts . . . are designed to prevent.'" *Miller* v. *Universal City Studios, Inc.*, 650 F. 2d 1365, 1371 (CA5 1981), quoting *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 310 (CA2 1966). See Gorman, 29 J. Copyright Soc., at 594–595.

quotation was a noninfringing fair use within the meaning of § 107.

Congress "eschewed a rigid, bright-line approach to fair use." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 449, n. 31. A court is to apply an "equitable rule of reason" analysis, *id.*, at 448, guided by four statutorily prescribed factors:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U. S. C. § 107.

These factors are not necessarily the exclusive determinants of the fair use inquiry and do not mechanistically resolve fair use issues; "no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H. R. Rep. No. 94–1476, at 65. See also *id.*, at 66 ("[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute"); S. Rep. No. 94–473, p. 62 (1975). The statutory factors do, however, provide substantial guidance to courts undertaking the proper fact-specific inquiry.

With respect to a work of history, particularly the memoirs of a public official, the statutorily prescribed analysis cannot properly be conducted without constant attention to copyright's crucial distinction between protected literary form and unprotected information or ideas. The question must always be: Was the subsequent author's use of *literary form* a fair use within the meaning of § 107, in light of the purpose for the use, the nature of the copyrighted work, the amount of literary form used, and the effect of this use of literary form on the value of or market for the original?

Limiting the inquiry to the propriety of a subsequent author's use of the copyright owner's literary form is not easy in the case of a work of history. Protection against only substantial appropriation of literary form does not ensure historians a return commensurate with the full value of their labors. The literary form contained in works like "A Time to Heal" reflects only a part of the labor that goes into the book. It is the labor of collecting, sifting, organizing, and reflecting that predominates in the creation of works of history such as this one. The value this labor produces lies primarily in the information and ideas revealed, and not in the particular collocation of words through which the information and ideas are expressed. Copyright thus does not protect that which is often of most value in a work of history, and courts must resist the tendency to reject the fair use defense on the basis of their feeling that an author of history has been deprived of the full value of his or her labor. A subsequent author's taking of information and ideas is in no sense piratical because copyright law simply does not create any property interest in information and ideas.

The urge to compensate for subsequent use of information and ideas is perhaps understandable. An inequity seems to lurk in the idea that much of the fruit of the historian's labor may be used without compensation. This, however, is not some unforeseen byproduct of a statutory scheme intended primarily to ensure a return for works of the imagination. Congress made the affirmative choice that the copyright laws should apply in this way: "Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary . . . form in which the author expressed intellectual concepts." H. R. Rep. No. 94–1476, at 56–57. This distinction is at the essence of copyright. The copyright laws serve as the "engine of free expression," *ante*, at 558, only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas. To ensure the progress of arts and sciences and the integrity

of First Amendment values, ideas and information must not be freighted with claims of proprietary right.[13]

In my judgment, the Court's fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history. The failure to distinguish between information and literary form permeates every aspect of the Court's fair use analysis and leads the Court to the wrong result in this case. Application of the statutorily prescribed analysis with attention to the distinction between information and literary form leads to a straightforward finding of fair use within the meaning of § 107.

The Purpose of the Use. The Nation's purpose in quoting 300 words of the Ford manuscript was, as the Court acknowledges, news reporting. See *ante*, at 561. The Ford work contained information about important events of recent history. Two principals, Mr. Ford and General Alexander Haig, were at the time of The Nation's publication in 1979 widely thought to be candidates for the Presidency. That The Nation objectively reported the information in the Ford manuscript without independent commentary in no way diminishes the conclusion that it was reporting news. A typical newsstory differs from an editorial precisely in that it presents newsworthy information in a straightforward and unelaborated manner. Nor does the source of the information render The Nation's article any less a news report. Often books and manuscripts, solicited and unsolicited, are

---

[13] This congressional limitation on the scope of copyright does not threaten the production of history. That this limitation results in significant diminution of economic incentives is far from apparent. In any event noneconomic incentives motivate much historical research and writing. For example, former public officials often have great incentive to "tell their side of the story." And much history is the product of academic scholarship. Perhaps most importantly, the urge to preserve the past is as old as humankind.

the subject matter of news reports. *E. g., New York Times Co.* v. *United States,* 403 U. S. 713 (1971). Frequently the manuscripts are unpublished at the time of the news report.[14]

Section 107 lists news reporting as a prime example of fair use of another's expression. Like criticism and all other purposes Congress explicitly approved in § 107, news reporting informs the public; the language of § 107 makes clear that Congress saw the spread of knowledge and information as the strongest justification for a properly limited appropriation of expression. The Court of Appeals was therefore correct to conclude that the purpose of The Nation's use—dissemination of the information contained in the quotations of Mr. Ford's work—furthered the public interest. 723 F. 2d 195, 207–208 (CA2 1983). In light of the explicit congressional endorsement in § 107, the purpose for which Ford's literary form was borrowed strongly favors a finding of fair use.

The Court concedes the validity of the news reporting purpose[15] but then quickly offsets it against three purportedly countervailing considerations. First, the Court asserts that because The Nation publishes for profit, its publication of

---

[14] *E. g.*, N. Y. Times, Aug. 2, 1984, p. C20, col. 5 (article about revelations in forthcoming biography of Cardinal Spellman); N. Y. Times, Dec. 10, 1981, p. A18, col. 1 (article about revelations in forthcoming book by John Erlichman); N. Y. Times, Sept. 29, 1976, p. 1, col. 2 (article about revelations in forthcoming autobiography of President Nixon); N. Y. Times, Mar. 27, 1976, p. 9, col. 1 (article about revelations concerning President Nixon's resignation in forthcoming book The Final Days); N. Y. Times, Sept. 23, 1976, p. 36, col. 1 (article about revelations concerning President Ford in forthcoming book Blind Ambition by John Dean).

[15] The Court properly rejects the argument that this is not legitimate news. Courts have no business making such evaluations of journalistic quality. See *ante,* at 561. The Court also properly rejects the argument that this use is nonproductive. See *ibid.* News reporting, which encompasses journalistic judgment with respect to selection, organization, and presentation of facts and ideas, is certainly a productive use. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 478–479 (BLACKMUN, J., dissenting).

the Ford quotes is a presumptively unfair commercial use. Second, the Court claims that The Nation's stated desire to create a "news event" signaled an illegitimate purpose of supplanting the copyright owner's right of first publication. *Ante*, at 562–563. Third, The Nation acted in bad faith, the Court claims, because its editor "knowingly exploited a purloined manuscript." *Ante*, at 563.

The Court's reliance on the commercial nature of The Nation's use as "a separate factor that tends to weigh against a finding of fair use," *ante*, at 562, is inappropriate in the present context. Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use based on news reporting or criticism because that reporting or criticism was published for profit is to render meaningless the congressional imprimatur placed on such uses.[16]

Nor should The Nation's intent to create a "news event" weigh against a finding of fair use. Such a rule, like the

[16] To support this claim the Court refers to some language in *Sony Corp. of America* v. *Universal City Studios, Inc.*, *supra*, to the effect that "every commercial use of copyrighted material is presumptively an unfair exploitation." *Id.*, at 451. See *ante*, at 562. Properly understood, this language does not support the Court's position in this case. The Court in *Sony Corp.* dealt with a use—video recording of copyrighted television programs for personal use—about which Congress had expressed no policy judgment. When a court evaluates uses that Congress has not specifically addressed, the presumption articulated in *Sony Corp.* is appropriate to effectuate the congressional instruction to consider "whether such use is of a commercial nature." 17 U. S. C. § 107(1). Also, the Court made that statement in the course of evaluating a use that appropriated the *entirety* of the copyrighted work in a form *identical* to that of the original; the presumption articulated may well have been intended to apply to takings under these circumstances. But, in light of the specific language of § 107, this presumption is not appropriately employed to negate the weight Congress explicitly gave to news reporting as a justification for limited use of another's expression.

Court's automatic presumption against news reporting for profit, would undermine the congressional validation of the news reporting purpose. A news business earns its reputation, and therefore its readership, through consistent prompt publication of news—and often through "scooping" rivals. More importantly, the Court's failure to maintain the distinction between information and literary form colors the analysis of this point. Because Harper & Row had no legitimate copyright interest in the information and ideas in the Ford manuscript, The Nation had every right to seek to be the first to disclose these facts and ideas to the public. The record suggests only that The Nation sought to be the first to reveal the information in the Ford manuscript. The Nation's stated purpose of scooping the competition should under those circumstances have no negative bearing on the claim of fair use. Indeed the Court's reliance on this factor would seem to amount to little more than distaste for the standard journalistic practice of seeking to be the first to publish news.

The Court's reliance on The Nation's putative bad faith is equally unwarranted. No court has found that The Nation possessed the Ford manuscript illegally or in violation of any common-law interest of Harper & Row; all common-law causes of action have been abandoned or dismissed in this case. 723 F. 2d, at 199–201. Even if the manuscript had been "purloined" by someone, nothing in this record imputes culpability to The Nation.[17] On the basis of the record in this case, the most that can be said is that The Nation made use of the contents of the manuscript knowing the copyright owner would not sanction the use.

---

[17] This case is a far cry from *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130, 146 (SDNY 1968), the only case the Court cites to support consideration of The Nation's purported bad faith. In that case the publisher claiming fair use had personally stolen film negatives from the offices of Time and then published graphic representations of the stolen photographic images. And the court found fair use despite these circumstances. *Ibid.*

At several points the Court brands this conduct thievery. See, *e. g.*, *ante*, at 556, 563. This judgment is unsupportable, and is perhaps influenced by the Court's unspoken tendency in this case to find infringement based on the taking of information and ideas. With respect to the appropriation of information and ideas other than the quoted words, The Nation's use was perfectly legitimate despite the copyright owner's objection because no copyright can be claimed in ideas or information. Whether the quotation of 300 words was an infringement or a fair use within the meaning of § 107 is a close question that has produced sharp division in both this Court and the Court of Appeals. If the Copyright Act were held not to prohibit the use, then the copyright owner would have had no basis in law for objecting. The Nation's awareness of an objection that has a significant chance of being adjudged unfounded cannot amount to bad faith. Imputing bad faith on the basis of no more than knowledge of such an objection, the Court impermissibly prejudices the inquiry and impedes arrival at the proper conclusion that the "purpose" factor of the statutorily prescribed analysis strongly favors a finding of fair use in this case.

The Nature of the Copyrighted Work. In *Sony Corp. of America* v. *Universal City Studios, Inc.*, we stated that "not . . . all copyrights are fungible" and that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture." 464 U. S., at 455, n. 40. These statements reflect the principle, suggested in § 107(2) of the Act, that the scope of fair use is generally broader when the source of borrowed expression is a factual or historical work. See 3 Nimmer § 13.05[A][2], at 13–73—13–74. "[I]nformational works," like the Ford manuscript, "that readily lend themselves to productive use by others, are less protected." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 496–497 (BLACKMUN, J., dissenting). Thus the second statutory factor also favors a finding of fair use in this case.

The Court acknowledges that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy," *ante*, at 563, and that "[s]ome of the briefer quotations from the memoir are arguably necessary to convey the facts," *ibid.* But the Court discounts the force of this consideration, primarily on the ground that "[t]he fact that a work is unpublished is a crucial element of its 'nature.'" *Ante*, at 564.[18] At this point the Court introduces into analysis of this case a categorical presumption against prepublication fair use. See *ante*, at 555 ("Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use").

This categorical presumption is unwarranted on its own terms and unfaithful to congressional intent.[19] Whether a

---

[18] The Court also discounts this factor in part because the appropriation of The Nation, "focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts." *Ante*, at 564. Whatever the propriety of this view of The Nation's use, it is properly analyzed under the third statutory fair use factor—the amount and substantiality of the expression taken in relation to the copyrighted work as a whole, 17 U. S. C. § 107(3)—and will be analyzed as such in this opinion.

[19] The Court lays claim to specific congressional intent supporting the presumption against prepublication fair use. See *ante*, at 553, quoting S. Rep. No. 94–473, p. 64 (1975); *ante*, at 551, n. 4, 553–554. The argument based on congressional intent is unpersuasive for three reasons.

First, the face of the statute clearly allows for prepublication fair use. The right of first publication, like all other rights § 106 of the Act specifically grants copyright owners, is explicitly made "subject to section 107," the statutory fair use provision. See 17 U. S. C. § 106.

Second, the language from the Senate Report on which the Court relies so heavily, see *ante*, at 553, simply will not bear the weight the Court places on it. The Senate Report merely suggests that prepublication photocopying for classroom purposes will not generally constitute fair use when the author has an interest in the confidentiality of the unpublished work, evidenced by the author's "deliberate choice" not to publish. Given that the face of § 106 specifically allows for prepublication fair use, it would be unfaithful to the intent of Congress to draw from this circumscribed

particular prepublication use will impair any interest the Court identifies as encompassed within the right of first publication, see *ante*, at 552–555,[20] will depend on the nature of the copyrighted work, the timing of prepublication use, the amount of expression used, and the medium in which the second author communicates. Also, certain uses might be tolerable for some purposes but not for others. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, *supra*, at 490, n. 40. The Court is ambiguous as to whether it relies on the force of the presumption against prepublication fair use or an analysis of the purpose and effect of this particular use. Compare *ante*, at 552–555, with *ante*, at 564. To the extent the Court relies on the presumption, it presumes intolerable

---

suggestion in the Senate Report a blanket presumption against any amount of prepublication fair use for any purpose and irrespective of the effect of that use on the copyright owner's privacy, editorial, or economic interests.

Third, the Court's reliance on congressional adoption of the common law is also unpersuasive. The common law did not set up the monolithic barrier to prepublication fair use that the Court wishes it did. See, *e. g.*, *Estate of Hemingway* v. *Random House, Inc.*, 53 Misc. 2d 462, 279 N. Y. S. 2d 51 (S. Ct. N. Y. Cty.), aff'd, 29 App. Div. 2d 633, 285 N. Y. S. 2d 568 (1st Jud. Dept. 1967), aff'd on other grounds, 23 N. Y. 2d 341, 244 N. E. 2d 250 (1968). The statements of general principle the Court cites to support its contrary representation of the common law, see *ante*, at 551, n. 4, are themselves unsupported by reference to substantial judicial authority. Congressional endorsement of the common law of fair use should not be read as adoption of any rigid presumption against prepublication use. If read that way, the broad statement that the Copyright Act was intended to incorporate the common law would in effect be given the force of nullifying Congress' repeated methodological prescription that definite rules are inappropriate and fact-specific analysis is required. The broad language adopting the common-law approach to fair use is best understood as an endorsement of the essential fact-specificity and case-by-case methodology of the common law of fair use.

[20] The Court finds the right of first publication particularly weighty because it encompasses three important interests: (i) a privacy interest in whether to make expression public at all; (ii) an editorial interest in ensuring control over the work while it is being groomed for public dissemination; and (iii) an economic interest in capturing the full remunerative potential of initial release to the public. *Ante*, at 552–555.

injury—in particular the usurpation of the economic interest[21]—based on no more than a quick litmus test for prepublication timing. Because "Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests," we held last Term that the fair use inquiry could never be resolved on the basis of such a "two dimensional" categorical approach. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S., at 455, n. 40 (rejecting categorical requirement of "productive use").

To the extent the Court purports to evaluate the facts of this case, its analysis relies on sheer speculation. The quotation of 300 words from the manuscript infringed no privacy interest of Mr. Ford. This author intended the words in the manuscript to be a public statement about his Presidency. Lacking, therefore, is the "deliberate choice on the part of the copyright owner" to keep expression confidential, a consideration that the Senate Report—in the passage on which the Court places great reliance, see *ante*, at 553—recognized as the impetus behind narrowing fair use for unpublished works. See S. Rep. No. 94–473, at 64. See also 3 Nimmer § 13.05[A], at 13–73 ("[T]he scope of the fair use doctrine is considerably narrower with respect to unpublished works *which are held confidential by their copyright owners*") (emphasis added). What the Court depicts as the copyright owner's "confidentiality" interest, see *ante*, at 564, is not a privacy interest at all. Rather, it is no more than an economic interest in capturing the full value of initial release of information to

---

[21] Perhaps most inappropriate is the Court's apocalyptic prophesy that permitting any prepublication use for news reporting will "effectively destroy any expectation of copyright protection in the work of a public figure." *Ante*, at 557. The impact of a prepublication use for purposes of news reporting will obviously vary with the circumstances. A claim of news reporting should not be a fig leaf for substantial plagiarism, see *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F. 2d 91 (CA2 1977), but there is no warrant for concluding that prepublication quotation of a few sentences will usually drain all value from a copyright owner's right of first publication.

the public, and is properly analyzed as such. See *infra*, at 602–603. Lacking too is any suggestion that The Nation's use interfered with the copyright owner's interest in editorial control of the manuscript. The Nation made use of the Ford quotes on the eve of official publication.

Thus the only interest The Nation's prepublication use might have infringed is the copyright owner's interest in capturing the full economic value of initial release. By considering this interest as a component of the "nature" of the copyrighted work, the Court's analysis deflates The Nation's claim that the informational nature of the work supports fair use without any inquiry into the actual or potential economic harm of The Nation's particular prepublication use. For this reason, the question of economic harm is properly considered under the fourth statutory factor—the effect on the value of or market for the copyrighted work, 17 U. S. C. § 107(4)—and not as a presumed element of the "nature" of the copyright.

The Amount and Substantiality of the Portion Used. More difficult questions arise with respect to judgments about the importance to this case of the amount and substantiality of the quotations used. The Nation quoted only approximately 300 words from a manuscript of more than 200,000 words, and the quotes are drawn from isolated passages in disparate sections of the work. The judgment that this taking was quantitatively "infinitesimal," 723 F. 2d, at 209, does not dispose of the inquiry, however. An evaluation of substantiality in qualitative terms is also required. Much of the quoted material was Mr. Ford's matter-of-fact representation of the words of others in conversations with him; such quotations are "arguably necessary adequately to convey the facts," *ante*, at 563, and are not rich in expressive content. Beyond these quotations a portion of the quoted material was drawn from the most poignant expression in the Ford manuscript; in particular The Nation made use of six examples of Mr. Ford's expression of his reflections on

events or perceptions about President Nixon.[22] The fair use inquiry turns on the propriety of the use of these quotations with admittedly strong expressive content.

The Court holds that "in view of the expressive value of the excerpts and their key role in the infringing work," this third statutory factor disfavors a finding of fair use.[23] To support

---

[22] These six quotes are:

(1) "'[C]ompassion for Nixon as an individual hadn't prompted my decision at all.' Rather, he did it because he had 'to get the monkey off my back one way or the other.'" *Ante*, at 572–573.

(2) "Nixon 'would not spend the time quietly in San Clemente,' and 'it would be virtually impossible for me to direct public attention on anything else.'" *Ante*, at 573.

(3) "'I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible.'" *Ante*, at 575.

(4) "'If I made the trip it would remind everybody of Watergate and the pardon. If I didn't people would say I lacked compassion.'" *Ibid.*

(5) "He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death." *Ibid.*

(6) "'A terribly proud man,' writes Ford, 'he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)' . . . 'His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong.' . . . 'Nixon was out of touch with reality.'" *Ante*, at 578.

[23] The Court places some emphasis on the fact that the quotations from the Ford work constituted a substantial portion of The Nation's article. Superficially, the Court would thus appear to be evaluating The Nation's quotation of 300 words in relation to the amount and substantiality of expression used in relation to the second author's work as a whole. The statute directs the inquiry into "the amount and substantiality of the portion used in relation to *the copyrighted work* as a whole," 17 U. S. C. § 107(3) (emphasis added). As the statutory directive implies, it matters little

this conclusion, the Court purports to rely on the District Court factual findings that The Nation had taken "the heart of the book." 557 F. Supp. 1062, 1072 (SDNY 1983). This reliance is misplaced, and would appear to be another result of the Court's failure to distinguish between information and literary form. When the District Court made this finding, it was evaluating not the quoted words at issue here but the "totality" of the information and reflective commentary in the Ford work. *Ibid.* The vast majority of what the District Court considered the heart of the Ford work, therefore, consisted of ideas and information The Nation was free to use. It may well be that, as a qualitative matter, most of the value of the manuscript did lie in the information and ideas The Nation used. But appropriation of the "heart" of the manuscript in this sense is irrelevant to copyright analysis because copyright does not preclude a second author's use of information and ideas.

Perhaps tacitly recognizing that reliance on the District Court finding is unjustifiable, the Court goes on to evaluate independently the quality of the expression appearing in The Nation's article. The Court states that "[t]he portions actually quoted were selected by Mr. Navasky as among the most powerful passages." *Ante,* at 565. On the basis of no more than this observation, and perhaps also inference from the fact that the quotes were important to The Nation's article,[24] the Court adheres to its conclusion that The Nation appropriated the heart of the Ford manuscript.

---

whether the second author's use is 1- or 100-percent appropriated expression if the taking of that expression had no adverse effect on the copyrighted work. See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984) (100% of expression taken). I presume, therefore, that the Court considered the role of the expression "in the infringing work" only as indirect evidence of the qualitative value of the expression taken in this case. If read this way, the point dovetails with the Court's major argument that The Nation appropriated the most valuable sentences of the work.

[24] See n. 23, *supra.*

At least with respect to the six particular quotes of Mr. Ford's observations and reflections about President Nixon, I agree with the Court's conclusion that The Nation appropriated some literary form of substantial quality. I do not agree, however, that the substantiality of the expression taken was clearly excessive or inappropriate to The Nation's news reporting purpose.

Had these quotations been used in the context of a critical book review of the Ford work, there is little question that such a use would be fair use within the meaning of § 107 of the Act. The amount and substantiality of the use—in both quantitative and qualitative terms—would have certainly been appropriate to the purpose of such a use. It is difficult to see how the use of these quoted words in a news report is less appropriate. The Court acknowledges as much: "[E]ven substantial quotations might qualify as a fair use in a review of a published work or a news account of a speech that had been delivered to the public." See *ante*, at 564. With respect to the motivation for the pardon and the insights into the psyche of the fallen President, for example, Mr. Ford's reflections and perceptions are so laden with emotion and deeply personal value judgments that full understanding is immeasurably enhanced by reproducing a limited portion of Mr. Ford's own words. The importance of the work, after all, lies not only in revelation of previously unknown fact but also in revelation of the thoughts, ideas, motivations, and fears of two Presidents at a critical moment in our national history. Thus, while the question is not easily resolved, it is difficult to say that the use of the six quotations was gratuitous in relation to the news reporting purpose.

Conceding that even substantial quotation is appropriate in a news report of a *published* work, the Court would seem to agree that this quotation was not clearly inappropriate in relation to The Nation's news reporting purpose. For the Court, the determinative factor is again that the substantiality of the use was inappropriate in relation to the pre-

publication timing of that use. That is really an objection to the effect of this use on the market for the copyrighted work, and is properly evaluated as such.

The Effect on the Market. The Court correctly notes that the effect on the market "is undoubtedly the single most important element of fair use." *Ante*, at 566, citing 3 Nimmer § 13.05[A], at 13–76, and the Court properly focuses on whether The Nation's use adversely affected Harper & Row's serialization potential and not merely the market for sales of the Ford work itself. *Ante*, at 566–567. Unfortunately, the Court's failure to distinguish between the use of information and the appropriation of literary form badly skews its analysis of this factor.

For purposes of fair use analysis, the Court holds, it is sufficient that the *entire article* containing the quotes eroded the serialization market potential of Mr. Ford's work. *Ante*, at 567. On the basis of Time's cancellation of its serialization agreement, the Court finds that "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage." *Ibid.* In essence, the Court finds that by using some quotes in a story about the Nixon pardon, The Nation "competed for a share of the market of prepublication excerpts" *ante*, at 568, because Time planned to excerpt from the chapters about the pardon.

The Nation's publication indisputably precipitated Time's eventual cancellation. But that does not mean that The Nation's use of the 300 quoted words caused this injury to Harper & Row. Wholly apart from these quoted words, The Nation published significant information and ideas from the Ford manuscript. If it was this publication of information, and not the publication of the few quotations, that caused Time to abrogate its serialization agreement, then whatever the negative effect on the serialization market, that effect was the product of wholly legitimate activity.

The Court of Appeals specifically held that "the evidence does not support a finding that it was the very limited use of expression per se which led to *Time's* decision not to print ex-

cerpts." 723 F. 2d, at 208. I fully agree with this holding. If The Nation competed with Time, the competition was not for a share of the market in excerpts of literary form but for a share of the market in the new information in the Ford work. That the information, and not the literary form, represents most of the real value of the work in this case is perhaps best revealed by the following provision in the contract between Harper & Row and Mr. Ford:

> "Author acknowledges that the value of the rights granted to publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the work hereunder." App. 484.

The contract thus makes clear that Harper & Row sought to benefit substantially from monopolizing the initial revelation of information known only to Ford.

Because The Nation was the first to convey the information in this case, it did perhaps take from Harper & Row some of the value that publisher sought to garner for itself through the contractual arrangement with Ford and the license to Time. Harper & Row had every right to seek to monopolize revenue from that potential market through contractual arrangements but it has no right to set up copyright as a shield from competition in that market because copyright does not protect information. The Nation had every right to seek to be the first to publish that information.[25]

---

[25] The Court's reliance on the principle that "an infringer who mingles infringing and noninfringing elements 'must abide the consequences,'" *ante*, at 567 (citation omitted), is misconceived. Once infringement of a § 106 exclusive right has been shown, it is entirely appropriate to shift to

Balancing the Interests. Once the distinction between information and literary form is made clear, the statutorily prescribed process of weighing the four statutory fair use factors discussed above leads naturally to a conclusion that The Nation's limited use of literary form was not an infringement. Both the purpose of the use and the nature of the copyrighted work strongly favor the fair use defense here. The Nation appropriated Mr. Ford's expression for a purpose Congress expressly authorized in § 107 and borrowed from a work whose nature justifies some appropriation to facilitate the spread of information. The factor that is perhaps least favorable to the claim of fair use is the amount and substantiality of the expression used. Without question, a portion of the expression appropriated was among the most poignant in the Ford manuscript. But it is difficult to conclude that this taking was excessive in relation to the news reporting purpose. In any event, because the appropriation of literary form—as opposed to the use of information—was not shown to injure Harper & Row's economic interest, any uncertainty with respect to the propriety of the amount of expression borrowed should be resolved in favor of a finding of fair use.[26] In light of the circumscribed scope of the quotation in The Nation's article and the undoubted validity of the purpose

---

the infringer the burden of showing that the infringement did not cause all the damages shown. But the *question* in this case is whether this particular use infringed any § 106 rights. Harper & Row may have shown actual damage flowing from The Nation's use of information, but they have not shown actual damage flowing from an infringement of a § 106 exclusive right.

[26] Had The Nation sought to justify a more substantial appropriation of expression on a news reporting rationale, a different case might be presented. The substantiality of the taking would certainly dilute the claim of need to use the first author's exact words to convey a particular thought or sentiment. Even if the claim of need were plausible, the equities would have to favor the copyright owner in order to prevent erosion of virtually all copyright protection for works of former public officials. In this case, however, the need is manifest and the integrity of copyright protection for the works of public officials is not threatened.

motivating that quotation, I must conclude that the Court has simply adopted an exceedingly narrow view of fair use in order to impose liability for what was in essence a taking of unprotected information.

III

The Court's exceedingly narrow approach to fair use permits Harper & Row to monopolize information. This holding "effect[s] an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas." *International News Service* v. *Associated Press*, 248 U. S., at 263 (Brandeis, J., dissenting). The Court has perhaps advanced the ability of the historian—or at least the public official who has recently left office—to capture the full economic value of information in his or her possession. But the Court does so only by risking the robust debate of public issues that is the "essence of self-government." *Garrison* v. *Louisiana*, 379 U. S., at 74–75. The Nation was providing the grist for that robust debate. The Court imposes liability upon The Nation for no other reason than that The Nation succeeded in being the first to provide certain information to the public. I dissent.

BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO

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

No. 84–465. Argued March 18, 1985—Decided May 20, 1985

Respondent, upon pleading guilty in a Missouri state court to controlled substance offenses, was put on probation and given suspended prison sentences. Two months later, he was arrested for and subsequently charged with leaving the scene of an automobile accident, a felony. After a hearing, the judge who had sentenced respondent, finding that respondent had violated his probation conditions by committing a felony, revoked probation and ordered execution of the previously imposed sentences. After unsuccessfully seeking postconviction relief in state court, respondent filed a habeas corpus petition in Federal District Court, alleging that the state judge had violated due process requirements by revoking probation without considering alternatives to incarceration. The District Court agreed and ordered respondent released from custody. The Court of Appeals affirmed.

Held:

1. The Due Process Clause of the Fourteenth Amendment does not generally require a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation. The procedures for revocation of probation—written notice to the probationer of the claimed probation violations, disclosure of the evidence against him, an opportunity for the probationer to be heard in person and to present witnesses and documentary evidence, a neutral hearing body, a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation, the right to cross-examine adverse witnesses unless the hearing body finds good cause for not allowing confrontation, and the right to assistance of counsel, *Morrissey* v. *Brewer*, 408 U. S. 471; *Gagnon* v. *Scarpelli*, 411 U. S. 778—do not include an express statement by the factfinder that alternatives to incarceration were considered and rejected. The specified procedures adequately protect the probationer against revocation of probation in a constitutionally unfair manner. Pp. 610–614.

2. The procedures required by the Due Process Clause were afforded in this case, even though the state judge did not explain on the record his consideration and rejection of alternatives to incarceration. The revoca-

tion of probation did not violate due process simply because the offense of leaving the scene of an accident was unrelated to the offense for which respondent was previously convicted or because, after the revocation proceeding, the charges arising from the automobile accident were reduced to the misdemeanor of reckless and careless driving. Pp. 615–616.

735 F. 2d 319, 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 case. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 617.

John Ashcroft, former Attorney General of Missouri, argued the cause for petitioners. With him on the briefs were *William L. Webster*, Attorney General, and *John M. Morris III* and *David C. Mason*, Assistant Attorneys General.

Jordan B. Cherrick argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the Due Process Clause of the Fourteenth Amendment generally requires a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation. After a hearing, a state judge found that respondent had violated his probation conditions by committing a felony shortly after his original prison sentences were suspended. The judge revoked probation and ordered respondent to begin serving the previously im-

*A brief for the State of Indiana et al. as *amici curiae* urging reversal was filed by *Linley E. Pearson*, Attorney General of Indiana, and *William E. Daily*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Norman Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Jim Smith* of Florida, *Neil Hartigan* of Illinois, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Edwin Lloyd Pittman* of Mississippi, *Michael T. Greely* of Montana, *Stephen E. Merrill* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Brian McKay* of Nevada, *T. Travis Medlock* of South Carolina, *W. J. Michael Cody* of Tennessee, *Gerald L. Baliles* of Virginia, and *Archie G. McLintock* of Wyoming.

posed sentences. Nearly six years later, the District Court for the Eastern District of Missouri held that respondent had been denied due process because the record of the revocation hearing did not expressly indicate that the state judge had considered alternatives to imprisonment. The District Court granted a writ of habeas corpus and ordered respondent unconditionally released from custody. 567 F. Supp. 882 (1983). The Court of Appeals for the Eighth Circuit affirmed. 735 F. 2d 319 (1984). We granted certiorari, 469 U. S. 1033 (1984), and we now reverse.

I

On November 15, 1976, respondent Nicholas Romano pleaded guilty in the Circuit Court of Laclede County, State of Missouri, to two counts of transferring and selling a controlled substance. The charges resulted from Romano's attempt to trade 26 pounds of marihuana, which he had harvested, refined, and packaged, for what he thought was opium. App. 15, 27–28, 40. After the Missouri Department of Probation and Parole completed a presentence investigation, the trial judge held a sentencing hearing on April 13, 1977. Romano's attorney urged the court to order probation. He argued that the offenses had not involved any victim, that Romano had no previous felony convictions, and that, except for running a stop sign, he had not violated the law after his arrest on the controlled substance charges. *Id.*, at 31–36. Both the Probation Department and the prosecutor opposed probation. *Id.*, at 33, 36–38. The trial judge nonetheless concluded that probation was appropriate because the underlying charges did not involve an offense against the person. *Id.*, at 43.

The judge imposed concurrent sentences of 20 years on each count, suspended execution of the sentences, and placed Romano on probation for 5 years. *Id.*, at 42–43, 47. The trial judge observed that Romano appeared to "have an uphill run on this probation," *id.*, at 43, given the presentence

report and the fact that his "past track record [was] not too good." *Ibid.* The trial judge warned that if any of the conditions of probation were violated, he would revoke probation and order Romano imprisoned under the terms of the suspended sentence. *Id.*, at 41, 44. Only two months after being placed on probation, Romano was arrested for leaving the scene of an automobile accident. In an information issued on July 15, 1977, he was charged with violating Mo. Rev. Stat. §§ 564.450, 564.460 (1959), replaced by Mo. Rev. Stat. §§ 577.010, 577.060 (1978), a felony punishable by up to five years' imprisonment. The information alleged that Romano had struck and seriously injured a pedestrian with his automobile and, knowing that such injury had occurred, "unlawfully and feloniously" left the scene without stopping or reporting the accident. 1 Record 50.

On July 18, 1977, the judge who had sentenced Romano on the controlled substance charges held a probation revocation hearing. Several witnesses gave testimony indicating that Romano had run over a pedestrian in front of a tavern and then had driven away. Romano offered no explanation of his involvement in the accident. Instead, his counsel challenged the credibility of the witnesses, argued that the evidence did not justify a finding that Romano had violated his probation conditions, and requested the court to continue the defendant's probation. App. 99–102. Neither Romano nor his two lawyers otherwise proposed or requested alternatives to incarceration. The judge found that Romano had violated his probation conditions by leaving the scene of an accident, revoked probation, and ordered execution of the previously imposed sentence. *Id.*, at 103. Although the judge prepared a memorandum of his findings, *id.*, at 107–110, he did not expressly indicate that he had considered alternatives to revoking probation. On October 12, 1977, the State filed an amended information reducing the charges arising from the automobile accident to the misdemeanor of reckless and care-

less driving. 1 Record 52. Romano was convicted on the reduced charges and ordered to pay a $100 fine. *Id.*, at 53.

Romano was incarcerated in state prison following the revocation of his probation. After unsuccessfully seeking postconviction relief in state court, he filed a petition for a writ of habeas corpus in Federal District Court. The habeas petition, filed in November 1982, alleged that the state judge had violated the requirements of due process by revoking respondent's probation without considering alternatives to incarceration. The District Court agreed, and held that under the circumstances "alternatives to incarceration should have been considered, on the record, and if [the trial judge] decided still to send Romano to jail, he should have given the reasons why the alternatives were inappropriate." 567 F. Supp., at 886. Because Romano had been imprisoned for more than five years and had been paroled after he filed his federal habeas petition, the District Court concluded that the proper relief was to order him released from the custody of the Missouri Department of Probation and Parole. *Id.*, at 887. The Court of Appeals agreed that due process required the trial judge to consider alternatives to incarceration in the probation revocation proceeding and to indicate on the record that he had done so. See 735 F. 2d, at 322, 323.

II

The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation. *Bearden* v. *Georgia*, 461 U. S. 660, 666, and n. 7 (1983). Both types of limits are implicated in this case. The opinions of the District Court and the Court of Appeals not only require consideration of alternatives to incarceration before probation is revoked, which is properly characterized as a substantive limitation, but also impose a procedural requirement that the sentencing court explain its reasons for rejecting such alternatives. These requirements, the courts below held, follow

from *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). We disagree. Nothing in these decisions requires a sentencing court to state explicitly why it has rejected alternatives to incarceration. Moreover, although *Morrissey* and *Gagnon* outline the minimum procedural safeguards required by due process, neither decision purports to restrict the substantive grounds for revoking probation or parole. *Bearden* v. *Georgia* recognized substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution. We have no occasion in the present case, however, to decide whether concerns for fundamental fairness prohibit the automatic revocation of probation in any other context.

A

In identifying the procedural requirements of due process, we have observed that the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation. See *Gagnon*, *supra*, at 784; cf. *Morrissey*, *supra*, at 479–480 (parole revocation). Probationers have an obvious interest in retaining their conditional liberty, and the State also has an interest in assuring that revocation proceedings are based on accurate findings of fact and, where appropriate, the informed exercise of discretion. *Gagnon*, *supra*, at 785. Our previous cases have sought to accommodate these interests while avoiding the imposition of rigid requirements that would threaten the informal nature of probation revocation proceedings or interfere with exercise of discretion by the sentencing authority.

Gagnon concluded that the procedures outlined in *Morrissey* for parole revocation should also apply to probation proceedings. 411 U. S., at 782. Thus the final revocation of probation must be preceded by a hearing, although the fact-

finding body need not be composed of judges or lawyers. The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. *Id.*, at 786. The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation. Finally, the probationer has a right to the assistance of counsel in some circumstances. *Id.*, at 790. One point relevant to the present case is immediately evident from a review of the minimum procedures set forth in some detail in *Gagnon* and *Morrissey:* the specified procedures do not include an express statement by the factfinder that alternatives to incarceration were considered and rejected.

Neither *Gagnon* nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decisionmaker. See *Morrissey*, 408 U. S., at 475; *id.*, at 492–493 (Douglas, J., dissenting in part); Wis. Stat. Ann. § 57.03 (1957) (statute involved in *Gagnon*). Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole. Where such discretion exists, however, the parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition. *Gagnon*, *supra*, at 789; *Morrissey*, *supra*, at 488. This Court has not held that a defendant who is afforded these opportunities is

also entitled to an explicit statement by the factfinder explaining why alternatives to incarceration were not selected.

We do not question the desirability of considering possible alternatives to imprisonment before probation is revoked. See, *e. g.*, ABA Standards for Criminal Justice 18–7.3, and Commentary (2d ed. 1980); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 5.4, p. 158 (1973). Nonetheless, incarceration for violation of a probation condition is not constitutionally limited to circumstances where that sanction represents the only means of promoting the State's interest in punishment and deterrence. The decision to revoke probation is generally predictive and subjective in nature, *Gagnon*, 411 U. S., at 787, and the fairness guaranteed by due process does not require a reviewing court to second-guess the factfinder's discretionary decision as to the appropriate sanction. Accordingly, our precedents have sought to preserve the flexible, informal nature of the revocation hearing, which does not require the full panoply of procedural safeguards associated with a criminal trial. *Id.*, at 787–790; *Morrissey*, *supra*, at 489–490. We believe that a general requirement that the factfinder elaborate upon the reasons for a course not taken would unduly burden the revocation proceeding without significantly advancing the interests of the probationer. Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 13–16 (1979) (discussing procedures where parole release decision implicated liberty interest).

The procedures already afforded by *Gagnon* and *Morrissey* protect the defendant against revocation of probation in a constitutionally unfair manner. As we observed in another context in *Harris* v. *Rivera*, 454 U. S. 339, 344–345, n. 11 (1981) *(per curiam)*, "when other procedural safeguards have minimized the risk of unfairness, there is a diminished justification for requiring a judge to explain his rulings." The written statement required by *Gagnon* and *Morrissey* helps to insure accurate factfinding with respect to any alleged

violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence. Cf. *Douglas* v. *Buder*, 412 U. S. 430 (1973) *(per curiam)* (revocation invalid under Due Process Clause where there was no evidentiary support for finding that probation conditions were violated). Moreover, where the factfinder has discretion to continue probation, the procedures required by *Gagnon* and *Morrissey* assure the probationer an opportunity to present mitigating evidence and to argue that alternatives to imprisonment are appropriate. That opportunity, combined with the requirement that the factfinder state the reason for its decision and the evidence relied upon, accommodates the interests involved in a manner that satisfies procedural due process.

B

The Court's decision in *Bearden* v. *Georgia* recognized that in certain circumstances, fundamental fairness requires consideration of alternatives to incarceration prior to the revocation of probation. Where a fine or restitution is imposed as a condition of probation, and "the probationer has made all reasonable efforts to pay . . . yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." 461 U. S., at 668–669 (footnote omitted). This conclusion did not rest on the view that *Gagnon* and *Morrissey* generally compel consideration of alternatives to incarceration in probation revocation proceedings. Indeed, by indicating that such consideration is required only if the defendant has violated a condition of probation through no fault of his own, *Bearden* suggests the absence of a more general requirement. See 461 U. S., at 672. *Bearden* acknowledged this Court's sensitivity to the treatment of indigents in our criminal justice system and, after considering the penological interests of the

State, concluded that "depriv[ing] the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine" would be "contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.*, at 673 (footnote omitted).

We need not decide today whether concerns for fundamental fairness would preclude the automatic revocation of probation in circumstances other than those involved in *Bearden*. The state judge was not required by Missouri law to order incarceration upon finding that Romano had violated a condition of his probation. The statute in effect at the time declared that the court "may in its discretion" revoke probation and order the commencement of a previously imposed sentence in response to a violation of probation conditions. Mo. Rev. Stat. § 549.101.1 (Supp. 1965), repealed and replaced by Mo. Rev. Stat. § 559.036 (1978). But the statute also expressly provided that "[t]he court may in its discretion order the continuance of the probation . . . upon such conditions as the court may prescribe." Mo. Rev. Stat. § 549.101.1 (Supp. 1965). Under Missouri law, the determination to revoke probation was at the discretion of the trial judge, who was obligated to make independent findings and conclusions apart from any recommendation of the probation officer. *Moore* v. *Stamps*, 507 S. W. 2d 939, 948–949 (Mo. App. 1974) (en banc). We must presume that the state judge followed Missouri law and, without expressly so declaring, recognized his discretionary power to either revoke or continue probation. Cf. *Townsend* v. *Sain*, 372 U. S. 293, 314–315 (1963).

III

The decision to revoke Romano's probation satisfied the requirements of due process. In conformance with *Gagnon* and *Morrissey*, the State afforded respondent a final revocation hearing. The courts below concluded, and we agree, that there was sufficient evidence to support the state court's

finding that Romano had violated the conditions of his probation. 735 F. 2d, at 321; 567 F. Supp., at 885. The memorandum prepared by the sentencing court and the transcript of the hearing provided the necessary written statement explaining the evidence relied upon and the reason for the decision to revoke probation. Romano does not dispute that he had a full opportunity to present mitigating factors to the sentencing judge and to propose alternatives to incarceration. The procedures required by the Due Process Clause of the Fourteenth Amendment were afforded in this case, even though the state judge did not explain on the record his consideration and rejection of alternatives to incarceration.

As a substantive ground for challenging the action of the state court, Romano argues that because the offense of leaving the scene of an accident was unrelated to his prior conviction for the controlled substance offenses, revocation of his probation was arbitrary and contrary to due process. This argument also lacks merit. The revocation of probation did not rest on a relatively innocuous violation of the terms and conditions of probation, but instead resulted from a finding that Romano had committed a felony involving injury to another person only two months after receiving his suspended sentence. The Fourteenth Amendment assuredly does not bar a State from revoking probation merely because the new offense is unrelated to the original offense. Nor is our conclusion in this regard affected by the fact that after the revocation proceeding, the charges arising from the automobile accident were reduced to reckless and careless driving.

Given our disposition of the merits, we need not address the propriety of the relief ordered by the District Court and affirmed by the Court of Appeals. The judgment of the Court of Appeals is reversed.

It is so ordered.

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

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring.

I

I agree that revocation of probation need not be accompanied by an express demonstration on the record that alternatives to revocation were considered and found wanting before the decision to revoke was made.[1] Because I have argued on several occasions that written explanations for particular decisions are constitutionally required,[2] I write separately to explain my view as to why such explanations are not required in this setting.

The Court has not attempted any systematic explanation of when due process requires contemporaneous reasons to be given for final decisions, or for steps in the decisionmaking process, that affect protected liberty or property interests. The Court has stated that the occasions when due process requires an explanation of the reasons for a decision "are the exception rather than the rule." *Harris* v. *Rivera*, 454 U. S. 339, 344 (1981) *(per curiam)*. At the same time, we have recognized several occasions in which such reasons must be provided, such as when public welfare benefits are terminated,[3] parole[4] or probation[5] is revoked, good-time credits

---

[1] Respondent did not propose at the revocation hearing any specific alternatives to revocation and there is therefore no need to address a situation in which the probationer specifically proposes such alternatives. See *ante*, at 609.

[2] *Ponte* v. *Real*, *ante*, at 508–513 (MARSHALL, J., dissenting); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 40 (1979) (MARSHALL, J., dissenting); see also *Hewitt* v. *Helms*, 459 U. S. 460, 479 (1983) (STEVENS, J., dissenting in part); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 468 (1981) (STEVENS, J., dissenting); cf. *Dorszynski* v. *United States*, 418 U. S. 424, 445 (1974) (MARSHALL, J., concurring in judgment) (statutory interpretation).

[3] *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970).

[4] *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972).

[5] *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973).

are taken away from prison inmates,[6] or inmates are transferred to mental institutions.[7] This requirement is not limited to explanations for substantive decisions on the merits, for record explanations must also be provided at stages of the hearing that are integral to assuring fair and accurate determinations on the merits. For example, counsel cannot be denied at parole or probation revocation hearings without a record explanation.[8] Similarly, the right of an inmate to present witnesses and to confront and cross-examine adverse witnesses at hearings involving transfers to mental institutions may be limited only when supported by record findings of good cause.[9]

In my view, the theme unifying these cases is that whether due process requires written reasons for a decision, or for a particular step in the decisionmaking process, is, like all due process questions, to be analyzed under the three-factor standard set forth in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). When written reasons would contribute significantly to the "fairness and reliability" of the process by which an individual is deprived of liberty or property, *id.*, at 343, reasons must be given in this form unless the balance between the individual interest affected and the burden to the government tilts against the individual. *Id.*, at 335.[10] Whether

---

[6] *Wolff* v. *McDonnell*, 418 U. S. 539, 563 (1974).

[7] *Vitek* v. *Jones*, 445 U. S. 480 (1980).

[8] *Gagnon*, *supra*, at 791.

[9] *Vitek*, *supra*, at 494–495 (requiring "a finding, not arbitrarily made, of good cause").

[10] When judicial review is one of the elements relied on to assure that the process as a whole is reliable, written reasons may be required to enable that review to fulfill its role effectively. Cf. *Wolff*, *supra*, at 565 ("[T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly"); *Ponte* v. *Real*, *ante*, at 508–513, (MARSHALL, J., dissenting) (written explanation required when necessary, *inter alia*, to facilitate meaningful judicial review); *Hewitt*, *supra*, at 495 (STEVENS, J.,

written reasons would make such a contribution in any particular case depends on a variety of factors, including the nature of the decisionmaking tribunal,[11] the extent to which other procedural protections already assure adequately the fairness and accuracy of the proceedings,[12] and the nature of the question being decided.[13]

Applying these principles here, I believe a factfinder need not on the record run through the litany of alternatives available before choosing incarceration. Most important, *Gagnon* already requires a written statement of the evidence relied on and the reasons for concluding that revocation of probation is warranted.[14] That explanation will allow courts to determine whether revocation is substantively valid, or fundamentally unfair, even in the absence of record consideration of alternatives to revocation.[15]

In addition, probation revocation bodies, be they judges or boards, are familiar enough with the possibility of alternatives to incarceration that such a requirement is not necessary to call their attention to the standards governing exercise of

---

dissenting) ("A written statement of reasons would facilitate administrative and judicial review . . .").

[11] See, *e. g.*, *Hewitt*, *supra*, at 493 (STEVENS, J., dissenting); *Greenholtz*, *supra*, at 40 (MARSHALL, J., dissenting in part); *Connecticut Bd. of Pardons*, *supra*, at 472 (STEVENS, J., dissenting).

[12] See, *e. g.*, *Harris* v. *Rivera*, 454 U. S. 339, 344–345, n. 11 (1981) *(per curiam)*; *Connecticut Bd. of Pardons*, *supra*, at 472 (STEVENS, J., dissenting).

[13] See, *e. g.*, *Dorszynski*, *supra*, at 457–459 (MARSHALL, J., concurring in judgment) (written reasons required when sentencing judge commanded by statute to give priority to particular factors in sentencing).

[14] *Gagnon* incorporates for probation the due process requirements for parole revocation laid out in *Morrissey*, *supra*, which include "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U. S., at 489.

[15] Cf. *Ponte*, *ante*, at 508–513 (MARSHALL, J., dissenting) (written reasons required when necessary to assure meaningful judicial review); *Hewitt*, 459 U. S., at 495 (STEVENS, J., dissenting) (same).

their discretion.[16] Indeed, the only constitutional limitation on this discretion is that revocation be *a* rational response to the violation; revocation need not be the only available response to be permissible. See Part II. The breadth of this discretion significantly attenuates the value that written consideration of alternatives might otherwise play. Finally, a requirement that sentencers go through on the record an almost limitless variety of options other than revocation would signficantly burden revocation hearings, for given the number of options available a statement of reasons rejecting each of them would amount to a lengthy document. On balance, then, due process does not require written reasons for rejecting nonincarceration alternatives to revocation.

II

That written reasons are not required for rejection of alternatives to revocation does not suggest that the Constitution allows probation to be revoked for any reason at all or for any probation violation. On the contrary, under *Bearden* v. *Georgia*, 461 U. S. 660 (1983), as I read it, the decision to revoke probation must be based on a probation violation that logically undermines the State's initial determination that probation is the appropriate punishment for the particular defendant. *Bearden* held that probation cannot be revoked for failure to pay a fine and restitution, in the absence of a finding that the probationer has not made bona fide efforts to pay or that adequate alternative forms of punishment do not exist. If a probationer cannot pay because he is poor, rather than because he has not tried to pay, his failure to make restitution or pay a fine signifies nothing about his continued rehabilitative prospects and cannot form the basis of a valid revocation decision. Revocation under these circumstances, the Court said, would be "fundamentally unfair." *Id.*, at 666, and n. 7, 673.

[16] Cf. n. 13, *supra*.

Although *Bearden* dealt with only one basis for revocation—failure to pay a fine and restitution—*Bearden*'s holding can be understood only in light of more general principles about the nature of probation and the valid bases for revocation. First, the State has wide latitude in deciding whether its penological interests will best be served by imprisonment, a fine, probation, or some other alternative. But in choosing probation, the State expresses a conclusion that its interests will be met by allowing an individual the freedom to prove that he can rehabilitate himself and live according to the norms required by life in a community. *Bearden* then recognizes that, once this decision is made, both the State and the probationer have an interest in assuring that the probationer is not deprived of this opportunity without reason. See also *Morrissey* v. *Brewer*, 408 U. S. 471, 484 (1972). To the probationer, who is integrating himself into a community, it is fundamentally unfair to be promised freedom for turning square corners with the State but to have the State retract that promise when nothing he has done legitimately warrants such an about-face.[17] Similarly, it is irrational for the State to conclude that its interests are best served by probation, but then to conclude, in the absence of valid cause tracing to the probationer's conduct, that imprisonment is warranted.

Thus, while the State can define the rules of punishment initially, choosing probation or imprisonment, the State can-

---

[17] This principle underlies *Douglas* v. *Buder*, 412 U. S. 430 (1973) *(per curiam)*, where a probationer had been probated on the condition, *inter alia*, that he report to his probation officer "all arrests" for any reason and without delay. Although he was involved in a traffic accident and was cited for driving too fast, Douglas did not report either the incident or the citation for 11 days. His probation was revoked. We reversed, one prong of our holding being that defining these occurrences as an arrest would constitute so unforeseeable and surprising an interpretation of the special probation condition as to violate due process. See *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964).

not change the rules in the middle of the game.[18] See *Wood* v. *Georgia*, 450 U. S. 261, 286–287 (1981) (WHITE, J., dissenting). A probation violation must therefore be such as to make it logical for the State to conclude that its initial decision to choose probation rather than imprisonment should now be abandoned.

This principle establishes substantive limitations on probation revocation decisions beyond which revocation is fundamentally unfair. Although these limits are not stringent, it is important to note their existence. For example, a minor traffic violation, or other technical probation violation, may well not rationally justify a conclusion that the probationer is no longer a good rehabilitative risk.[19] Similarly, certain probation violations that might justify revocation if committed early in the probation term might not justify revocation if the probationer has completed cleanly 14 years, for example, of a

---

[18] This norm of regularity in governmental conduct informs numerous doctrines. See, *e. g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954) (Government bound by its own regulations); *Vitek* v. *Jones*, 445 U. S., at 489 (due process interest created by "'objective expectation, firmly fixed in state law and official Penal Complex practice'"); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S., at 467 (BRENNAN, J., concurring) (liberty interests arise from "statute, regulation, administrative practice, contractual arrangement or other mutual understanding [that establish] that particularized standards or criteria guide the State's decisionmakers"); *Motor Vehicle Manufacturers Assn.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 42 (1983) (reasoned explanation required for agency revocation of validly promulgated rule); *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800, 807–808 (1973) ("There is, then, at least a presumption that [previously chosen] policies will be carried out best if the settled rule is adhered to").

[19] See generally *Prellwitz* v. *Berg*, 578 F. 2d 190, 193, n. 3 (CA7 1978) ("[T]he due process clause may require more than just proving a breach of a condition of supervision to justify revoking probation; a subjective determination of whether the violation warrants revocation is also contemplated"); *United States* v. *Reed*, 573 F. 2d 1020, 1024 (CA8 1978) ("The decision to revoke probation should not merely be a reflexive reaction to an accumulation of technical violations of the conditions imposed upon the offender").

15-year term.[20] No doubt a violation may stir certain biases in judges who believe they have "taken a chance" on a probationer or in probation officers who feel personally at fault, but those biases do not authorize revocations that are solely vindictive or reflexive. Instead, given the nature of the liberty interest at stake, revocation must reflect a "considered judgment" that probation is no longer appropriate to satisfy the State's legitimate penological interests. *Williams* v. *Illinois*, 399 U. S. 235, 265 (1970) (Harlan, J., concurring in result).

To some extent, the rationality of the decision to revoke must be evaluated in light of alternative measures available for responding to the violation. One reason it was arbitrary in *Bearden* to revoke probation for blameless failure to pay a fine was that the State's interest could be "served fully by alternative means." 461 U. S., at 672.[21] The Court noted

---

[20] See, *e. g.*, *Cottle* v. *Wainwright*, 493 F. 2d 397 (CA5 1974) (describing revocation and imposition of 7-year sentence for two incidents of alleged public drunkenness occurring 2 months before end of 7-year parole term).

[21] That a violation is "willful" in the sense that the probationer had notice of the condition violated and could have adhered to it does not automatically make revocation constitutional. Probation typically is conditioned on a general obligation to obey all state and local laws, but all citizens live under similar obligations. Nonetheless, we recognize some violations of the law as minor, such as certain traffic offenses. Such violations should be treated as no more major when committed by a probationer; they do not generally justify revocation. That remains true notwithstanding the State's inclusion of a probation condition generally requiring conformity to all state laws. The minimum requirements of fair process, both substantively and procedurally, are defined by the Due Process Clause, not by state law. See *Cleveland Bd. of Education* v. *Loudermill*, 470 U. S. 532 (1985). Statutes authorizing revocation "for any cause" deemed sufficient by the court may, as applied to particular cases, violate these principles. See, *e. g.*, Va. Code § 19.2–306 (1983).

It may be that violation of any special condition of probation, as opposed to violation of the general obligation to obey all laws, would justify revocation if the probationer has advance notice of this possibility. If a probationer is given a short list of reasonable commands he is obligated to follow, willful refusal to abide by these specific conditions may indicate that the

that the time for making payments could be extended, the fine reduced, or the probationer ordered to perform some form of labor or public service in lieu of the fine. *Ibid.* The State need not establish that revocation is the only means of realizing its penological interests once a probation violation has been committed, but alternative sanctions available to the State surely are a relevant consideration in evaluating whether revocation is logically related to the nature of the underlying violation.

The "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). Probationers, possessed of the conditional liberty interest created by probation, are protected by this standard, and the decision to revoke probation must therefore be rationally justifiable in light of alternative sanctions available and the nature of the underlying violation. This is not a demanding standard given the breadth of reasons that can justify revocation, but it does impose substantive outer boundaries on revocation decisions.

III

There can be no doubt that the revocation decision here could have been based on a rational conclusion that respondent's probation violation demonstrated his unsuitability for continued probation. The probation judge found that respondent had committed the felony of leaving the scene of an accident, an accident in which an individual had been struck.[22] Although unrelated to the drug offenses for which respondent was initially sentenced, this violation demonstrates not only that Romano was a reckless driver, but also that he

---

probationer is simply incapable of complying with authority. Such a conclusion would justify revocation. A similar conclusion might logically follow from minor violations of a general-obligation clause if those violations are repeated or flagrant.

[22] This finding of historical fact is subject to the rule of *Sumner* v. *Mata*, 455 U. S. 591 (1982).

either had some reason for seeking to cover up that fact or that he refuses to accept responsibility for his actions. The probation judge might have chosen some option other than revocation, but surely it was not irrational or illogical to conclude that Romano was no longer a good rehabilitative risk. Nor was the probation judge required to go through alternatives to revocation *seriatim* in the record. I therefore join the Court's opinion.

ZAUDERER *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

No. 83–2166. Argued January 7, 1985—Decided May 28, 1985

Appellant, an attorney practicing law in Ohio, ran a newspaper advertisement advising readers that his firm would represent defendants in drunken driving cases and that his clients' "full legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING." Later, appellant ran another newspaper advertisement publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive known as the Dalkon Shield Intrauterine Device. The advertisement featured a line drawing of the device and stated that the Dalkon Shield had generated a large amount of lawsuits; that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims; that readers should not assume that their claims were time-barred; that cases were handled on a contingent-fee basis; and that "[i]f there is no recovery, no legal fees are owed by our clients." This advertisement attracted 106 clients. Appellee Office of Disciplinary Counsel of the Supreme Court of Ohio filed a complaint charging that appellant's advertisements violated a number of Disciplinary Rules of the Ohio Code of Professional Responsibility. The complaint alleged that the drunken driving advertisement was deceptive because it purported to propose a transaction that would violate a rule prohibiting contingent-fee representation in criminal cases, and that the Dalkon Shield advertisement violated rules prohibiting the use of illustrations in advertisements and the soliciting of legal employment. The complaint also alleged that the Dalkon Shield advertisement violated a rule prohibiting false or deceptive statements because it failed to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful. Rejecting appellant's contentions that the Ohio rules restricting the content of advertising by attorneys were unconstitutional, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court concluded that the advertisements violated a number of the rules and recommended disciplinary action. With respect to the drunken driving advertisement, the Board, differing from the theory advanced in appellee's complaint, found that the advertisement's failure to mention the common practice of plea bargaining might be deceptive to potential clients who would be unaware of the possibility that they would both be found guilty of a lesser offense and be liable for

attorney's fees because they had not been convicted of drunken driving. The Ohio Supreme Court ultimately adopted the Board's findings and issued a public reprimand.

Held: The reprimand is sustainable to the extent that it is based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement. But insofar as the reprimand is based on appellant's use of an illustration in his advertisement and his offer of legal advice, the reprimand violated his First Amendment rights. Pp. 637–656.

(a) The speech at issue is "commercial speech" entitled to First Amendment protection. Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Pp. 637–638.

(b) The reprimand cannot be sustained on the ground that the Dalkon Shield advertisement violated rules against soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem. The advertisement's statements concerning the Dalkon Shield were neither false nor deceptive, and the governmental interests that were found to be sufficient to justify a ban on in-person solicitation of legal business in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, are not present here. Nor can a prohibition on the use of legal advice and information in attorney advertising be sustained on the ground that a prophylactic rule is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation. And the contention that a prophylactic rule is necessary because the regulatory problems in distinguishing deceptive and nondeceptive legal advertising are different in kind from the problems presented by the advertising of other types of goods and services is unpersuasive. Pp. 639–647.

(c) Ohio's ban on the use of illustrations in attorney advertisements cannot stand. Because the illustration in appellant's Dalkon Shield advertisement was an accurate representation, the burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means. The State's interest in preserving the dignity of the legal profession is insufficient to justify the ban on all use of illustrations in advertising. Nor can the rule be sustained on unsupported assertions that the use of illustrations in attorney advertising creates unacceptable risks that the public will be misled, manipulated, or confused; or that, because illustrations may produce their effects by operating on a subconscious level, it

would be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Pp. 647–649.

(d) The Ohio Supreme Court's decision to discipline appellant for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for litigation costs even if their lawsuits were unsuccessful does not violate the First Amendment. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. An advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support the disclosure requirement. Pp. 650–653.

(e) The constitutional guarantee of due process was not violated by the discrepancy between the theory relied on by both the Ohio Supreme Court and its Board of Commissioners as to how the drunken driving advertisement was deceptive and the theory asserted by appellee in its complaint. Under Ohio law, bar discipline is the Ohio Supreme Court's responsibility, and the Ohio rules provide ample opportunity for response to the Board's recommendations to the court that put appellant on notice of the charges he had to answer to the court's satisfaction. Such notice and opportunity to respond satisfy the demands of due process. Pp. 654–655.

10 Ohio St. 3d 44, 461 N. E. 2d 883, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN and STEVENS, JJ., joined; in Parts I, II, III, and IV of which BRENNAN and MARSHALL, JJ., joined; and in Parts I, II, V, and VI of which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. BRENNAN J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which MARSHALL, J., joined, *post*, p. 656. O'CONNOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 673. POWELL, J., took no part in the decision of the case.

Alan B. Morrison argued the cause for appellant. With him on the briefs were *David C. Vladeck* and *David K. Frank*.

H. Bartow Farr III argued the cause for appellee. On the brief were *Angelo J. Gagliardo* and *Mark H. Aultman.**

JUSTICE WHITE delivered the opinion of the Court.

Since the decision in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), in which the Court held for the first time that the First Amendment precludes certain forms of regulation of purely commercial speech, we have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. See *In re R. M. J.*, 455 U. S. 191 (1982); *In re Primus*, 436 U. S. 412 (1978); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases and that his clients' "[f]ull legal fee [would be] refunded if [they were] convicted

---

*Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Bruce Campbell* and *Charles S. Sims;* and for A. H. Robins Co. by *E. Barrett Prettyman, Jr.*

of DRUNK DRIVING."[1] The advertisement appeared in the Journal for two days; on the second day, Charles Kettlewell, an attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio (appellee) telephoned appellant and informed him that the advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by Disciplinary Rule 2–106(C) of the Ohio Code of Professional Responsibility. Appellant immediately withdrew the advertisement and in a letter to Kettlewell apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.

Appellant's second effort was more ambitious. In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device.[2] The advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:

---

[1] The advertisement notified the potential client that "[e]xpert witness (chemist) fees must be paid." The only other information contained in the advertisement was the name of appellant's firm, its telephone number, and its address.

[2] An intrauterine device (or IUD) is "a plastic or metal coil, spiral, or other shape, about 25 mm long, that is inserted into the cavity of the womb to prevent conception. Its exact mode of action is unknown but it is thought to interfere with implantation of the embryo." Urdang Dictionary of Current Medical Terms 220 (1981). The Dalkon Shield is a variety of IUD that was marketed in the early 1970's. Because of evidence that the Shield was associated with a variety of health problems among users, the Shield was withdrawn from the market in 1974. In 1980, the manufacturer advised physicians that they should remove the Shield from any woman still using it, and in 1983, the Food and Drug Administration followed suit. In 1984, the manufacturer instituted a mass-media campaign urging women to have the device removed. See Robins Mounts Drive to Settle Dalkon Suits, National Law Journal, Dec. 24, 1984, p. 1, col. 3.

> "The Dalkon Shield Interuterine *[sic]* Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information."

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements.

The complaint, as subsequently amended, alleged that the drunken driving ad violated Ohio Disciplinary Rule 2–101(A) in that it was "false, fraudulent, misleading, and deceptive to the public"[3] because it offered representation on a contingent-fee basis in a criminal case—an offer that could not be carried out under Disciplinary Rule 2–106(C). With

---

[3] DR 2–101(A) provides that "[a] lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

respect to the Dalkon Shield advertisement, the complaint alleged that in running the ad and accepting employment by women responding to it, appellant had violated the following Disciplinary Rules: DR 2–101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be "dignified," and limits the information that may be included in such ads to a list of 20 items;[4]

---

[4] Disciplinary Rule 2–101(B), in its entirety, provides:

"In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2–103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2–101(A) [see n. 3, *supra*] and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except for the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

"(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

"(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2–105;

"(3) Age;

"(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

"(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

"(6) Public or quasi-public offices;

"(7) Military service;

"(8) Published legal authorships;

"(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

"(10) Foreign language ability;

"(11) Whether credit cards or other credit arrangements are accepted;

"(12) Office and telephone answering service hours;

DR 2–103(A), which prohibits an attorney from "recommend-[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; and DR 2–104(A), which provides (with certain exceptions not applicable here) that "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The complaint also alleged that the advertisement violated DR 2–101(B)(15), which provides that any advertisement that mentions contingent-fee rates must "disclos[e] whether percentages are computed before or after deduction of court costs and expenses," and that the ad's failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement "deceptive" in violation of DR 2–101(A). The complaint did not allege that the Dalkon Shield advertisement was false or deceptive in any respect other than its

---

"(13) Fee for an initial consultation;

"(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

"(15) Contingent fee rates subject to DR 2–106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

"(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

"(17) Fixed fees for specific legal services;

"(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

"(19) Memberships and offices in legal fraternities and legal societies;

"(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented."

omission of information relating to the contingent-fee arrangement; indeed, the Office of Disciplinary Counsel stipulated that the information and advice regarding Dalkon Shield litigation was not false, fraudulent, misleading, or deceptive and that the drawing was an accurate representation of the Dalkon Shield.

The charges against appellant were heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Appellant's primary defense to the charges against him was that Ohio's rules restricting the content of advertising by attorneys were unconstitutional under this Court's decisions in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), and *In re R. M. J.*, 455 U. S. 191 (1982). In support of his contention that the State had not provided justification for its rules sufficient to withstand the First Amendment scrutiny called for by those decisions, appellant proffered the testimony of expert witnesses that unfettered advertising by attorneys was economically beneficial and that appellant's advertising in particular was socially valuable in that it served to inform members of the public of their legal rights and of the potential health hazards associated with the Dalkon Shield. Appellant also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.

The panel found that appellant's use of advertising had violated a number of Disciplinary Rules. The panel accepted the contention that the drunken driving advertisement was deceptive, but its reasoning differed from that of the Office of Disciplinary Counsel: the panel concluded that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving). The panel also found that the use of an illustration in appellant's Dalkon Shield advertisement

violated DR 2–101(B), that the ad's failure to disclose the client's potential liability for costs even if her suit were unsuccessful violated both DR 2–101(A) and DR 2–101 (B)(15), that the advertisement constituted self-recommendation in violation of DR 2–103(A), and that appellant's acceptance of offers of employment resulting from the advertisement violated DR 2–104(A).[5]

The panel rejected appellant's arguments that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel noted that neither *Bates* nor *In re R. M. J.* had forbidden all regulation of attorney advertising and that both of those cases had involved advertising regulations substantially more restrictive than Ohio's. The panel also relied heavily on *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), in which this Court upheld Ohio's imposition of discipline on an attorney who had engaged in in-person solicitation. The panel apparently concluded that the interests served by the application of Ohio's rules to advertising that contained legal advice and solicited clients to pursue a particular legal claim were as substantial as the interests at stake in *Ohralik*. Accordingly, the panel rejected appellant's constitutional defenses and recommended that he be publicly reprimanded for his violations. The Board of Commissioners adopted the panel's findings in full, but recommended the sanction of indefinite suspension from the practice of law rather than the more lenient punishment proposed by the panel.

The Supreme Court of Ohio, in turn, adopted the Board's findings that appellant's advertisements had violated the Disciplinary Rules specified by the hearing panel. 10 Ohio St. 3d 44, 461 N. E. 2d 883 (1984). The court also agreed with the Board that the application of Ohio's rules to appellant's advertisements did not offend the First Amendment. The

---

[5] The panel did not find that the advertisement's alleged lack of "dignity" or its inclusion of information not allowed by DR 2–101(B)(1)–(20) constituted an independent violation.

court pointed out that *Bates* and *In re R. M. J.* permitted regulations designed to prevent the use of deceptive advertising and that *R. M. J.* had recognized that even nondeceptive advertising might be restricted if the restriction was narrowly designed to achieve a substantial state interest. The court held that disclosure requirements applicable to advertisements mentioning contingent-fee arrangements served the permissible goal of ensuring that potential clients were not misled regarding the terms of the arrangements. In addition, the court held, it was "allowable" to prevent attorneys from claiming expertise in particular fields of law in the absence of standards by which such claims might be assessed, and it was "reasonable" to preclude the use of illustrations in advertisements and to prevent attorneys from offering legal advice in their advertisements, although the court did not specifically identify the interests served by these restrictions. Having determined that appellant's advertisements violated Ohio's Disciplinary Rules and that the First Amendment did not forbid the application of those rules to appellant, the court concluded that appellant's conduct warranted a public reprimand.

Contending that Ohio's Disciplinary Rules violate the First Amendment insofar as they authorize the State to discipline him for the content of his Dalkon Shield advertisement, appellant filed this appeal. Appellant also claims that the manner in which he was disciplined for running his drunken driving advertisement violated his right to due process. We noted probable jurisdiction, 469 U. S. 813 (1984), and now affirm in part and reverse in part.[6]

---

[6] In its brief on the merits, appellee suggests that because appellant received only a public reprimand—the least severe discipline that may be imposed on an attorney who violates one of Ohio's Disciplinary Rules—the judgment below must be affirmed if any one of the findings of a disciplinary violation is sustainable. We disagree. The reprimand imposed on appellant incorporated the opinion of the Supreme Court of Ohio as well as the

II

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983); *In re R. M. J.*, 455 U. S. 191 (1982); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980). More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case—advertising pure and simple—falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," *Ohralik* v. *Ohio State Bar Assn.*, *supra*, at 455–456, and appellant's advertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, see *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n of New York*, *supra*, it must include appellant's advertisements.[7]

---

report of the Board of Bar Commissioners. Thus, the reprimand constituted a public chastisement of appellant for each of the offenses specified. A reprimand that specified fewer infractions would be a different punishment and would be a lesser deterrent to future advertising.

[7] Appellant's advertising contains statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context, would be fully protected speech. That this is so does not alter the status of the advertisements as commercial speech:

"We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 563, n. 5. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transac-

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, see *Friedman* v. *Rogers*, 440 U. S. 1 (1979), or that proposes an illegal transaction, see *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973). Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. *Central Hudson Gas & Electric*, *supra*, at 566. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible, see *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977); *In re R. M. J.*, *supra*, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible, see *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). To resolve this appeal, we must apply the teachings of these cases to three separate forms of regulation Ohio has imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.[8]

---

tions. See *ibid.*" *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 68 (1983) (footnote omitted).

In this case, Ohio has placed no general restrictions on appellant's right to publish facts or express opinions regarding Dalkon Shield litigation; Ohio's Disciplinary Rules prevent him only from conveying those facts and opinions in the form of advertisements of his services as an attorney.

[8] In its brief on the merits, appellee Office of Disciplinary Counsel advances the surprising contention that the Court ought not permit appellant to raise his constitutional defenses to Ohio's disciplinary proceedings. Ap-

III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys—a result obviously not in keeping with our decisions in *Bates* and *In re R. M. J.* But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that

---

pellee's argument apparently is that because appellant could have challenged the constitutionality of the rules in an action for a declaratory judgment in federal court, he was not entitled to violate them and raise their unconstitutionality defensively. This odd argument stands ordinary jurisprudential principles on their heads. We have often emphasized that, in our federal system, it is preferable that constitutional attacks on state statutes be raised defensively in state-court proceedings rather than in proceedings initiated in federal court. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971). This principle is as applicable to attorney disciplinary proceedings as it is to criminal cases. *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982). Accordingly, it was perfectly appropriate for appellant to refrain from an anticipatory challenge to Ohio's rules and to trust that any proceedings the State might initiate would provide a forum in which he could assert his First Amendment rights.

lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation.[9] Rather, the advertisement reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits[10] and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred—advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease ac-

---

[9] The absence from appellant's advertising of any claims of expertise or promises relating to the quality of appellant's services renders the Ohio Supreme Court's statement that "an allowable restriction for lawyer advertising is that of asserted expertise" beside the point. Appellant stated only that he had represented other women in Dalkon Shield litigation—a statement of fact not in itself inaccurate. Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services, see *Bates* v. *State Bar of Arizona*, 433 U. S. 350; 366 (1977), they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas. See *In re R. M. J.*, 455 U. S. 191, 203–205 (1982).

[10] By 1979, it was "estimated that 2500 claims [had] been made . . . for injuries allegedly caused by [the Dalkon Shield]." Van Dyke, The Dalkon Shield: A "Primer" in IUD Liability, 6 West. St. U. L. Rev. 1, 3, n. 7 (1978). By mid-1980, the number of lawsuits had risen to 4,000. Bamford, Dalkon Shield Starts Losing in Court, 2 American Lawyer 31 (July 1980). By the end of 1984 it was reported that the manufacturer had settled or satisfied judgments in 6,289 cases and that over 3,600 cases were still pending. See Robins Mounts Drive to Settle Dalkon Suits, National Law Journal, Dec. 24, 1984, p. 1, col. 3. Plaintiffs have succeeded in winning favorable settlements and jury verdicts against the Shield's manufacturer. See, *e. g.*, *Worsham* v. *A. H. Robins Co.*, 734 F. 2d 676 (CA11 1984) (affirming jury verdict); *Gardiner* v. *A. H. Robins Co.*, 747 F. 2d 1180 (CA8 1984) (noting settlement of cases).

crues.[11] The State's power to prohibit advertising that is "inherently misleading," see *In re R. M. J.*, 455 U. S., at 203, thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*. We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. *Ohralik*, 436 U. S., at 464–465. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." *Id.*, at 466. These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were careful to point out that "in-person solicitation of

---

[11] In 1983, the Ohio Supreme Court explicitly adopted the rule that "[w]hen an injury does not manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he has been injured, whichever comes first." *O'Stricker* v. *Jim Walter Corp.*, 4 Ohio St. 3d 84, 90, 447 N. E. 2d 727, 732.

professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." *Id.*, at 455.

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement—and print advertising generally—poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation—the fear that lawyers will "stir up litigation"—justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "[A]s a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death." L. Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in

3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926).

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Bates* v. *State Bar of Arizona,* 433 U. S., at 376. That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless—may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware—the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of adver-

tising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes. See *Central Hudson Gas & Electric*, 447 U. S., at 565, 569–571. Indeed, in *In re R. M. J.* we went so far as to state that "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." 455 U. S., at 203. The State's argument, then, must be that this dictum is incorrect—that there are some circumstances in which a prophylactic rule is the least restrictive possible means of achieving a substantial governmental interest. Cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 467.

We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are

truthful and helpful, much more so than is the case with other goods or services.[12] This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," 15 U. S. C. § 45(a)(1), reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. See, *e. g.*, *Warner-Lambert Co.* v. *FTC*, 183 U. S. App. D. C. 230, 562 F. 2d 749 (1977); *National Comm'n on Egg Nutrition* v. *FTC*, 570 F. 2d 157 (CA7 1977). In short, assessment of the validity of legal advice and information contained in attorneys' advertising is

[12] The State's argument may also rest in part on a suggestion that even completely accurate advice regarding the legal rights of the advertiser's audience may lead some members of the audience to initiate meritless litigation against innocent defendants. To the extent that this is the State's contention, it is unavailing. To be sure, some citizens, accurately informed of their legal rights, may file lawsuits that ultimately turn out not to be meritorious. But the State is not entitled to prejudge the merits of its citizens' claims by choking off access to information that may be useful to its citizens in deciding whether to press those claims in court. As we observed in *Bates* v. *State Bar of Arizona*, 433 U. S., at 375, n. 31, if the State's concern is with abuse of process, it can best achieve its aim by enforcing sanctions against vexatious litigation. In addition, there would be no impediment to a rule forbidding attorneys to use advertisements soliciting clients for nuisance suits—meritless claims filed solely to harass a defendant or coerce a settlement. Because a client has no legal right to file such a claim knowingly, advertisements designed to stir up such litigation may be forbidden because they propose an "illegal transaction." See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973).

not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.[13]

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising—indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. Prophylactic restraints that would be

---

[13] The American Bar Association evidently shares the view that weeding out false or misleading advertising by attorneys from advertising that is accurate and nonmisleading is neither impractical nor unduly burdensome: the ABA's new Model Rules of Professional Conduct eschew all regulation of the content of advertising that is not "false or misleading." ABA Model Rule of Professional Conduct 7.2 (1983). A recent staff report of the Federal Trade Commission has also concluded that application of a "false or deceptive" standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally. See Federal Trade Commission Staff Report, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising 149–155 (1984).

unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

IV

The application of DR 2–101(B)'s restriction on illustrations in advertising by lawyers to appellant's advertisement fails for much the same reasons as does the application of the self-recommendation and solicitation rules. The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. Because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means.

The text of DR 2–101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly

has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. As we held in *Carey* v. *Population Services International*, 431 U. S. 678, 701 (1977), the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

In its arguments before this Court, the State has asserted that the restriction on illustrations serves a somewhat different purpose, akin to that supposedly served by the prohibition on the offering of legal advice in advertising. The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, once again, the State's argument is that its purposes can only be served through a prophylactic rule.

We are not convinced. The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. Moreover, none of the

State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. Indeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. See, *e. g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374 (1965). See generally E. Kintner, A Primer on the Law of Deceptive Practices 158–173 (2d ed. 1978). Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

V

Appellant contends that assessing the validity of the Ohio Supreme Court's decision to discipline him for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful entails precisely the same inquiry as determining the validity of the restrictions on advertising content discussed above. In other words, he suggests that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contends that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so. Not surprisingly, appellant claims that the State has failed to muster substantial evidentiary support for any of the findings required to support the restriction.

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). Indeed, in *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), the Court went so far as to state that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.*, at 633.

But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U. S., at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." *In re R. M. J.*, 455 U. S., at 201. Accord, *Central Hudson Gas & Electric*, 447 U. S., at 565; *Bates* v. *State Bar of Arizona*, 433 U. S., at 384; *Virginia Pharmacy Bd., supra*, at 772, n. 24.

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[14]

---

[14] We reject appellant's contention that we should subject disclosure requirements to a strict "least restrictive means" analysis under which they

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"—terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require

---

must be struck down if there are other means by which the State's purposes may be served. Although we have subjected outright prohibitions on speech to such analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech. See, *e. g., Central Hudson Gas & Electric*, 447 U. S., at 565. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is "underinclusive"—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. See, *e. g., Zablocki* v. *Redhail*, 434 U. S. 374, 390 (1978). The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.

the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *FTC* v. *Colgate-Palmolive Co.*, 380 U. S., at 391–392. The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.[15]

---

[15] Appellant suggests that the disclosures required by the Ohio Supreme Court would in fact be unduly burdensome and would tend to chill advertising of contingent-fee arrangements. Evaluation of this claim is somewhat difficult in light of the Ohio court's failure to specify precisely what disclosures were required. The gist of the report of the Board of Commissioners on this point, however, was that appellant's advertising was potentially deceptive because it "left standing the impression that if there were no recovery, the client would owe nothing." App. to Juris. Statement 14a. Accordingly, the report at a minimum suggests that an attorney advertising a contingent fee must disclose that a client may be liable for costs even if the lawsuit is unsuccessful. The report and the opinion of the Ohio Supreme Court also suggest that the attorney's contingent-fee rate must be disclosed, see *ibid.*; 10 Ohio St. 3d 44, 48, 461 N. E. 2d 883, 886 (1984). Neither requirement seems intrinsically burdensome; and they certainly cannot be said to be unreasonable as applied to appellant, who included in his advertisement no information whatsoever regarding costs and fee rates. This case does not provide any factual basis for finding that Ohio's disclosure requirements are unduly burdensome.

The vagueness of the Ohio Supreme Court's opinion regarding precisely what an attorney must disclose in an advertisement mentioning a contingent fee is, however, unfortunate. It is also worth noting that DR 2–101(B)(15), the only explicit reference in the Ohio rules to a disclosure requirement involving contingent fees, does not on its face require any disclosures except when an advertisement mentions contingent-fee *rates*—which appellant's advertisement did not do. Because "[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed," *In re Ruffalo*, 390 U. S. 544, 554 (1968) (WHITE, J., concurring in result), it may well be that for Ohio actually to disbar an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns. Given the reasonableness of the decision that appellant's omis-

VI

Finally, we address appellant's argument that he was denied procedural due process by the manner in which discipline was imposed on him in connection with his drunken driving advertisement. Appellant's contention is that the theory relied on by the Ohio Supreme Court and its Board of Commissioners as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint.[16] We cannot agree that this discrepancy violated the constitutional guarantee of due process.

Under the law of Ohio, bar discipline is the responsibility of the Ohio Supreme Court. Ohio Const., Art. IV, § 2(B)(1)(g). The Board of Commissioners on Grievances and Discipline formally serves only as a body that recommends discipline to the Supreme Court; it has no authority to impose discipline itself. See Govt. Bar Rule V(2), (16)–(20). That the Board of Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio. Appellant does not contend that he was afforded no opportunity to respond to the Board's recommendation; indeed, the Ohio rules appear to provide ample opportunity for response to Board recommendations, and it appears that appellant availed himself of that opportu-

---

sions created the potential for deception of the public, however, we see no infirmity in a decision to issue a public reprimand on the basis of those omissions. And, of course, were Ohio to articulate its disclosure rules regarding contingent fees in such a way that they provided a sure guide to the advertising attorney, neither the Due Process Clause nor the First Amendment would preclude disbarment as a penalty for the violation of those rules.

[16] See *supra*, at 634.

nity.[17] The notice and opportunity to respond afforded appellant were sufficient to satisfy the demands of due process.[18]

VII

The Supreme Court of Ohio issued a public reprimand incorporating by reference its opinion finding that appellant had violated Disciplinary Rules 2–101(A), 2–101(B), 2–101 (B)(15), 2–103(A), and 2–104(A). That judgment is affirmed to the extent that it is based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement. But insofar as the reprimand was based on appellant's use of an

---

[17] Appellant suggests that he was prejudiced by his inability to present evidence relating to the Board's factual conclusion that it was a common practice for persons charged with drunken driving to plead guilty to lesser offenses. If this were in fact the case, appellant's due process objection might be more forceful. But appellant does not—and probably cannot—seriously dispute that guilty pleas to lesser offenses are common in drunken driving cases, nor does he argue that he was precluded from arguing before the Ohio Supreme Court that it was improper for the Board of Commissioners to take judicial notice of the prevalence of such pleas. Under these circumstances, we see no violation of due process in the Ohio Supreme Court's acceptance of the Board's factual conclusions. See *American Trucking Assns., Inc.* v. *Frisco Transportation Co.*, 358 U. S. 133, 144 (1958).

[18] Appellant's reliance on *In re Ruffalo*, 390 U. S. 544 (1968), is misplaced. Although the majority in that case did hold that a change in the charges against the petitioner during proceedings before the Ohio Board of Commissioners violated due process, the feature of that case that was particularly offensive was that the change was such that the very evidence put on by the petitioner in defense of the original charges became, under the revised charges, inculpatory. Thus, in that case, the original charges functioned as a "trap," *id.*, at 551, for they lulled the petitioner into presenting evidence that "irrevocably assur[ed] his disbarment under charges not yet made." *Id.*, at 551, n. 4. In this case, the variance between the theory of the Office of Disciplinary Counsel and the Board of Commissioners had no such prejudicial effect on appellant.

illustration in his advertisement in violation of DR 2–101(B) and his offer of legal advice in his advertisement in violation of DR 2–103(A) and 2–104(A), the judgment is reversed.

It is so ordered.

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

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

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." *Ante*, at 647, 649. I therefore join Parts I–IV of the Court's opinion, and I join the Court's judgment set forth in Part VII to the extent it reverses the Supreme Court of Ohio's public reprimand of the appellant Philip Q. Zauderer for his violations of Disciplinary Rules 2–101(B), 2–103(A), and 2–104(A).

With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Ante*, at 651. I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore concur in part and dissent in part from Part V of the Court's opinion, dissent from Part VI, and dissent from the judgment set forth in Part VII insofar as it affirms the Supreme Court

of Ohio's public reprimand "based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement." *Ante*, at 655.

I

A

The Court concludes that the First Amendment's protection of commercial speech is satisfied so long as a disclosure requirement is "reasonably related" to preventing consumer deception, and it suggests that this standard "might" be violated if a disclosure requirement were "unjustified" or "unduly burdensome." *Ante*, at 651. I agree with the Court's somewhat amorphous "reasonable relationship" inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases. Under those standards, regulation of commercial speech—whether through an affirmative disclosure requirement or through outright suppression[1]—is "reasonable" only

[1] Much of the Court's reasoning appears to rest on the premise that, in the commercial-speech context, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Ante*, at 652, n. 14. I believe the Court greatly overstates the distinction between disclosure and suppression in these circumstances. We have noted in traditional First Amendment cases that an affirmative publication requirement "operates as a command in the same sense as a statute or regulation forbidding [someone] to publish specified matter," and that "a compulsion to publish that which '"reason" tells [one] should not be published'" therefore raises substantial First Amendment concerns. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256 (1974). Such compulsion in the advertising context will frequently be permissible, and I agree that the distinction between suppression and disclosure supports some differences in analysis. See n. 2, *infra*. Nevertheless, disclosure requirements must satisfy the basic tenets of commercial-speech doctrine: they must demonstrably and directly advance substantial state interests, and they may extend no further than "reasonably necessary" to serve those interests. *In re R. M. J.*, 455 U. S. 191, 203 (1982); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 564–565 (1980).

to the extent that a State can demonstrate a legitimate and substantial interest to be achieved by the regulation. *In re R. M. J.*, 455 U. S. 191, 203 (1982); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 564 (1980). Moreover, the regulation must directly advance the state interest and "may extend only as far as the interest it serves." *Id.*, at 565. See also *id.*, at 564 ("[T]he regulatory technique must be in proportion to [the State's] interest"). Where the State imposes regulations to guard against "the potential for deception and confusion" in commercial speech, those regulations "may be no broader than reasonably necessary to prevent the deception." *In re R. M. J.*, *supra*, at 203. See also *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976) (disclosure requirements are permissible only to the extent they "are necessary to prevent [the advertisement from] being deceptive"); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 384 (1977) (States may require "some *limited* supplementation . . . so as to assure that the consumer is not misled") (emphasis added).[2]

Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenu-

---

[2] I agree that Zauderer's "least restrictive means" analysis is misconceived in the context of commercial-speech disclosure requirements. See *ante*, at 651–652, n. 14. Zauderer argues that Ohio's interest in preventing consumer deception could more effectively be achieved through direct regulation of contingent-fee agreements themselves rather than through compelled disclosures in advertising. Brief for Appellant 41–43. As we repeatedly have emphasized, however, States have a substantial interest in ensuring that advertising *itself* is not misleading, see *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 771–772, and regulation of the underlying substantive conduct does not remove the potential for deception in the body of the advertisement. Beyond this, however, a disclosure requirement is "reasonably related" to truth in advertising only to the extent that it satisfies the standards set forth above in text.

ous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, *supra*, at 569. Where a regulation is addressed to allegedly deceptive advertising, the State must instead demonstrate that the advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," *In re R. M. J.*, *supra*, at 202, and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.[3]

As the Court acknowledges, it is "somewhat difficult" to apply these standards to Ohio's disclosure requirements "in light of the Ohio court's failure to specify precisely what disclosures were required." *Ante*, at 653, n. 15. It is also somewhat difficult to determine precisely what disclosure requirements the Court approves today. The Supreme Court of Ohio appears to have imposed three overlapping requirements, each of which must be analyzed under the First

---

[3] See, *e. g.*, *In re R. M. J.*, *supra*, at 200, n. 11 (State must justify restriction in light of "experience"); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, *supra*, at 570; *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 95 (1977) ("The record here demonstrates that respondents failed to establish that [their restriction] is needed"); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, at 769 (Commonwealth's justifications failed on "close inspection"). See also *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 528 (1981) (BRENNAN, J., concurring in judgment). In evaluating the necessary form and content of disclosure, courts of course should be guided by the "enlightenment gained from administrative experience," because regulatory authorities are "often in a better position than are courts to determine" such matters. *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 385 (1965); cf. *In re R. M. J.*, *supra*, at 200, n. 11. Particularly in this First Amendment context, however, such determinations merit deference only to the extent they are supported by evidence and reasoned explanation.

Amendment standards set forth above. First, the court concluded that "a lawyer advertisement which refers to contingent fees" should indicate whether "additional costs . . . might be assessed the client." 10 Ohio St. 3d 44, 48, 461 N. E. 2d 883, 886 (1984). The report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court explained that such a requirement is necessary to guard against "the impression that if there were no recovery, the client would owe nothing." App. to Juris. Statement 14a. I agree with the Court's conclusion that, given the general public's unfamiliarity with the distinction between fees and costs, a State may require an advertising attorney to include a costs disclaimer so as to avoid the potential for misunderstanding, *ante*, at 653—provided the required disclaimer is "no broader than reasonably necessary to prevent the deception," *In re R. M. J.*, *supra*, at 203.

Second, the report and opinion provide that an attorney advertising his availability on a contingent-fee basis must "specifically expres[s]" his rates. 10 Ohio St. 3d, at 48, 461 N. E. 2d, at 886; see also App. to Juris. Statement 14a. The Court's analysis of this requirement—which the Court characterizes as a "suggest[ion]," *ante*, at 653, n. 15—is limited to the passing observation that the requirement does not "see[m] intrinsically burdensome," *ibid.* The question of burden, however, is irrelevant unless the State can first demonstrate that the rate-publication requirement directly and proportionately furthers a "substantial interest." *In re R. M. J.*, 455 U. S., at 203. Yet an attorney's failure to specify a particular percentage rate when advertising that he accepts cases on a contingent-fee basis can in no way be said to be "inherently likely to deceive," *id.*, at 202, and the voluminous record in this case fails to reveal a single instance suggesting that such a failure has in actual experience proved deceptive.[4] Nor has Ohio at any point identified any other

[4] The Office of Disciplinary Counsel introduced no evidence and made no arguments concerning this question, and the Board of Commissioners did

"substantial interest" that would be served by such a requirement. Although a State might well be able to demonstrate that rate publication is necessary to prevent deception or to serve some other substantial interest, it must do so pursuant to the carefully structured commercial-speech standards in order to ensure the full evaluation of competing considerations and to guard against impermissible discrimination among different categories of commercial speech. See n. 7, *infra*.[5] Ohio has made no such demonstration here.

Third, the Supreme Court of Ohio agreed with the Board of Commissioners that Zauderer had acted unethically "by failing *fully* to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement." 10 Ohio St. 3d, at 47, 461

---

not address the issue. The Supreme Court of Ohio referred in passing to rate disclosure as contributing to "purposes of clarity." 10 Ohio St. 3d 44, 48, 461 N. E. 2d 883, 886 (1984). But there is nothing in this record to suggest that a simple reference to contingent fees is unclear, and such cursory and "highly speculative" arguments are an unacceptable substitute for the reasoned evaluation that is required when regulating commercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 569; see also *Bates* v. *State Bar of Arizona*, *supra*, at 381.

[5] Ohio's failure to make such a demonstration is particularly troubling in light of Zauderer's persuasive argument that it is extremely burdensome—and in fact potentially misleading—to attempt to set forth a particular advertised "rate" for personal injury cases. He argues that his contingent-fee rates—like those of many attorneys—vary substantially depending upon the unique factual and legal needs of a given client and the extent of representation that is necessary to advance the client's interests. Zauderer's specific rate information is subject to numerous qualifications and clarifications, all of which are spelled out in a lengthy written contract. See n. 6, *infra*. It was precisely out of concern that a set "rate" might not accurately encompass the range of potentially required services that some Members of this Court objected to *any* price disclosure by attorneys in the first instance. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S., at 386 (BURGER, C. J., concurring in part and dissenting in part); *id.*, at 392 (POWELL, J., concurring in part and dissenting in part). Our approval of attorney price advertising has previously extended only to those services for which fixed rates can "meaningfully be established." *Id.*, at 373.

N. E. 2d, at 886 (emphasis added); see App. to Juris. Statement 14a, 19a. The record indicates that Zauderer enters into a comprehensive contract with personal injury clients, one that spells out over several pages the various terms and qualifications of the contingent-fee relationship.[6] If Ohio

---

[6] A representative "Retainer Agreement and Contract of Employment" provides, *inter alia:*

"IV. *ATTORNEY FEES*

"I hereby agree to pay P. Q. Z. & A as attorney fees for such representation, which fees are deemed by me to be reasonable:

"*Thirty-Three and One-Third Per Cent* of the gross amount recovered by way of settlement or compromise prior to trial;

"*Forty Per Cent* of the gross amount recovered by way of settlement or compromise or judgment if a trial or any part thereof commences, and an appeal is not necessary;

"*Forty-Five Per Cent* of the gross amount recovered by way of settlement or compromise or judgment if a trial or any part thereof commences, and an appeal is necessary.

"The term 'gross amount' shall mean the total amount of money recovered, prior to any deduction for expenses, and shall include any interest awarded or recovered.

"IT IS AGREED AND UNDERSTOOD THAT THIS EMPLOYMENT IS UPON A CONTINGENT FEE BASIS, AND IF NO RECOVERY IS MADE, I WILL NOT BE INDEBTED TO P. Q. Z. & A FOR ANY SUM WHATSOEVER AS ATTORNEY FEES *(EXCEPT AS PROVIDED IN SECTION VIII HEREOF.)*

"V. *COSTS AND OTHER EXPENSES*

"I understand and agree that out-of-pocket costs incurred or advanced by P. Q. Z. & A in the course of the investigation or in the handling of any litigation or appeal on my behalf including, but not limited to, court costs, long distance telephone charges, court costs, document duplication costs, brief printing costs, postage, court reporter fees, medical report expenses, witness fees, costs of obtaining evidence, necessary disbursements and reasonable travel expenses incurred by P. Q. Z. & A in advancing my cause, must be borne by me. I, thus, agree to reimburse P. Q. Z. & A for any such necessary out-of-pocket expenses it advances on my behalf.

"VI. *EMPLOYMENT OF EXPERTS AND INVESTIGATORS*

"P. Q. Z. & A may, in its discretion, employ medical experts or other necessary experts or investigators in connection with my case, after consultation with me.

seriously means to require Zauderer "fully to disclose the[se] terms," this requirement would obviously be so "unduly burdensome" as to violate the First Amendment. *Ante*, at 651. Such a requirement, compelling the publication of detailed fee information that would fill far more space than the advertisement itself, would chill the publication of protected commercial speech and would be entirely out of proportion

---

"I understand that all fees and expenses charged by such experts, including witness fees, are my responsibility, and I agree to reimburse P. Q. Z. & A for any such fees or expenses which it advances or incurs on my behalf.

"VI. *ASSOCIATE COUNSEL AND LEGAL ASSISTANTS*

"P. Q. Z. & A may, in its discretion, employ associate counsel (including one or more lawyers outside the office of P. Q. Z. & A) and law clerks or legal assistants or paralegals to assist it in representing me. The cost of such assistance shall be borne by P. Q. Z. & A out of the attorney fees, if any, paid under Section IV of this contract. (I understand that if P. Q. Z. & A employs associate counsel, a division of attorney fees, if any, paid under Section IV will be made, and I hereby consent to such employment and division of fees).

"VII. *RETENTION OF ATTORNEY'S FEES AND ADVANCED COSTS FROM SETTLEMENT PROCEEDS*

"P. Q. Z. & A may receive the settlement or judgment amount and may retain its percentage of attorney's fees from such sum. Before disbursing the remainder to me, it may deduct therefrom the amount of costs and expenses advanced or incurred by P. Q. Z. & A as herein provided.

"VIII. *SUBSTITUTION OR DISCHARGE OF ATTORNEY*

"P. Q. Z. & A shall be entitled to the reasonable value of its professional services (and its costs and other expenses as provided in Sections V and VI) in the event I discharge P. Q. Z. & A or obtain a substitution of attorneys before any settlement, compromise or judgment on any claim for the prosecution of which P. Q. Z. & A is hereby retained.

. . . . .

"X. *COMPENSATION IN EVENT OF SETTLEMENT BY CLIENT*

"I agree that if I settle my claim or cause of action without the consent of P. Q. Z. & A, I will pay to P. Q. Z. & A: (a) the fee computed in accordance with the terms of this agreement, based upon the final recovery received by me in the settlement, and (b) the costs and expenses as provided in Section V and VI." Attachment A to Response of Respondent Zauderer to Relator's First Set of Interrogatories, No. 454 (Bd. of Commr's on Grievances and Discipline, S. Ct. Ohio).

to the State's legitimate interest in preventing potential deception. See *In re R. M. J.*, 455 U. S., at 203; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 564; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 771–772, n. 24. Given the Court's explicit endorsement of Ohio's other disclosure provisions, I can only read the Court's telling silence respecting this apparent requirement as an implicit acknowledgment that it could not possibly pass constitutional muster.[7]

B

Ohio's glaring failure "to specify precisely what disclosures were required," *ante*, at 653, n. 15, is relevant in another important respect. Even if a State may impose particular disclosure requirements, an advertiser may not be punished for failing to include such disclosures "unless his failure is in violation of valid state statutory or decisional law requiring the [advertiser] to label or take other precautions to prevent confusion of customers." *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234, 238–239 (1964). Whether or not Ohio *may* properly impose the disclosure requirements discussed above, it failed to provide Zauderer with sufficient notice that he was expected to include such disclosures in his Dalkon Shield advertisement. The State's punishment of Zauderer therefore violated basic due process and First Amendment guarantees.

---

[7] Ohio apparently imposes no comparably sweeping disclosure requirements on advertisements that mention other types of fee arrangements, such as hourly rates or fixed-fee schedules. Cf. Ohio DR 2–101(B)(16)–(17). In the absence of any evidence supporting such extremely disparate treatment—and there is none in this record—one inference might be that contingent-fee advertising is being impermissibly singled out for onerous treatment. Cf. *Friedman* v. *Rogers*, 440 U. S. 1, 20–24 (1979) (BLACKMUN, J., concurring in part and dissenting in part); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 475–476 (1978) (MARSHALL, J., concurring in part and concurring in judgment).

Neither the published rules, state authorities, nor governing precedents put Zauderer on notice of what he was required to include in the advertisement. As the Court acknowledges, Ohio's Disciplinary Rules do not "on [their] face require any disclosures except when an advertisement mentions contingent-fee *rates*—which appellant's advertisement did not do." *Ante*, at 653, n. 15. In light of the ambiguity of the rules, Zauderer contacted the governing authorities *before* publishing the advertisement and unsuccessfully sought to determine whether it would be ethically objectionable. He met with representatives of the Office of Disciplinary Counsel, reviewed the advertisement with them, and asked whether the Office had any objections or recommendations concerning the form or content of the advertisement. The Office refused to advise Zauderer whether "he should or should not publish the advertisement," informing him that it "does not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements." Stipulation of Fact Between Relator and Respondent ¶¶ 22, 27, App. 16. And even after full disciplinary proceedings, Ohio still has failed, as the Court acknowledges, "to specify precisely what disclosures were required," and therefore to specify precisely how Zauderer violated the law and what reasonable precautions he can take to avoid future disciplinary actions. *Ante*, at 653, n. 15.

A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). This requirement "applies with particular force in review of laws dealing with speech," *Hynes*

v. *Mayor of Oradell*, 425 U. S. 610, 620 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," *Smith* v. *California*, 361 U. S. 147, 151 (1959).[8]

These guarantees apply fully to attorney disciplinary proceedings. *In re Ruffalo*, 390 U. S. 544, 550 (1968). Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." *Id.*, at 555 (WHITE, J., concurring in result).[9] But where "[t]he appraisal of [an attorney's] conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. *Id.*, at 555–556.[10]

---

[8] See also *Buckley* v. *Valeo*, 424 U. S. 1, 76–82 (1976) *(per curiam)*; *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287 (1961).

[9] Arguably vague regulations may take on "definiteness and clarity" in the context of the profession's "complex code of behavior," and an attorney is properly charged with knowledge of all applicable disciplinary rules and ethical guidelines. *In re Bithoney*, 486 F. 2d 319, 324–325 (CA1 1973). See also Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N. C. L. Rev. 671, 676–680 (1979).

[10] In addition to ensuring fair notice, vagueness doctrine also guards against "'harsh and discriminatory enforcement . . . against particular groups deemed to merit [official] displeasure.'" *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 170 (1972) (citation omitted); see also *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983). Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction. See, *e. g.*, Comment, Controlling Lawyers by Bar Associations and Courts,

I do not believe that Zauderer's Dalkon Shield advertisement can be said to be so obviously misleading as to justify punishment in the absence of a reasonably clear contemporaneous rule requiring the inclusion of certain disclaimers. The advertisement's statement that "[i]f there is no recovery, no legal fees are owed by our clients" was accurate on its face, and "[t]here is nothing in the record to indicate that the inclusion of this information was misleading" in actual practice because of the failure to include a costs disclaimer. *In re R. M. J.*, 455 U. S., at 205–206.[11] Moreover, although the statement might well be viewed by many attorneys as carrying the potential for deception, the Office of Disciplinary Counsel itself *stipulated* that "[t]he Dalkon Shield advertisement published by [Zauderer] does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Stipulation of Fact Between Relator and Respondent ¶30, App. 17. Several other States have approved the publication of Dalkon Shield advertisements containing the *identical* no-legal-fees statement, without even a suggestion that the statement might be deceptive.[12]

---

5 Harv. Civ. Rights-Civ. Lib. L. Rev. 301, 312–314 (1970); Comment, The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: What Ever Happened to *Spevak?*, 23 Vill. L. J. 127, 135–136 (1977). See also n. 11, *infra*.

[11] No member of the general public has ever complained to the Office of Disciplinary Counsel about Zauderer's Dalkon Shield advertisement. Second Stipulation of Fact Between Relator and Respondent ¶38, App. 41. Instead, the Office filed its charges only as a result of complaints received from other attorneys—including the local counsel for A. H. Robins Company, manufacturer of the Dalkon Shield. *Id.*, ¶¶39, 40, App. 41.

[12] See, *e. g.*, Brief for Respondent Zauderer In Support Of His Objections, No. DD 83–19 (S. Ct. Ohio), pp. 129–130 (decision of the Disciplinary Board of the Supreme Court of Pennsylvania); *id.*, at 132 (decision of the State Disciplinary Board of the State Bar of Georgia); *id.*, at 135 (decision of the Florida Bar Grievance Committee for the Tenth Judicial Circuit); Statement of Additional Authorities Upon Which Counsel For Respondent Zauderer Intends To Rely, No. DD 83–19 (S. Ct. Ohio), pp. 15–16 (decision

And the Office of Disciplinary Counsel's refusal to respond to Zauderer's prepublication inquiries concerning the propriety of the advertisement wholly undermines one of the basic justifications for allowing punishment for violations of imprecise commercial regulations—that a businessperson can clarify the meaning of an arguably vague regulation by consulting with government administrators.[13] Although I agree that a State may upon a proper showing require a costs disclaimer as a prophylactic measure to guard against potential deception, see *supra*, at 660, and may thereafter discipline attorneys who fail to include such disclaimers, Ohio had imposed no such requirement at the time Zauderer published the advertisement, as the Court acknowledges, *ante*, at 653, n. 15. The State instead has punished Zauderer for violating requirements that did not exist prior to this disciplinary proceeding.

The Court appears to concede these serious problems, noting that "it may well be that for Ohio actually to *disbar* an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns." *Ibid.* (emphasis added). The Court

---

of the Office of Trial Counsel, State Bar of California); *In re Discipline of Appert & Pyle*, 315 N. W. 2d 204 (Minn. 1981).

The Office of Disciplinary Counsel apparently did not initially view the no-legal-fees statement as deceptive, because it did not so charge until almost five months *after* the proceedings had commenced. Compare Complaint and Certificate, App. 3, with Amended Complaint ¶¶ 24–27, App. 25. As Zauderer notes, "the fact that the charge was not made in the original complaint suggests that if appellee found the ad misleading, it was only after several readings of both the ad and the Code that it reached this conclusion." Brief for Appellant 38.

[13] See, *e. g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 49 (1966). The Court previously has noted that, because traditional prior restraint principles do not fully apply to commercial speech, a State may require "a system of previewing advertising campaigns to insure that they will not defeat" state restrictions. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 571, n. 13.

"see[s] no infirmity" in this case, however, because the Supreme Court of Ohio publicly reprimanded Zauderer rather than disbarring him. *Ante*, at 654, n. 15. This distinction is thoroughly unconvincing. When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a public reprimand.[14] Moreover, a public reprimand in Ohio exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Zauderer as an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it has been published in statewide professional journals and the official reports of the Ohio Supreme Court.[15] This Court's casual indifference to the gravity of this injury inflicted on an attorney's good name demeans the entire legal profession.[16] In addition, under Ohio law "[a] person who has been . . . publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred . . . ." Govt. Bar Rule V(7). In light of Ohio's vague rules, the governing authorities' refusal to provide clarification and

---

[14] See *In re R. M. J.*, 455 U. S., at 198 (private reprimand). See also *In re Primus*, 436 U. S. 412, 421 (1978) (public reprimand); *Bates* v. *State Bar of Arizona*, 433 U. S., at 358 (censure).

[15] See, *e. g.*, Govt. Bar Rules IV, V(5)(a), V(20)(a); App. to Juris. Statement 22a–23a. Zauderer also was taxed costs of $1,043.63. *Ibid.*

[16] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. *Wisconsin* v. *Constantineau*, 400 U. S. 433, 437 (1971). See also *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972) (same with respect to "any charge . . . that might seriously damage [a person's] standing and associations in his community"); *Paul* v. *Davis*, 424 U. S. 693, 722–723 (1976) (BRENNAN, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty' ").

guidance to Zauderer, and the Ohio Supreme Court's "failure to specify precisely what disclosures [are] required," *ante*, at 653, n. 15, Zauderer will hereafter publish advertisements mentioning contingent fees only at his peril. No matter what disclaimers he includes, Ohio may decide after the fact that further information should have been included and might, under the force of its rules, attempt to suspend him indefinitely from his livelihood. Such a potential trap for an unwary attorney acting in good faith not only works a significant due process deprivation, but also imposes an intolerable chill upon the exercise of First Amendment rights. See *supra*, at 665–666, and n. 8.[17]

II

The Office of Disciplinary Counsel charged that Zauderer's drunken driving advertisement was deceptive because it proposed a contingent fee in a criminal case—an unlawful arrangement under Ohio law. Amended Complaint ¶¶ 3–7, App. 22–23. Zauderer defended on the ground that the offer of a refund did not constitute a proposed contingent fee. This was the sole issue concerning the drunken driving advertisement that the Office complained of, and the evidence and arguments presented to the Board of Commissioners were limited to this question. The Board, however, did not

---

[17] The First Amendment protects not only the right of attorneys to disseminate truthful information about the availability of contingent-fee arrangements, but the right of the public to receive such knowledge as well. See, *e. g.*, *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S., at 96–97; *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 770. Many members of the public fail to consult an attorney precisely out of ignorance concerning available fee arrangements. See, *e. g.*, *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 473–475 (MARSHALL, J., concurring in part and concurring in judgment); *Bates* v. *State Bar of Arizona*, 433 U. S., at 370, and n. 22. Contingent-fee advertising, by providing information that is relevant to the potential vindication of legal rights, therefore serves interests far broader than the simple facilitation of commercial barter.

even mention the contingent-fee issue in its certified report. Instead, it found the advertisement "misleading and deceptive" on the basis of a completely new theory—that as a matter of "general knowledge" as discerned from certain "Municipal Court reports," drunken driving charges are "in many cases . . . reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court," so that in such circumstances "the legal fee would not be refundable." App. to Juris. Statement 11a. Although Zauderer argued before the Supreme Court of Ohio that this theory had never been advanced by the Office of Disciplinary Counsel, that he had never had any opportunity to object to the propriety of judicial notice or to present opposing evidence, and that there was no evidence connecting him to the alleged practice, the court adopted the Board's findings without even acknowledging his objections. 10 Ohio St. 3d, at 48, 461 N. E. 2d, at 886.

Zauderer of course might not ultimately be able to disprove the Board's theory. The question before the Court, however, is not one of prediction but one of process. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 U. S. 257, 273 (1948). Under the Due Process Clause, "reasonable notice" must include disclosure of "the *specific* issues [the party] must meet," *In re Gault*, 387 U. S. 1, 33–34 (1967) (emphasis added), and appraisal of "the factual material on which the agency relies for decision so that he may rebut it," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 288, n. 4 (1974). These guarantees apply fully to attorney disciplinary proceedings because, obviously, "lawyers also enjoy first-class citizenship." *Spevack* v. *Klein*, 385 U. S. 511, 516 (1967). Where there is an "absence of fair notice as to the reach of the grievance procedure and the *precise* nature of the charges," so that the attorney is not given a meaningful opportunity to present evidence in his defense, the proceed-

ings violate due process. *In re Ruffalo*, 390 U. S., at 552 (emphasis added).[18]

The Court acknowledges these guarantees, but argues that the Board's change of theories after the close of evidence was "of little moment" because Zauderer had an opportunity to object to the Board's certified report before the Supreme Court of Ohio. *Ante*, at 654. This reasoning is untenable. Although the Supreme Court of Ohio made the ultimate determination concerning discipline, it held no *de novo* hearing and afforded Zauderer no opportunity to present evidence opposing the Board's surprise exercise of judicial notice. Under Ohio procedure, the court's role was instead limited to a record review of the Board's certified findings to determine whether they were "against the weight of the evidence" or made in violation of legal and procedural guarantees. *Cincinnati Bar Assn.* v. *Fennell*, 63 Ohio St. 2d 113, 119, 406 N. E. 2d 1129, 1133 (1980).[19] All that Zauderer could do was to argue that the Board's report was grounded on a theory that he had never been notified of and that he never had an opportunity to challenge with evidence of his own, and to request that proper procedures be followed.[20]

---

[18] The Court attempts to distinguish *Ruffalo* by explaining that the absence of fair notice in that case caused the attorney to give exculpatory testimony that, after it prompted the inclusion of additional charges, became inculpatory. *Ante*, at 655, n. 18. In the instant case, the Court assures, the absence of fair notice was not "particularly offensive" because it simply led Zauderer to *refrain* from presenting evidence that might have been exculpatory rather than to *present* evidence having an inculpatory effect. *Ibid.* This constricted interpretation of due process guarantees flies in the face of what I had thought was an "immutable" principle of our constitutional jurisprudence—that "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959).

[19] See generally Govt. Bar Rule V(11)–(20). The attorney may only file a list of objections to the certified findings and recommendations along with a supporting brief. Rule V(18).

[20] See Brief for Respondent Zauderer In Support Of His Objections, No. DD 83–19 (S. Ct. Ohio), pp. 76–78.

The court completely ignored these objections.[21] To hold that this sort of procedure constituted a meaningful "chance to be heard in a trial of the issues," *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948), is to make a mockery of the due process of law that is guaranteed every citizen accused of wrongdoing.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, V, and VI of the Court's opinion, and its judgment except insofar as it reverses the reprimand based on appellant Zauderer's use of unsolicited legal advice in violation of DR 2–103(A) and 2–104(A). I agree that appellant was properly reprimanded for his drunken driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in Part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban.[1] I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dis-

---

[21] The mere opportunity unsuccessfully to bring procedural violations to the attention of an appellate-type forum obviously does not constitute the meaningful "chance to be heard" that is guaranteed by the Due Process Clause. *Cole* v. *Arkansas*, 333 U. S. 196, 201–202 (1948).

[1] Like the majority, I express no view as to whether this is also the case for broadcast media. As the Court observed in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 384 (1977), "the special problems of advertising on the electronic broadcast media will warrant special consideration."

pensed is professional advice. Almost every State restricts an attorney's ability to accept employment resulting from unsolicited legal advice. At least two persuasive reasons can be advanced for the restrictions. First, there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 773, n. 25 (1976). Faced with this complexity, a layperson may often lack the knowledge or experience to gauge the quality of the sample before signing up for a larger purchase. Second, and more significantly, the attorney's personal interest in obtaining business may color the advice offered in soliciting a client. As a result, a potential customer's decision to employ the attorney may be based on advice that is neither complete nor disinterested.

These risks are of particular concern when an attorney offers unsolicited advice to a potential client in a personal encounter. In that context, the legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). For these reasons, most States expressly bar lawyers from accepting employment resulting from *in person* unsolicited advice.[2] Some States, like the American Bar Association in its Model Rules of Professional Conduct, extend the prohibition to employment re-

---

[2] See, *e. g.*, Alaska DR 2–104(A); Ariz. DR 2–104(A); Ark. DR 2–104(A); Colo. DR 2–104(A); Conn. DR 2–104(A); Del. DR 2–104(A); D. C. DR 2–104(A); Ga. DR 2–104(A); Ind. DR 2–104(A); Kan. DR 2–104(A); Mo. DR 2–104(A); Mont. DR 2–104(A); Nev. DR 2–104(A); N. M. DR 2–104(A); N. C. DR 2–104(A); N. D. DR 2–104(A); Okla. DR 2–104(A); Tenn. DR 2–104(A); Utah DR 2–104(A); Wash. DR 2–104(A); W. Va. DR 2–104(A); Wyo. DR 2–104(A).

sulting from unsolicited advice in telephone calls, letters, or communications directed to a specific recipient.[3] Ohio and 14 other States go a step further. They do not limit their rules to certain methods of communication, but instead provide that, with limited exceptions, a "lawyer who has given unsolicited legal advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."[4]

The issue posed and decided in Part III of the Court's opinion is whether such a rule can be applied to punish the use of legal advice in a printed advertisement soliciting business. The majority's conclusion is a narrow one: "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive . . . advice regarding the legal rights of potential clients." *Ante*, at 647. The Court relies on its commercial speech analysis in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980), and *In re R. M. J.*, 455 U. S. 191 (1982). As the Court notes, *Central Hudson Gas & Electric* establishes that a State can prohibit truthful and nondeceptive commercial speech only if the restriction directly advances a substantial government interest. *In re R. M. J.* went further, stating that a State cannot place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive. 455 U. S., at 203.

Given these holdings, the Court rejects Ohio's ban on the legal advice contained in Zauderer's Dalkon Shield advertise-

---

[3] See ABA Model Rule of Professional Conduct 7.3 (1983); Haw. DR 2–103, DR 2–104; Me. Rule 3.9(F); Minn. DR 2–103(A) (in person and telephonic solicitation); S. D. DR 2–103, DR 2–104(A).

[4] See Idaho DR 2–104; Ky. DR 2–104(A); Md. DR 2–104(A); Mich. DR 2–104(A); Miss. DR 2–104(A); Neb. DR 2–104(A); N. J. DR 2–104(A); N. Y. DR 2–104(A); Ohio DR 2–104(A); Ore. DR 2–104(A); Pa. DR 2–104(A); R. I. DR 2–104(A); Tex. DR 2–104(A); Vt. DR 2–104(A); Wis. DR 2–104(A).

ment: "do not assume it is too late to take legal action against the . . . manufacturer." App. 15. Surveying Ohio law, the majority concludes that this advice "seems completely unobjectionable," *ante*, at 640. Since the statement is not misleading, the Court turns to the asserted state interests in restricting it, and finds them all wanting. The Court perceives much less risk of overreaching or undue influence here than in *Ohralik* simply because the solicitation does not occur in person. The State's interest in discouraging lawyers from stirring up litigation is denigrated because lawsuits are not evil, and States cannot properly interfere with access to our system of justice. Finally, the Court finds that there exist less restrictive means to prevent attorneys from using misleading legal advice to attract clients: just as the Federal Trade Commission has been able to identify unfair or deceptive practices in the marketing of mouthwash and eggs, *Warner-Lambert Co.* v. *FTC*, 183 U. S. App. D. C. 230, 562 F. 2d 749 (1977), *National Comm'n on Egg Nutrition* v. *FTC*, 570 F. 2d 157 (CA7 1977), the States can identify unfair or deceptive legal advice without banning that advice entirely. *Ante*, at 645–646. The majority concludes that "[t]he qualitative distinction the State has attempted to draw eludes us." *Ante*, at 646.

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of professional conduct, and the distinction between professional services and standardized consumer products. See, *e. g.*, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975). The States understandably require more of attorneys than of others engaged in commerce. Lawyers are *professionals*, and as such they have greater obligations. As Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be

exacted . . . qualities of truth-speaking, of a high sense of honor, of granite discretion." *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, 247 (1957). The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, see *Florida Bar* v. *Schreiber*, 420 So. 2d 599 (Fla. 1982) (opinion of Ehrlich, J.), substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large.

The Court's commercial speech decisions have repeatedly acknowledged that the differences between professional services and other advertised products may justify distinctive state regulation. See *Virginia Pharmacy Board*, 425 U. S., at 773, n. 25; *id.*, at 773–775 (opinion of BURGER, C. J.); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383–384 (1977); *In re R. M. J.*, *supra*, at 204, n. 15. Most significantly, in *Ohralik*, the Court found that the strong state interest in maintaining standards among members of licensed professions and in preventing fraud, overreaching, or undue influence by attorneys justified a prophylactic rule barring in person solicitation. 436 U. S., at 460–462. Although the antisolicitation rule in *Ohralik* would in some circumstances preclude an attorney from honestly and fairly informing a potential client of his or her legal rights, the Court nevertheless deferred to the State's determination that risks of undue influence or overreaching justified a blanket ban. See also *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (upholding Texas prohibition on use of any trade name in the practice of optometry due to risk of deceptive or misleading use of trade names). At a minimum, these cases demonstrate that States are entitled under some circumstances to encompass truthful, nondeceptive speech within a ban of a type of advertising that threatens substantial state interests.

In my view, a State could reasonably determine that the use of unsolicited legal advice "as bait with which to obtain agreement to represent [a client] for a fee," *Ohralik*, 436 U. S., at 458, poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's Dalkon Shield advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether "it is too late to take legal action against the . . . manufacturer" without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. *Matter of Von Wiegen*, 101 App. Div. 2d 627, 474 N. Y. S. 2d 147, modified, 63 N. Y. 2d 163, 470 N. E. 2d 838 (1984), cert. pending,

No. 84–1120. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim were completely accurate—even if liability were in fact clear and the attorney actually thought it to be so—I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. See *Ohralik*, *supra*, at 461 (noting that DR 2–104(A) serves "to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest"). Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights. See, *e. g.*, Ohio DR 2–104(A)(4) (permitting attorneys to speak and write publicly on legal topics as long as they do not emphasize their own experience or reputation). Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, *ante*, at 643, while at the same time opposing the use of self-interested legal advice to solicit clients.

In the face of these substantial and legitimate state concerns, I cannot agree with the majority that Ohio DR 2–104(A) is unnecessary to the achievement of those interests. The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's long-standing and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule. As the Iowa Supreme Court recently observed, "[t]he professional disciplinary system would be in chaos if violations could be defended on the ground the lawyer involved could think of a better rule." *Committee On Professional*

Ethics and Conduct of Ohio State Bar Assn. v. *Humphrey*, 355 N. W. 2d 565, 569 (1984), cert. pending, No. 84–1150. Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

Syllabus

LANDRETH TIMBER CO. *v.* LANDRETH ET AL.

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

No. 83–1961. Argued March 26, 1985—Decided May 28, 1985

Respondents father and sons, who owned all of the common stock of a lumber business that they operated, offered their stock for sale through brokers. The company's sawmill was subsequently damaged by fire, but potential purchasers were told that the mill would be rebuilt and modernized. Thereafter, a stock purchase agreement for all of the stock was executed, and ultimately petitioner company was formed by the purchasers. Respondent father agreed to stay on as a consultant for some time to help with the daily operations of the mill. After the acquisition was completed, the mill did not live up to the purchasers' expectations. Eventually, petitioner sold the mill at a loss and went into receivership. Petitioner then filed suit in Federal District Court for rescission of the sale of stock and damages, alleging that respondents had violated the registration provisions of the Securities Act of 1933 (1933 Act) and the antifraud provisions of the Securities Exchange Act of 1934 (1934 Act). The court granted summary judgment for respondents, holding that under the "sale of business" doctrine, the stock could not be considered a "security" for purposes of the Acts because managerial control of the business had passed into the hands of the purchasers, who bought 100% of the stock. The court concluded that the transaction thus was a commercial venture rather than a typical investment. The Court of Appeals affirmed.

Held: The stock at issue here is a "security" within the definition of the Acts, *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, distinguished, and the "sale of business" doctrine does not apply. Pp. 685–697.

(a) Section 2(1) of the 1933 Act and § 3(a)(10) of the 1934 Act define a "security" as including "stock" and other listed types of instruments. Although the fact that instruments bear the label "stock" is not of itself sufficient to invoke the Acts' coverage, when an instrument is both called "stock" and bears stock's usual characteristics as identified in *Forman, supra*, a purchaser justifiably may assume that the federal securities laws apply. The stock involved here possesses all of the characteristics traditionally associated with common stock. Moreover, reading the securities laws to apply to the sale of stock at issue here comports with Congress' remedial purpose in enacting the legislation to protect investors. Pp. 685–688.

(b) When an instrument is labeled "stock" and possesses all of the traditional characteristics of stock, a court is not required to look to the economic substance of the transaction to determine whether the stock is a "security" within the meaning of the Acts. A contrary rule is not supported by this Court's prior decisions involving unusual instruments not easily characterized as "securities." Nor were the Acts intended, as asserted by respondents, to cover only "passive investors" and not privately negotiated transactions involving the transfer of control to "entrepreneurs." Pp. 688–692.

(c) An instrument bearing both the name and all of the usual characteristics of stock presents the clearest case for coverage by the plain language of the definition. "Stock" is distinguishable from most if not all of the other listed categories, and may be viewed as being in a category by itself for purposes of interpreting the Acts' definition of "security." Pp. 693–694.

(d) Application of the "sale of business" doctrine depends on whether control has passed to the purchaser. Even though the transfer of 100% of a corporation's stock normally transfers control, the purchasers here had no intention of running the sawmill themselves. Moreover, if the doctrine were applied here, it would also have to be applied to cases in which less than 100% of a company's stock was sold, thus inevitably leading to difficult questions of line-drawing. As explained in *Gould* v. *Ruefenacht*, *post*, p. 701, coverage by the Acts would in most cases be unknown and unknowable to the parties at the time the stock was sold. Such uncertainties attending the applicability of the Acts would be intolerable. Pp. 694–697.

731 F. 2d 1348, reversed.

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. 697.

James L. Quarles III argued the cause for petitioner. With him on the briefs were *Russell B. Stevenson, Jr.*, and *William F. Lee*.

James A. Smith, Jr., argued the cause for respondents. With him on the briefs were *Guy P. Michelson*, *Patricia H. Char*, and *Richard D. Vogt*.*

**Solicitor General Lee, Deputy Solicitor General Claiborne, Daniel L. Goelzer, Paul Gonson, Jacob H. Stillman,* and *Rosalind C. Cohen* filed a

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the sale of all of the stock of a company is a securities transaction subject to the antifraud provisions of the federal securities laws (the Acts).

I

Respondents Ivan K. Landreth and his sons owned all of the outstanding stock of a lumber business they operated in Tonasket, Washington. The Landreth family offered their stock for sale through both Washington and out-of-state brokers. Before a purchaser was found, the company's sawmill was heavily damaged by fire. Despite the fire, the brokers continued to offer the stock for sale. Potential purchasers were advised of the damage, but were told that the mill would be completely rebuilt and modernized.

Samuel Dennis, a Massachusetts tax attorney, received a letter offering the stock for sale. On the basis of the letter's representations concerning the rebuilding plans, the predicted productivity of the mill, existing contracts, and expected profits, Dennis became interested in acquiring the stock. He talked to John Bolten, a former client who had retired to Florida, about joining him in investigating the offer. After having an audit and an inspection of the mill conducted, a stock purchase agreement was negotiated, with Dennis the purchaser of all of the common stock in the lumber company. Ivan Landreth agreed to stay on as a consultant for some time to help with the daily operations of the mill. Pursuant to the terms of the stock purchase agreement, Dennis assigned the stock he purchased to B & D Co., a corporation formed for the sole purpose of acquiring the lumber company stock. B & D then merged with the lumber company, form-

---

brief for the Securities and Exchange Commission as *amicus curiae* urging reversal.

Stephen M. Shapiro and *Barbara A. Reeves* filed a brief for Advance Ross Corp. as *amicus curiae* urging affirmance.

ing petitioner Landreth Timber Co. Dennis and Bolten then acquired all of petitioner's Class A stock, representing 85% of the equity, and six other investors together owned the Class B stock, representing the remaining 15% of the equity.

After the acquisition was completed, the mill did not live up to the purchasers' expectations. Rebuilding costs exceeded earlier estimates, and new components turned out to be incompatible with existing equipment. Eventually, petitioner sold the mill at a loss and went into receivership. Petitioner then filed this suit seeking rescission of the sale of stock and $2,500,000 in damages, alleging that respondents had widely offered and then sold their stock without registering it as required by the Securities Act of 1933, 15 U. S. C. § 77a *et seq.* (1933 Act). Petitioner also alleged that respondents had negligently or intentionally made misrepresentations and had failed to state material facts as to the worth and prospects of the lumber company, all in violation of the Securities Exchange Act of 1934, 15 U. S. C. § 78a *et seq.* (1934 Act).

Respondents moved for summary judgment on the ground that the transaction was not covered by the Acts because under the so-called "sale of business" doctrine, petitioner had not purchased a "security" within the meaning of those Acts. The District Court granted respondents' motion and dismissed the complaint for want of federal jurisdiction. It acknowledged that the federal statutes include "stock" as one of the instruments constituting a "security," and that the stock at issue possessed all of the characteristics of conventional stock. Nonetheless, it joined what it termed the "growing majority" of courts that had held that the federal securities laws do not apply to the sale of 100% of the stock of a closely held corporation. App. to Pet. for Cert. 13a. Relying on *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975), and *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), the District Court ruled that the stock could not be considered a "security" unless the purchaser had entered into the

transaction with the anticipation of earning profits derived from the efforts of others. Finding that managerial control of the business had passed into the hands of the purchasers, and thus that the transaction was a commercial venture rather than a typical investment, the District Court dismissed the complaint.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's application of the sale of business doctrine. 731 F. 2d 1348 (1984). It agreed that it was bound by *United Housing Foundation, Inc.* v. *Forman, supra,* and *SEC* v. *W. J. Howey Co., supra,* to determine in every case whether the economic realities of the transaction indicated that the Acts applied. Because the Courts of Appeals are divided over the applicability of the federal securities laws when a business is sold by the transfer of 100% of its stock, we granted certiorari. 469 U. S. 1016 (1984). We now reverse.

II

It is axiomatic that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 756 (1975) (POWELL, J., concurring); accord, *Teamsters* v. *Daniel,* 439 U. S. 551, 558 (1979). Section 2(1) of the 1933 Act, 48 Stat. 74, as amended and as set forth in 15 U. S. C. § 77b(1), defines a "security" as including

> "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, . . . or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, re-

ceipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."[1]

As we have observed in the past, this definition is quite broad, *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982), and includes both instruments whose names alone carry well-settled meaning, as well as instruments of "more variable character [that] were necessarily designated by more descriptive terms," such as "investment contract" and "instrument commonly known as a 'security.'" *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 351 (1943). The face of the definition shows that "stock" is considered to be a "security" within the meaning of the Acts. As we observed in *United Housing Foundation, Inc.* v. *Forman, supra*, most instruments bearing such a traditional title are likely to be covered by the definition. *Id.*, at 850.

As we also recognized in *Forman*, the fact that instruments bear the label "stock" is not of itself sufficient to invoke the coverage of the Acts. Rather, we concluded that we must also determine whether those instruments possess "some of the significant characteristics typically associated with" stock, *id.*, at 851, recognizing that when an instrument is both called "stock" and bears stock's usual characteristics, "a purchaser justifiably [may] assume that the federal securities laws apply," *id.*, at 850. We identified those characteristics usually associated with common stock as (i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value.[2] *Id.*, at 851.

---

[1] We have repeatedly ruled that the definitions of "security" in § 3(a)(10) of the 1934 Act and § 2(1) of the 1933 Act are virtually identical and will be treated as such in our decisions dealing with the scope of the term. *Marine Bank* v. *Weaver*, 455 U. S. 551, 555, n. 3 (1982); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847, n. 12 (1975).

[2] Although we did not so specify in *Forman*, we wish to make clear here that these characteristics are those usually associated with common stock,

Under the facts of *Forman*, we concluded that the instruments at issue there were not "securities" within the meaning of the Acts. That case involved the sale of shares of stock entitling the purchaser to lease an apartment in a housing cooperative. The stock bore none of the characteristics listed above that are usually associated with traditional stock. Moreover, we concluded that under the circumstances, there was no likelihood that the purchasers had been misled by use of the word "stock" into thinking that the federal securities laws governed their purchases. The purchasers had intended to acquire low-cost subsidized living space for their personal use; no one was likely to have believed that he was purchasing investment securities. *Ibid.*

In contrast, it is undisputed that the stock involved here possesses all of the characteristics we identified in *Forman* as traditionally associated with common stock. Indeed, the District Court so found. App. to Pet. for Cert. 13a. Moreover, unlike in *Forman*, the context of the transaction involved here—the sale of stock in a corporation—is typical of the kind of context to which the Acts normally apply. It is thus much more likely here than in *Forman* that an investor would believe he was covered by the federal securities laws. Under the circumstances of this case, the plain meaning of the statutory definition mandates that the stock be treated as "securities" subject to the coverage of the Acts.

Reading the securities laws to apply to the sale of stock at issue here comports with Congress' remedial purpose in enacting the legislation to protect investors by "compelling full and fair disclosure relative to the issuance of 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" *SEC* v. *W. J. Howey Co.*, 328 U. S., at 299 (quoting H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933)). Although we recognize that Congress did not intend to provide a comprehensive federal remedy for

---

the kind of stock often at issue in cases involving the sale of a business. Various types of preferred stock may have different characteristics and still be covered by the Acts.

all fraud, *Marine Bank* v. *Weaver*, *supra*, at 556, we think it would improperly narrow Congress' broad definition of "security" to hold that the traditional stock at issue here falls outside the Acts' coverage.

III

Under other circumstances, we might consider the statutory analysis outlined above to be a sufficient answer compelling judgment for petitioner.[3] Respondents urge, however, that language in our previous opinions, including *Forman*, requires that we look beyond the label "stock" and the characteristics of the instruments involved to determine whether application of the Acts is mandated by the economic substance of the transaction. Moreover, the Court of Appeals rejected the view that the plain meaning of the definition would be sufficient to hold this stock covered, because it saw "no principled way," 731 F. 2d, at 1353, to justify treating notes, bonds, and other of the definitional categories differently. We address these concerns in turn.

A

It is fair to say that our cases have not been entirely clear on the proper method of analysis for determining when an instrument is a "security." This Court has decided a number of cases in which it looked to the economic substance of the transaction, rather than just to its form, to determine whether the Acts applied. In *SEC* v. *C. M. Joiner Leasing Corp.*, for example, the Court considered whether the 1933 Act applied to the sale of leasehold interests in land near a proposed oil well drilling. In holding that the leasehold interests were "securities," the Court noted that "the reach of the Act does not stop with the obvious and commonplace." 320 U. S., at 351. Rather, it ruled that unusual devices such

---

[3] Professor Loss suggests that the statutory analysis is sufficient. L. Loss, Fundamentals of Securities Regulation 212 (1983). See *infra*, at 693–694.

as the leaseholds would also be covered "if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'" *Ibid.*

SEC v. *W. J. Howey Co., supra,* further elucidated the *Joiner* Court's suggestion that an unusual instrument could be considered a "security" if the circumstances of the transaction so dictated. At issue in that case was an offering of units of a citrus grove development coupled with a contract for cultivating and marketing the fruit and remitting the proceeds to the investors. The Court held that the offering constituted an "investment contract" within the meaning of the 1933 Act because, looking at the economic realities, the transaction "involve[d] an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U. S., at 301.

This so-called "*Howey* test" formed the basis for the second part of our decision in *Forman,* on which respondents primarily rely. As discussed above, see Part II, *supra,* the first part of our decision in *Forman* concluded that the instruments at issue, while they bore the traditional label "stock," were not "securities" because they possessed none of the usual characteristics of stock. We then went on to address the argument that the instruments were "investment contracts." Applying the *Howey* test, we concluded that the instruments likewise were not "securities" by virtue of being "investment contracts" because the economic realities of the transaction showed that the purchasers had parted with their money not for the purpose of reaping profits from the efforts of others, but for the purpose of purchasing a commodity for personal consumption. 421 U. S., at 858.

Respondents contend that *Forman* and the cases on which it was based[4] require us to reject the view that the shares of

---

[4] Respondents also rely on *Tcherepnin* v. *Knight,* 389 U. S. 332 (1967), and *Marine Bank* v. *Weaver,* 455 U. S. 551 (1982), as support for their argument that we have mandated in every case a determination of whether

stock at issue here may be considered "securities" because of their name and characteristics. Instead, they argue that our cases require us in every instance to look to the economic substance of the transaction to determine whether the *Howey* test has been met. According to respondents, it is clear that petitioner sought not to earn profits from the efforts of others, but to buy a company that it could manage and control. Petitioner was not a passive investor of the kind Congress intended the Acts to protect, but an active entrepreneur, who sought to "use or consume" the business purchased just as the purchasers in *Forman* sought to use the apartments they acquired after purchasing shares of stock. Thus, respondents urge that the Acts do not apply.

We disagree with respondents' interpretation of our cases. First, it is important to understand the contexts within which these cases were decided. All of the cases on which respondents rely involved unusual instruments not easily characterized as "securities." See n. 4, *supra*. Thus, if the Acts were to apply in those cases at all, it would have to have been because the economic reality underlying the transactions indicated that the instruments were actually of a type that falls within the usual concept of a security. In the case at bar, in contrast, the instrument involved is traditional stock, plainly within the statutory definition. There is no need here, as there was in the prior cases, to look beyond the characteristics of the instrument to determine whether the Acts apply.

---

the economic realities of a transaction call for the application of the Acts. It is sufficient to note here that these cases, like the other cases on which respondents rely, involved unusual instruments that did not fit squarely within one of the enumerated specific kinds of securities listed in the definition. *Tcherepnin* involved withdrawable capital shares in a state savings and loan association, and *Weaver* involved a certificate of deposit and a privately negotiated profit-sharing agreement. See *Marine Bank* v. *Weaver*, *supra*, at 557, n. 5, for an explanation of why the certificate of deposit involved there did not fit within the definition's category "certificate of deposit, for a security."

Contrary to respondents' implication, the Court has never foreclosed the possibility that stock could be found to be a "security" simply because it is what it purports to be. In *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), the Court noted: "[W]e do nothing to the words of the Act; we merely accept them. . . . In some cases, [proving that the documents were securities] might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock." *Id.*, at 355. Nor does *Forman* require a different result. Respondents are correct that in *Forman* we eschewed a "literal" approach that would invoke the Acts' coverage simply because the instrument carried the label "stock." *Forman* does not, however, eliminate the Court's ability to hold that an instrument is covered when its characteristics bear out the label. See *supra*, at 686–687.

Second, we would note that the *Howey* economic reality test was designed to determine whether a particular instrument is an "investment contract," not whether it fits within *any* of the examples listed in the statutory definition of "security." Our cases are consistent with this view.[5] *Teamsters*

---

[5] In support of their contention that the Court has mandated use of the *Howey* test whenever it determines whether an instrument is a "security," respondents quote our statement in *Teamsters* v. *Daniel*, 439 U. S. 551, 558, n. 11 (1979), that the *Howey* test "'embodies the essential attributes that run through all of the Court's decisions defining a security'" (quoting *Forman*, 421 U. S., at 852). We do not read this bit of dicta as broadly as respondents do. We made the statement in *Forman* in reference to the purchasers' argument that if the instruments at issue were not "stock" and were not "investment contracts," at least they were "instrument[s] commonly known as a 'security'" within the statutory definition. We stated, as part of our analysis of whether the instruments were "investment contracts," that we perceived "no distinction, *for present purposes*, between an 'investment contract' and an 'instrument commonly known as a "security."'" *Ibid.* (emphasis added). This was not to say that the *Howey* test applied to any case in which an instrument was alleged to be a security, but only that once the label "stock" did not hold true, we perceived no reason to analyze the case differently whether we viewed the instruments as "invest-

v. *Daniel*, 439 U. S., at 558 (appropriate to turn to the *Howey* test to "determine whether a particular financial relationship constitutes an investment contract"); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975); see *supra*, at 689. Moreover, applying the *Howey* test to traditional stock and all other types of instruments listed in the statutory definition would make the Acts' enumeration of many types of instruments superfluous. *Golden* v. *Garafalo*, 678 F. 2d 1139, 1144 (CA2 1982). See *Tcherepnin* v. *Knight*, 389 U. S. 332, 343 (1967).

Finally, we cannot agree with respondents that the Acts were intended to cover only "passive investors" and not privately negotiated transactions involving the transfer of control to "entrepreneurs." The 1934 Act contains several provisions specifically governing tender offers, disclosure of transactions by corporate officers and principal stockholders, and the recovery of short-swing profits gained by such persons. See, *e. g.*, 1934 Act, §§ 14, 16, 15 U. S. C. §§ 78n, 78p. Eliminating from the definition of "security" instruments involved in transactions where control passed to the purchaser would contravene the purposes of these provisions. Accord, *Daily* v. *Morgan*, 701 F. 2d 496, 503 (CA5 1983). Furthermore, although § 4(2) of the 1933 Act, 15 U. S. C. § 77d(2), exempts transactions not involving any public offering from the Act's registration provisions, there is no comparable exemption from the antifraud provisions. Thus, the structure and language of the Acts refute respondents' position.[6]

---

ment contracts" or as falling within another similarly general category of the definition—an "instrument commonly known as a 'security.'" Under either of these general categories, the *Howey* test would apply.

[6] In criticizing the sale of business doctrine, Professor Loss agrees. He considers that the doctrine "comes dangerously close to the heresy of saying that the fraud provisions do not apply to private transactions; for nobody, apparently, has had the temerity to argue that the sale of a *publicly* owned business for stock of the acquiring corporation that is distributed to the shareholders of the selling corporation as a liquidating dividend does

B

We now turn to the Court of Appeals' concern that treating stock as a specific category of "security" provable by its characteristics means that other categories listed in the statutory definition, such as notes, must be treated the same way. Although we do not decide whether coverage of notes or other instruments may be provable by their name and characteristics, we do point out several reasons why we think stock may be distinguishable from most if not all of the other categories listed in the Acts' definition.

Instruments that bear both the name and all of the usual characteristics of stock seem to us to be the clearest case for coverage by the plain language of the definition. First, traditional stock "represents to many people, both trained and untrained in business matters, the paradigm of a security." *Daily* v. *Morgan*, *supra*, at 500. Thus persons trading in traditional stock likely have a high expectation that their activities are governed by the Acts. Second, as we made clear in *Forman*, "stock" is relatively easy to identify because it lends itself to consistent definition. See *supra*, at 686. Unlike some instruments, therefore, traditional stock is more susceptible of a plain meaning approach.

Professor Loss has agreed that stock is different from the other categories of instruments. He observes that it "goes against the grain" to apply the *Howey* test for determining whether an instrument is an "investment contract" to traditional stock. L. Loss, Fundamentals of Securities Regulation 211–212 (1983). As Professor Loss explains:

> "It is one thing to say that the typical cooperative apartment dweller has bought a home, not a security; or that not every installment purchase 'note' is a security; or that a person who charges a restaurant meal by signing

---

not involve a security." L. Loss, Fundamentals of Securities Regulation 212 (1983) (emphasis in original) (footnote omitted).

his credit card slip is not selling a security even though his signature is an 'evidence of indebtedness.' But *stock* (except for the residential wrinkle) is so quintessentially a security as to foreclose further analysis." *Id.*, at 212 (emphasis in original).

We recognize that in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), the Court equated "notes" and "bonds" with "stock" as categories listed in the statutory definition that were standardized enough to rest on their names. *Id.*, at 355. Nonetheless, in *Forman*, we characterized *Joiner*'s language as dictum. 421 U. S., at 850. As we recently suggested in a different context in *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 137 (1984), "note" may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context. See *id.*, at 149–153. We here expressly leave until another day the question whether "notes" or "bonds" or some other category of instrument listed in the definition might be shown "by proving [only] the document itself." *SEC* v. *C. M. Joiner Leasing Corp.*, *supra*, at 355. We hold only that "stock" may be viewed as being in a category by itself for purposes of interpreting the scope of the Acts' definition of "security."

IV

We also perceive strong policy reasons for not employing the sale of business doctrine under the circumstances of this case.[7] By respondents' own admission, application of the

[7] JUSTICE STEVENS dissents on the ground that Congress did not intend the antifraud provisions of the federal securities laws to apply to "the private sale of a substantial ownership interest in [a business] simply because the transactio[n] w[as] structured as [a] sal[e] of stock instead of assets." *Post*, at 700. JUSTICE STEVENS, of course, is correct in saying that it is clear from the legislative history of the 1933 and 1934 Acts that Congress was concerned primarily with transactions "in securities . . .

doctrine depends in each case on whether control has passed to the purchaser. It may be argued that on the facts of this case, the doctrine is easily applied, since the transfer of 100% of a corporation's stock normally transfers control. We think even that assertion is open to some question, however, as Dennis and Bolten had no intention of running the sawmill themselves. Ivan Landreth apparently stayed on to manage the daily affairs of the business. Some commen-

---

traded in a public market." *Post*, at 698. *United Housing Foundation, Inc.* v. *Forman*, 421 U. S., at 849. It also is true that there is no indication in the legislative history that Congress considered the type of transactions involved in this case and in *Gould* v. *Ruefenacht, post*, p. 701.

The history is simply silent—as it is with respect to other transactions to which these Acts have been applied by the Securities and Exchange Commission and judicial interpretation over the half century since this legislation was adopted. One only need mention the expansive interpretation of § 10(b) of the 1934 Act and Rule 10b–5 adopted by the Commission. What the Court said in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), is relevant:

"When we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, see *J. I. Case Co. v Borak*, [377 U. S. 426 (1964)], but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b–5. It is therefore proper that we consider, in addition to the factors already discussed, what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Id.*, at 737.

See also *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 196–197 (1976).

In this case, unlike with respect to the interpretation of § 10(b) in *Blue Chip Stamps*, we have the plain language of § 2(1) of the 1933 Act in support of our interpretation. In *Forman, supra*, we recognized that the term "stock" is to be read in accordance with the common understanding of its meaning, including the characteristics identified in *Forman*. See *supra*, at 686. In addition, as stated in *Blue Chip Stamps, supra*, it is proper for a court to consider—as we do today—policy considerations in construing terms in these Acts.

tators who support the sale of business doctrine believe that a purchaser who has the ability to exert control but chooses not to do so may deserve the Acts' protection if he is simply a passive investor not engaged in the daily management of the business. Easley, Recent Developments in the Sale-of-Business Doctrine: Toward a Transactional Context-Based Analysis for Federal Securities Jurisdiction, 39 Bus. Law. 929, 971–972 (1984); Seldin, When Stock is Not a Security: The "Sale of Business" Doctrine Under the Federal Securities Laws, 37 Bus. Law. 637, 679 (1982). In this case, the District Court was required to undertake extensive fact-finding, and even requested supplemental facts and memoranda on the issue of control, before it was able to decide the case. App. to Pet. for Cert. 13a.

More importantly, however, if applied to this case, the sale of business doctrine would also have to be applied to cases in which less than 100% of a company's stock was sold. This inevitably would lead to difficult questions of line-drawing. The Acts' coverage would in every case depend not only on the percentage of stock transferred, but also on such factors as the number of purchasers and what provisions for voting and veto rights were agreed upon by the parties. As we explain more fully in *Gould* v. *Ruefenacht*, *post*, at 704–706, decided today as a companion to this case, coverage by the Acts would in most cases be unknown and unknowable to the parties at the time the stock was sold. These uncertainties attending the applicability of the Acts would hardly be in the best interests of either party to a transaction. Cf. *Marine Bank* v. *Weaver*, 455 U. S., at 559, n. 9 (rejecting the argument that the certificate of deposit at issue there was transformed, chameleon-like, into a "security" once it was pledged). Respondents argue that adopting petitioner's approach will increase the workload of the federal courts by converting state and common-law fraud claims into federal claims. We find more daunting, however, the prospect that parties to a transaction may never know whether they are

covered by the Acts until they engage in extended discovery and litigation over a concept as often elusive as the passage of control. Accord, *Golden* v. *Garafalo*, 678 F. 2d, at 1145–1146.

V

In sum, we conclude that the stock at issue here is a "security" within the definition of the Acts, and that the sale of business doctrine does not apply. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore

Reversed.

JUSTICE STEVENS, dissenting.*

In my opinion, Congress did not intend the antifraud provisions of the federal securities laws to apply to every transaction in a security described in § 2(1) of the 1933 Act:[1]

> "The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, . . . investment contract, voting-trust certificate, . . . or, in general, any interest or instrument commonly known as a 'security.'" 15 U. S. C. § 77b(1).

See also *ante*, at 686, n. 1. Congress presumably adopted this sweeping definition "to prevent the financial community from evading regulation by inventing new types of financial instruments rather than to prevent the courts from interpreting the Act in light of its purposes." *Sutter* v. *Groen*, 687 F. 2d 197, 201 (CA7 1982). Moreover, the "broad statutory

---

*[This opinion applies also to No. 84–165, *Gould* v. *Ruefenacht et al.*, *post*, p. 701.]

[1] Cf. *Milnarik* v. *M–S Commodities, Inc.*, 457 F. 2d 274, 275–276 (CA7) (Stevens, J., for the court) ("we do not believe every conceivable arrangement that would fit a dictionary definition of an investment contract was intended to be included within the statutory definition of a security"), cert. denied, 409 U. S. 887 (1972).

definition is preceded . . . by the statement that the terms mentioned are not to be considered securities if 'the context otherwise requires . . . .'" *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982).

The legislative history of the 1933 and 1934 Securities Acts makes clear that Congress was primarily concerned with transactions in securities that are traded in a public market. In *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975), the Court observed:

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." *Id.*, at 849.

I believe that Congress wanted to protect investors who do not have access to inside information and who are not in a position to protect themselves from fraud by obtaining appropriate contractual warranties.

At some level of analysis, the policy of Congress must provide the basis for placing limits on the coverage of the Securities Acts. The economic realities of a transaction may determine whether "unusual instruments" fall within the scope of the Acts, *ante*, at 690, and whether an ordinary commercial "note" is covered, *ante*, at 693–694. The negotiation of an individual mortgage note, for example, surely would not be covered by the Acts, although a note is literally a "security" under the definition. Cf. *Chemical Bank* v. *Arthur Andersen & Co.*, 726 F. 2d 930, 937 (CA2), cert. denied, 469 U. S.

884 (1984). The marketing to the public of a large portfolio of mortgage loans, however, might well be. See *Sanders* v. *John Nuveen & Co.*, 463 F. 2d 1075, 1079–1080 (CA7), cert. denied, 409 U. S. 1009 (1972).

I believe that the characteristics of the entire transaction are as relevant in determining whether a transaction in "stock" is covered by the Acts as they are in transactions involving "notes," "investment contracts," or the more hybrid securities. Providing regulations for the trading of publicly listed stock—whether on an exchange or in the over-the-counter market—was the heart of Congress' legislative program, and even private sales of such securities are surely covered by the Acts. I am not persuaded, however, that Congress intended to cover negotiated transactions involving the sale of control of a business whose securities have never been offered or sold in any public market. In the latter cases, it is only a matter of interest to the parties whether the transaction takes the form of a sale of stock or a sale of assets, and the decision usually hinges on matters that are irrelevant to the federal securities laws such as tax liabilities, the assignability of Government licenses or other intangible assets, and the allocation of the accrued or unknown liabilities of the going concern. If Congress had intended to provide a remedy for every fraud in the sale of a going concern or its assets, it would not have permitted the parties to bargain over the availability of federal jurisdiction.

In short, I would hold that the antifraud provisions of the federal securities laws are inapplicable unless the transaction involves (i) the sale of a security that is traded in a public market; or (ii) an investor who is not in a position to negotiate appropriate contractual warranties and to insist on access to inside information before consummating the transaction. Of course, until the precise contours of such a standard could be marked out in a series of litigated proceedings, some uncertainty in the coverage of the statutes would be unavoidable. Nevertheless, I am persuaded that the interests in certainty

and predictability that are associated with a simple "bright-line" rule are not strong enough to "justify expanding liability to reach substantive evils far outside the scope of the legislature's concern."[2] *Sutter* v. *Groen*, 687 F. 2d, at 202.

Both of these cases involved a sale of stock in a closely held corporation. In each case the transaction was preceded by comprehensive negotiations between the buyer and seller. There is no suggestion that the buyers were unable to obtain appropriate warranties or to insist on the exchange and independent evaluation of relevant financial information before entering into the transactions.[3] I do not believe Congress intended the federal securities laws to govern the private sale of a substantial ownership interest in these operating businesses simply because the transactions were structured as sales of stock instead of assets.

I would affirm the judgment of the Court of Appeals in No. 83–1961 and reverse the judgment in No. 84–165.

---

[2] In final analysis, the Court relies on its own evaluation of the relevant "policy considerations." See *ante*, at 694–697, and especially n. 7. While I agree that policy considerations are relevant in construing the Securities Acts, I would prefer to rely principally on the policies of Congress as reflected in the legislative history. If extrinsic considerations are to be given effect, I would place a far different evaluation on the weight of the conflicting policies, because I strongly believe that this Court should presume that federal legislation is not intended to displace state authority unless Congress has plainly indicated an intent to do so. See, *e. g.*, *Bennett* v. *New Jersey*, 470 U. S. 632, 654–655, n. 16 (1985) (STEVENS, J., dissenting); *Garcia* v. *United States*, 469 U. S. 70, 89–90 (1984) (STEVENS, J., dissenting); *Michigan* v. *Long*, 463 U. S. 1032, 1067 (1983) (STEVENS, J., dissenting); *United States* v. *Altobella*, 442 F. 2d 310, 316 (CA7 1971) (Stevens, J., for the court). Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 477 (1981) (STEVENS, J., dissenting).

[3] Indeed, in No. 83–1961, the parties entered into a lengthy Stock Purchase Agreement containing extensive warranties and other protections for the purchasers. App. 206–263.

Syllabus

GOULD *v.* RUEFENACHT ET AL.

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

No. 84–165. Argued March 26, 1985—Decided May 28, 1985

Respondent Ruefenacht (hereinafter respondent) purchased 50% of the stock of a company whose president previously had owned all of the stock. Respondent allegedly purchased the stock in reliance on financial documents and oral representations made by various individuals, including petitioner Gould, the company's corporate counsel. Part of the consideration for the deal was respondent's promise that he would participate in the company's management, which he did, but his actions were at all times subject to the president's veto. Respondent subsequently began to doubt the accuracy of some of the representations that had been made to him. He ultimately filed suit in Federal District Court, alleging violations of, *inter alia*, the Securities Act of 1933 and the Securities Exchange Act of 1934. The court granted summary judgment for the defendants, holding that the stock respondent purchased was not a "security" within the meaning of the Acts, and that the "sale of business" doctrine prevented application of the Acts. The Court of Appeals reversed.

Held: The stock purchased by respondent is a "security" within the meaning of the Acts, and the "sale of business" doctrine does not apply. *Landreth Timber Co.* v. *Landreth*, *ante*, p. 681. Pp. 704–706.

(a) Where an instrument bears the label "stock" and possesses all of the characteristics typically associated with stock, a court is not required to look beyond the character of the instrument to the economic substance of the transaction to determine whether the stock is a "security" within the meaning of the Acts. The instruments involved here were called "stock" and possessed all of the characteristics that are usually associated with traditional stock. P. 704.

(b) There are sound policy reasons for rejecting the "sale of business" doctrine as a rule of decision in cases involving the sale of traditional stock in a closely held corporation. The doctrine's application depends primarily on whether control has passed to the purchaser, which may not be determined simply by ascertaining what percentage of the company's stock has been purchased. Acquisition of more than 50% of a company's stock may or may not effect a transfer of operational control, while in some instances *de facto* operational control may be obtained by the acquisition of less than 50%. Such seemingly inconsistent results stem from

the fact that actual control may also depend on other variables. Therefore, the Acts' applicability to a sale of stock such as that involved here would rarely be certain at the time of the transaction. Application of the doctrine also would lead to arbitrary distinctions between transactions covered by the Acts and those that are not. Pp. 704–706.

737 F. 2d 320, 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, *ante*, p. 697.

Robert C. Epstein argued the cause for petitioner. With him on the brief were *Dean A. Gaver* and *Joseph J. Fleischman*. *Robert J. Kelly* filed a brief for O'Halloran, as respondent under this Court's Rule 19.6, urging reversal.

Peter S. Pearlman argued the cause for respondent Ruefenacht. With him on the brief was *Jeffrey W. Herrmann*.

Daniel L. Goelzer argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Claiborne*, *Paul Gonson*, *Jacob H. Stillman*, and *Rosalind C. Cohen*.

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the sale of 50% of the stock of a company is a securities transaction subject to the antifraud provisions of the federal securities laws (the Acts).

I

In 1980, respondent Ruefenacht (hereafter respondent) purchased 2,500 shares of the stock of Continental Import & Export, Inc., an importer of wine and spirits, from Joachim Birkle. Birkle was Continental's president and had owned 100% of the company's stock prior to the time of the sale. The 2,500 shares, for which respondent paid $250,000, represented 50% of Continental's outstanding stock.

According to respondent, he purchased the stock in reliance on financial documents and oral representations made

by Birkle; Christopher O'Halloran, a certified public accountant; and petitioner Gould, Continental's corporate counsel. Part of the consideration for the deal was a promise by respondent that he would participate in the firm's management. The record reveals that he helped solicit contracts for the firm, participated in some hiring decisions, signed a banking resolution so that he could endorse corporate checks in Birkle's absence, and engaged in other more minor pursuits. All the while, however, respondent remained a full-time employee of another corporation, and his actions on behalf of Continental were at all times subject to Birkle's veto.

After respondent paid $120,000 of the stock's purchase price, he began to doubt the accuracy of some of the representations made to him by Birkle and others. Respondent subsequently filed this suit,[1] alleging violations of §§ 12(2) and 17(a) of the Securities Act of 1933 (1933 Act), 15 U. S. C. §§ 77*l*(2), 77q. He also alleged violations of § 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U. S. C. § 78j(b), and Rule 10b–5, 17 CFR § 240.10b–5 (1984). The District Court granted summary judgment for the defendants, concluding that the stock respondent purchased was not a "security" within the meaning of § 3(a)(10) of the 1934 Act, 15 U. S. C. § 78c(a)(10), and § 2(1) of the 1933 Act, 15 U. S. C. § 77b(1). Finding that respondent intended to manage Continental jointly with Birkle, the court concluded that the sale of business doctrine prevented application of the Acts.

The United States Court of Appeals for the Third Circuit reversed. *Ruefenacht* v. *O'Halloran*, 737 F. 2d 320 (1984). It ruled that the plain language of the Acts' definitions of "security" included the stock at issue here, and it disagreed with

---

[1] The complaint named as defendants O'Halloran, Birkle, and Continental, as well as petitioner Gould. Birkle and Continental defaulted for failure to appear. O'Halloran is a respondent under this Court's Rule 19.6 and filed a brief urging that the decision of the Court of Appeals be reversed.

the District Court's conclusion that the sale of business doctrine must be applied in every case to determine whether an instrument is a "security" within the meaning of the Acts. Because the Courts of Appeals are divided over the applicability of the sale of business doctrine to sales of stock arguably transferring control of a closely held business, we granted certiorari. 469 U. S. 1016 (1984). For the reasons stated in our decision announced today in *Landreth Timber Co.* v. *Landreth*, *ante*, p. 681, we now affirm.

II

In *Landreth*, we held that where an instrument bears the label "stock" and possesses all of the characteristics typically associated with stock, see *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 851 (1975), a court will not be required to look beyond the character of the instrument to the economic substance of the transaction to determine whether the stock is a "security" within the meaning of the Acts. The instruments respondent purchased were called "stock," and the District Court ruled that they possessed all of the characteristics listed by *Forman* that are usually associated with traditional stock. App. 50a. As we noted in *Landreth*, *ante*, at 687, the sale of stock in a corporation is typical of the kind of transaction to which the Acts by their terms apply. We conclude that the stock purchased by respondent is a "security" within the meaning of the Acts, and that the sale of business doctrine does not apply.

III

Aside from the language of the Acts and the characteristics of the instruments, there are sound policy reasons for rejecting the sale of business doctrine as a rule of decision in cases involving the sale of traditional stock in a closely held corporation. As petitioner acknowledges, see Brief for Petitioner 27, application of the doctrine depends primarily in each case on whether control has passed to the purchaser.

See, *e. g.*, *Sutter* v. *Groen*, 687 F. 2d 197, 203 (CA7 1982); *King* v. *Winkler*, 673 F. 2d 342, 345 (CA11 1982); *Frederiksen* v. *Poloway*, 637 F. 2d 1147, 1148 (CA7), cert. denied, 451 U. S. 1017 (1981). Control, in turn, may not be determined simply by ascertaining what percentage of the company's stock has been purchased. To be sure, in many cases, acquisition of more than 50% of the voting stock of a corporation effects a transfer of operational control. In other cases, however, even the ownership of more than 50% may not result in effective control. In still other cases, *de facto* operational control may be obtained by the acquisition of less than 50%. These seemingly inconsistent results stem from the fact that actual control may also depend on such variables as voting rights, veto rights, or requirements for a supermajority vote on issues pertinent to company management, such as may be required by state law or the company's certificate of incorporation or its bylaws. See *Golden* v. *Garafalo*, 678 F. 2d 1139, 1146 (CA2 1982) ("In 'economic reality,' considerably less than 100%, and often less than 50%, of outstanding shares may be a controlling block which, when sold to a single holder, effectively transfers the power to manage the business"); *King* v. *Winkler*, *supra*, at 346 (application of the sale of business doctrine "is not [merely] a function of numbers"). Whether control has passed with the stock may also depend on how involved in management the purchaser intends to be, see *Landreth*, *ante*, at 695–696. Therefore, under respondent's theory, the Acts' applicability to a sale of stock such as that involved here would rarely be certain at the time of the transaction. Accord, Hazen, Taking Stock of Stock and the Sale of Closely Held Corporations, 61 N. C. L. Rev. 393, 406 (1983). Rather, it would depend on findings of fact made by a court—often only after extensive discovery and litigation.

Application of the sale of business doctrine also would lead to arbitrary distinctions between transactions covered by the Acts and those that are not. Because applicability of the

Acts would depend on factors other than the type and characteristics of the instrument involved, a corporation's stock could be determined to be a security as to the seller, but not as to the purchaser, or as to some purchasers but not others.[2] Likewise, if the same purchaser bought small amounts of stock through several different transactions, it is possible that the Acts would apply as to some of the transactions, but not as to the one that gave him "control." See *Ruefenacht* v. *O'Halloran*, 737 F. 2d, at 335. Such distinctions make little sense in view of the Acts' purpose to protect investors. Moreover, the parties' inability to determine at the time of the transaction whether the Acts apply neither serves the Acts' protective purpose nor permits the purchaser to compensate for the added risk of no protection when negotiating the transaction.

IV

We conclude that the stock at issue here is a "security," and that the sale of business doctrine does not apply. The judgment of the United States Court of Appeals for the Third Circuit is therefore

Affirmed.

[For dissenting opinion of JUSTICE STEVENS, see *ante*, p. 697.]

---

[2] For example, although the sale of all of a corporation's stock to a single buyer by a single seller would likely not constitute the sale of a security under the sale of business doctrine as to either party, the same sale to a single buyer by several sellers, none of whom exercised control, would probably be considered to be a securities transaction as to the sellers, but not as to the buyer. See *Ruefenacht* v. *O'Halloran*, 737 F. 2d 320, 335, and n. 36 (CA3 1984); *McGrath* v. *Zenith Radio Corp.*, 651 F. 2d 458, 467–468, n. 5 (CA7), cert. denied, 454 U. S. 835 (1981); Seldin, When Stock is Not a Security, 37 Bus. Law. 637, 679 (1982).

Syllabus

HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC.

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

No. 83–1925. Argued April 16, 1985—Decided June 3, 1985

In 1980, appellant Hillsborough County adopted ordinances and promulgated implementing regulations governing blood plasma centers within the county. One ordinance requires that blood donors be tested for hepatitis, that they donate at only one center, and that they be given a breath-analysis test for alcohol content before each donation. Pursuant to § 351 of the Public Health Service Act, the Food and Drug Administration (FDA) has promulgated federal regulations establishing minimum standards for the collection of blood plasma. Appellee operator of a blood plasma center located in appellant county filed suit in Federal District Court, challenging the constitutionality of the ordinances and implementing regulations on the ground, *inter alia*, that they violated the Supremacy Clause, and seeking declaratory and injunctive relief. The District Court upheld the ordinances and regulations, except the requirement that the donor be subject to a breath-analysis test. The Court of Appeals affirmed in part and reversed in part, holding that the FDA's regulations pre-empted all provisions of the ordinances and implementing regulations.

Held: Appellant county's ordinances and implementing regulations are not pre-empted by the federal regulations. Pp. 712–723.

(a) No intent to pre-empt may be inferred from the comprehensiveness of the federal regulations. While the regulations when issued in 1973 covered only plasma to be used in injections, the FDA has not indicated that regulations issued since that time expanding coverage to other uses have affected its express disavowal in 1973 of any intent to pre-empt state and local regulation, and such expansion of coverage does not cast doubt on the continued validity of that disavowal. Even in the absence of the disavowal, the comprehensiveness of the FDA's regulations would not justify pre-emption. To infer pre-emption whenever a federal agency deals with a problem comprehensively would be tantamount to saying that whenever the agency decides to step into a field, its regulations will be exclusive. Such a rule would be inconsistent with the federal-state balance embodied in this Court's Supremacy Clause jurisprudence. The adoption of the National Blood Policy in 1974, which

sets forth a broad statement of goals with respect to blood collection and distribution and calls for cooperation between the Federal Government and the private sector, does not support the claim that the federal regulations have grown so comprehensive since 1973 as to justify the inference of complete pre-emption. Pp. 716–719.

(b) Nor can an intent to pre-empt be inferred from the purported dominant federal interest in the field of blood plasma regulation. The factors indicating federal dominance are absent here. The regulation of health and safety matters is primarily and historically a matter of local concern, and the National Blood Policy is not a sufficient indication of federal dominance. Pp. 719–720.

(c) Any concern that the challenged ordinances impose on plasma centers and donors requirements more stringent than those imposed by the federal regulations and therefore present a serious obstacle to the federal goal of ensuring an "adequate supply of plasma" is too speculative to support pre-emption. The District Court's findings rejecting appellee's factual assertions with respect to this concern, the lack of evidence of a threat to the "adequacy" of the plasma supply, and the lack of any statement by the FDA on the subject of "adequacy," all lead to the conclusion that appellant county's requirements do not imperil the federal goal. And where the record does not indicate that appellee has received the necessary federal exemption from the good-health requirement needed to collect plasma from individuals with hepatitis, appellee lacks standing to challenge the ordinances on the ground that they conflict with the federal regulations because they prevent individuals with hepatitis from donating their plasma. Pp. 720–722.

722 F. 2d 1526, reversed and remanded.

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

Emeline C. Acton argued the cause for appellants. With her on the briefs was *Joe Horn Mount.*

Paul J. Larkin, Jr., argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *Margaret E. Clark.*

Larry A. Stumpf argued the cause for appellee. With him on the brief was *Victoria L. Baden.*

Richard Landfield argued the cause for the American Blood Resources Association et al. as *amici curiae* urging affirmance. With him on the brief was *William W. Becker.**

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the federal regulations governing the collection of blood plasma from paid donors pre-empt certain local ordinances.

I

Appellee Automated Medical Laboratories, Inc., is a Florida corporation that operates, through subsidiaries, eight blood plasma centers in the United States. One of the centers, Tampa Plasma Corporation (TPC), is located in Hillsborough County, Florida. Appellee's plasma centers collect blood plasma from donors by employing a procedure called plasmapheresis. Under this procedure, whole blood removed from the donor is separated into plasma and other components, and "at least the red blood cells are returned to the donor," 21 CFR § 606.3(e) (1984). Appellee sells the plasma to pharmaceutical manufacturers.

Vendors of blood products, such as TPC, are subject to federal supervision. Under § 351(a) of the Public Health Service Act, 58 Stat. 702, as amended, 42 U. S. C. § 262(a), such vendors must be licensed by the Secretary of Health and Human Services (HHS). Licenses are issued only on a showing that the vendor's establishment and blood products meet certain safety, purity, and potency standards established by the Secretary. 42 U. S. C. § 262(d). HHS is authorized to inspect such establishments for compliance. § 262(c).

**Benjamin W. Heineman, Jr.*, filed a brief for the National Association of Counties et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Blood Commission by *Michael H. Cardozo;* and for Grocery Manufacturers of America, Inc., by *Peter Barton Hutt.*

Pursuant to § 351 of the Act, the Food and Drug Administration (FDA), as the designee of the Secretary, has established standards for the collection of plasma. 21 CFR §§ 640.60–640.76 (1984). The regulations require that a licensed physician determine the suitability of a donor before the first donation and thereafter at subsequent intervals of no longer than one year. § 640.63(b)(1). A physician must also inform the donor of the hazards of the procedure and obtain the donor's consent, § 640.61, and must be on the premises when the procedure is performed, § 640.62. In addition, the regulations establish minimum standards for donor eligibility, §§ 640.63(c)–(d), specify procedures that must be followed in performing plasmapheresis, § 640.65, and impose labeling requirements, § 640.70.

In 1980, Hillsborough County adopted Ordinances 80–11 and 80–12. Ordinance 80–11 imposes a $225 license fee on plasmapheresis centers within the county. It also requires such centers to allow the County Health Department "reasonable and continuing access" to their premises for inspection purposes, and to furnish information deemed relevant by the Department. See App. 21–23.

Ordinance 80–12 establishes a countywide identification system, which requires all potential donors to obtain from the County Health Department an identification card, valid for six months, that may be used only at the plasmapheresis center specified on the card. The ordinance incorporates by reference the FDA's blood plasma regulations, but also imposes donor testing and recordkeeping requirements beyond those contained in the federal regulations. Specifically, the ordinance requires that donors be tested for hepatitis prior to registration, that they donate at only one center, and that they be given a breath analysis for alcohol content before each plasma donation. See *id.*, at 24–31.

The county has promulgated regulations to implement Ordinance 80–12. The regulations set the fee for the issuance of an identification card to a blood donor at $2. They also

establish that plasma centers must pay the county a fee of $1 for each plasmapheresis procedure performed. See *id.*, at 32–34.

In December 1981, appellee filed suit in the United States District Court for the Middle District of Florida, challenging the constitutionality of the ordinances and their implementing regulations. Appellee argued primarily that the ordinances violated the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment's Equal Protection Clause. Appellee sought a declaration that the ordinances were unlawful and a permanent injunction against their enforcement. *Id.*, at 5–20.

In November 1982, following a bench trial, the District Court upheld all portions of the local ordinances and regulations except the requirement that donors be subject to a breath-analysis test. *Id.*, at 40–46. The court rejected the Supremacy Clause challenge, discerning no evidence of federal intent to pre-empt the whole field of plasmapheresis regulation and finding no conflict between the Hillsborough County ordinances and the federal regulations.

In addition, the District Court rejected the claim that the ordinances violate the Equal Protection Clause because they regulate only centers that pay donors for plasma, and not centers in which volunteers donate whole blood. The court identified a rational basis for the distinction: paid donors sell plasma more frequently than volunteers donate whole blood, and paid donors have a higher rate of hepatitis than do volunteer donors.

Finally, the District Court found that, with one exception, the ordinances do not impermissibly burden interstate commerce. It concluded that the breath-analysis requirement would impose a large burden on plasma centers by forcing them to purchase fairly expensive testing equipment, and was not shown to achieve any purpose not adequately served by the subjective evaluations of sobriety already required by the federal regulations.

Automated Medical Laboratories appealed to the Court of Appeals for the Eleventh Circuit, which affirmed in part and reversed in part. 722 F. 2d 1526 (1984). The Court of Appeals held that the FDA's blood plasma regulations pre-empt all provisions of the county's ordinances and regulations. The court acknowledged the absence of an express indication of congressional intent to pre-empt. Relying on the pervasiveness of the FDA's regulations and on the dominance of the federal interest in plasma regulation, however, it found an implicit intent to pre-empt state and local laws on that subject. In addition, the court found a serious danger of conflict between the FDA regulations and the Hillsborough County ordinances, reasoning that "[i]f the County scheme remains in effect, the national blood policy of promoting uniformity and guaranteeing a continued supply of healthy donors will be adversely affected." *Id.*, at 1533.

The Court of Appeals thus affirmed, albeit on other grounds, the District Court's invalidation of the breath-analysis requirement. It reversed the District Court's judgment upholding the remaining requirements of the Hillsborough County ordinances and regulations. In view of its decision, the court did not reach the Commerce Clause and Equal Protection challenges to the county's scheme. *Ibid.*

Hillsborough County and the County Health Department appealed to this Court pursuant to 28 U. S. C. § 1254(2).[1] We noted probable jurisdiction, 469 U. S. 1156 (1984), and we now reverse.

II

It is a familiar and well-established principle that the Supremacy Clause, U. S. Const., Art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall,

---

[1] For the purposes of § 1254(2), local ordinances are treated in the same manner as state statutes. See, *e. g.*, *New Orleans* v. *Dukes*, 427 U. S. 297, 301 (1976) *(per curiam)*; *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927, n. 2 (1975).

C. J.). Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Pre-emption of a whole field also will be inferred where the field is one 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." *Ibid.;* see *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified 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 when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz, supra*, at 67. See generally *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 698–699 (1984).

We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes. See, *e. g., Capital Cities Cable, Inc.* v. *Crisp, supra*, at 699; *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153–154 (1982); *United States* v. *Shimer*, 367 U. S. 374, 381–383 (1961). Also, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws. See, *e. g., City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973).

III

In arguing that the Hillsborough County ordinances and regulations are pre-empted, appellee faces an uphill battle. The first hurdle that appellee must overcome is the FDA's statement, when it promulgated the plasmapheresis regulations in 1973, that it did not intend its regulations to be exclusive. In response to comments expressing concern that the regulations governing the licensing of plasmapheresis facilities "would pre-empt State and local laws governing plasmapheresis," the FDA explained in a statement accompanying the regulations that "[t]hese regulations are not intended to usurp the powers of State or local authorities to regulate plasmapheresis procedures in their localities." 38 Fed. Reg. 19365 (1973).

The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. See *supra*, at 712–713. In this case, appellee concedes that neither Congress nor the FDA expressly pre-empted state and local regulation of plasmapheresis. Thus, if the county ordinances challenged here are to fail they must do so either because Congress or the FDA *implicitly* pre-empted the whole field of plasmapheresis regulation, or because particular provisions in the local ordinances conflict with the federal scheme. According to appellee, two separate factors support the inference of a federal intent to pre-empt the whole field: the pervasiveness of the FDA's regulations and the dominance of the federal interest in this area. Appellee also argues that the challenged ordinances reduce the number of plasma donors, and that this effect conflicts with the congressional goal of ensuring an adequate supply of plasma.

The FDA's statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U. S. 837, 842–845 (1984), or subsequent developments reveal a change in that position. Given appellee's first argument for implicit pre-emption—that the comprehensiveness of the FDA's regulations evinces an intent to pre-empt—any pre-emptive effect must result from the change since 1973 in the comprehensiveness of the federal regulations.[2] To prevail on its second argument for implicit pre-emption—the dominance of the federal interest in plasmapheresis regulation—appellee must show either that this interest became more compelling since 1973, or that, in 1973, the FDA seriously underestimated the federal interest in plasmapheresis regulation.

The second obstacle in appellee's path is the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause. Through the challenged ordinances, Hillsborough County has attempted to protect the health of its plasma donors by preventing them from donating too frequently. See Brief for Appellants 12. It also has attempted to ensure the quality of the plasma collected so as to protect, in turn, the recipients of such plasma. "Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Jones* v. *Rath Packing Co.*, 430 U. S., at 525 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230) (citations omitted). Cf. *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 670 (1981) (deference to state regulation of safety under the dormant Commerce Clause); *id.*, at 681, n. 1 (BRENNAN, J., concurring in judgment) (same); *id.*, at 691 (REHNQUIST, J., dissenting) (same). Of course, the same principles apply where, as here, the field is said to have

---

[2] Appellee does not argue that pre-emption can be inferred from the comprehensiveness of the federal statutes governing plasmapheresis.

been pre-empted by an agency, acting pursuant to congressional delegation. Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.

IV

Given the clear indication of the FDA's intention *not to pre-empt* and the deference with which we must review the challenged ordinances, we conclude that these ordinances are not pre-empted by the federal scheme.

A

We reject the argument that an intent to pre-empt may be inferred from the comprehensiveness of the FDA's regulations at issue here. As we have pointed out, given the FDA's 1973 statement, the relevant inquiry is whether a finding of pre-emption is justified by the increase, since 1973, in the comprehensiveness of the federal regulations. Admittedly, these regulations have been broadened over the years. When they were adopted in 1973, these regulations covered only plasma to be used in injections. In 1976, the regulations were expanded to cover also plasma to be used for the manufacture of "noninjectable" products. 41 Fed. Reg. 10762 (1976). The original regulations also were amended to "clarify and strengthen the existing Source Plasma (Human) regulations in light of FDA inspectional and other regulatory experience." *Ibid.;* see also 39 Fed. Reg. 26161 (1974) (first proposing the amendments).

The FDA has not indicated that the new regulations affected its disavowal in 1973 of any intent to pre-empt state and local regulation, and the fact that the federal scheme was expanded to reach other uses of plasma does not cast doubt

on the continued validity of that disavowal.[3] Indeed, even in the absence of the 1973 statement, the comprehensiveness of the FDA's regulations would not justify pre-emption. In *New York Dept. of Social Services* v. *Dublino*, 413 U. S. 405 (1973), the Court stated that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Id.*, at 415. There, in upholding state work-incentive provisions against a pre-emption challenge, the Court noted that the federal provisions "had to be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements." *Ibid.* But merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field. See also *De Canas* v. *Bica*, 424 U. S. 351, 359–360 (1976).

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. See *Jones* v. *Rath Packing Co.*, 430 U. S., at 525.

---

[3] Nor do the amendments to the 1973 regulations indicate that the FDA was departing from its earlier statement; most of the changes are technical and provide no basis for inferring an intent that federal regulation be exclusive.

Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt. Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.

Appellee also relies on the promulgation of the National Blood Policy by the Department of Health, Education, and Welfare (HEW), as an indication that the federal regulatory scheme is now comprehensive enough to justify complete pre-emption. See Brief for Appellee 25–26. Such reliance is misplaced.

The National Blood Policy was established in 1974 as "a pluralistic and evolutionary approach to the solution of blood collection and distribution problems." 39 Fed. Reg. 32702 (1974). The policy contains no regulations; instead, it is a broad statement of goals and a call for cooperation between the Federal Government and the private sector:

> "These policies are intended to achieve certain goals but do not detail methods of implementation. In developing the most effective and suitable means of reaching these goals, the Secretary will involve, as appropriate, all relevant public and private sectors and Federal Government agencies in a cooperative effort to provide the best attainable blood services." *Id.*, at 32703.

The National Blood Policy indicates that federal regulation will be employed only as a last resort: "[I]f the private sector is unable to make satisfactory progress toward implementing

these policies, a legislative and/or regulatory approach would have to be considered." *Ibid.* The adoption of this policy simply does not support the claim that the federal regulations have grown so comprehensive since 1973 as to justify the inference of complete pre-emption.

B

Appellee's second argument for pre-emption of the whole field of plasmapheresis regulation is that an intent to pre-empt can be inferred from the dominant federal interest in this field. We are unpersuaded by the argument. Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive.

Instead, we must look for special features warranting pre-emption. Our case law provides us with clear standards to guide our inquiry in this area. For example, in the seminal case of *Hines* v. *Davidowitz*, 312 U. S. 52 (1941), the Court inferred an intent to pre-empt from the dominance of the federal interest in foreign affairs because "the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution," *id.*, at 62, and the regulation of that field is "intimately blended and intertwined with responsibilities of the national government," *id.*, at 66; see also *Zschernig* v. *Miller*, 389 U. S. 429, 440–441 (1968). Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily, and historically, a matter of local concern. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230.[4]

---

[4] It follows that the FDA's 1973 statement did not underestimate the federal interest in plasmapheresis regulation.

There is also no merit in appellee's reliance on the National Blood Policy as an indication of the dominance of the federal interest in this area. Nothing in that policy takes plasma regulation out of the health-and-safety category and converts it into an area of overriding national concern.

C

Appellee's final argument is that even if the regulations are not comprehensive enough and the federal interest is not dominant enough to pre-empt the entire field of plasmapheresis regulation, the Hillsborough County ordinances must be struck down because they conflict with the federal scheme. Appellee argues principally that the challenged ordinances impose on plasma centers and donors requirements more stringent than those imposed by the federal regulations, and therefore that they present a serious obstacle to the federal goal of ensuring an "adequate supply of plasma." Tr. of Oral Arg. 24; see Brief for Appellee 30; 37 Fed. Reg. 17420 (1972). We find this concern too speculative to support pre-emption.

Appellee claims that "[t]he evidence at trial indicated that enforcement of the County ordinances would result in an increase in direct costs of plasma production by $1.50 per litre, and a total increase in production costs (including direct and indirect costs) of $7 per litre of plasma, an increase of approximately 15% in the total cost of production." Brief for Appellee 30. Appellee argues that these increased financial burdens would reduce the number of plasma centers. In addition, appellee claims, the county requirements would reduce the number of donors who only occasionally sell their plasma because such donors would be deterred by the identification-card requirement. *Id.*, at 30–31.

On the basis of the record before it, the District Court rejected each of appellee's factual assertions. The District Court found that appellee's cost-of-compliance estimates "were clouded with speculation." App. 42. It also found that appellee had presented no facts to support its conclusion that "the vendor population would decrease by twenty-five

percent." *Ibid.* These findings of fact can be set aside only if they are clearly erroneous, Fed. Rule Civ. Proc. 52(a); see *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985), and hence come to us with a strong presumption of validity.

More importantly, even if the Hillsborough County ordinances had, in fact, reduced the supply of plasma in that county, it would not necessarily follow that they interfere with the federal goal of maintaining an adequate supply of plasma. Undoubtedly, overly restrictive local legislation could threaten the national plasma supply. Neither Congress nor the FDA, however, has struck a particular balance between safety and quantity; as we have noted, the regulations, which contemplated additional state and local requirements, merely establish minimum safety standards. See 38 Fed. Reg. 19365 (1973); *supra*, at 710–711. Moreover, the record in this case does not indicate what supply the Federal Government considers "adequate," and we have no reason to believe that any reduction in the quantity of plasma donated would make that supply "inadequate."

Finally, the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma and can do so with relative ease. See *supra*, at 713. Moreover, the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements. Thus, since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma.

Our analysis would be somewhat different had Congress not delegated to the FDA the administration of the federal program. Congress, unlike an agency, normally does not follow, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote. Moreover, it is more difficult for Congress to make its intentions known—for example by amending a statute—than it is for an agency to amend its regulations or to otherwise indicate its position.

In summary, given the findings of the District Court, the lack of any evidence in the record of a threat to the "adequacy" of the plasma supply, and the significance that we attach to the lack of a statement by the FDA, we conclude that the Hillsborough County requirements do not imperil the federal goal of ensuring sufficient plasma.[5]

Appellee also argues that the county ordinances conflict with the federal regulations because they prevent individuals with hepatitis from donating their plasma. See *supra*, at 710. Such plasma is used for the production of hepatitis vaccines, and the federal regulations provide for its collection pursuant to special authorization and under carefully controlled conditions. 21 CFR § 610.41 (1984). To the extent that the Hillsborough County ordinances preclude individuals with hepatitis from donating their plasma, the ordinances are said to stand in the way of the accomplishment of the federal goal of combating hepatitis.

In order to collect plasma from individuals with hepatitis, however, a plasma center must obtain from the FDA, pursuant to § 640.75, an exemption from the good-health requirements of § 640.63(c). The record does not indicate that appellee has received the required exemption. As a result, appellee could not collect plasma from individuals with hepatitis even in the absence of the county ordinances. Thus, appellee lacks standing to challenge the ordinances on this ground.[6]

---

[5] Two of the *amici* argue that the county ordinances interfere with the federal interest in uniform plasma standards. There is no merit to that argument. The federal interest at stake here is to ensure minimum standards, not uniform standards. Indeed, the FDA's 1973 statement makes clear that additional, nonconflicting requirements do not interfere with federal goals, and we have found no reason to doubt the continued validity of that statement. See *supra*, at 714.

[6] Since the ordinances incorporate the FDA's regulations, see *supra*, at 710, they may in fact also provide for the type of exemptions authorized by 21 CFR § 640.75 (1984). If the ordinances were interpreted that way there would be, of course, no conflict.

V

We hold that Hillsborough County Ordinances 80–11 and 80–12, and their implementing regulations, are not preempted by the scheme for federal regulation of plasmapheresis. The judgment of the Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 84–325. Argued February 26, 1985—Decided June 3, 1985*

A Massachusetts statute (§ 47B) requires that certain minimum mental-health-care benefits be provided a Massachusetts resident who is insured under a general health insurance policy or an employee health-care plan that covers hospital and surgical expenses. Appellant insurer in No. 84–325 contends that § 47B, as applied to insurance policies purchased by employee health-care plans regulated by the federal Employee Retirement Income Security Act of 1974 (ERISA), is pre-empted by that Act. Section 514(a) of ERISA provides that the statute shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." But § 514(b)(2)(A) provides that, with one exception, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance." The one exception is found in § 514(b)(2)(B), which states that no employee-benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts." Appellant insurer in No. 84–356 contends that § 47B, as applied to insurance policies purchased pursuant to collective-bargaining agreements regulated by the National Labor Relations Act (NLRA), is pre-empted by that Act, because it effectively imposes a contract term on the parties that otherwise would be a mandatory subject of collective bargaining. Massachusetts brought an action in Massachusetts Superior Court to enforce § 47B against appellant insurers, and that court issued an injunction requiring the insurers to provide the coverage mandated by § 47B. The Massachusetts Supreme Judicial Court affirmed, finding no pre-emption under either ERISA or the NLRA.

Held:

1. Section 47B, as applied, is a law "which regulates insurance" within the meaning of § 514(b)(2)(A), and therefore is not pre-empted by

---

*Together with No. 84–356, *Travelers Insurance Co.* v. *Massachusetts*, also on appeal from the same court.

§ 514(a) as it applies to insurance contracts purchased for plans subject to ERISA. Section 514(b)(2)(A)'s plain language, its relationship to the other ERISA pre-emption provisions, and the traditional understanding of insurance regulations, all lead to the conclusion that mandated-benefit laws such as § 47B are saved from pre-emption by the operation of § 514(b)(2)(A). Nothing in ERISA's legislative history suggests a different result. Pp. 739–747.

2. Nor is § 47B, as applied to a plan negotiated pursuant to a collective-bargaining agreement subject to the NLRA, pre-empted by the NLRA. Pp. 747–758.

(a) The NLRA pre-emption involved here is the one that protects against state interference with policies implicated by the structure of the NLRA itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. Pp. 747–751.

(b) Such pre-emption rests on a sound understanding of the NLRA's purpose and operation that is incompatible with the view that the NLRA pre-empts any state attempt to impose minimum-benefit terms on the parties to a collective-bargaining agreement. Pp. 751–753.

(c) Minimum state labor standards affect union and nonunion employees equally and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the NLRA. Unlike the NLRA, mandated-benefit laws, such as § 47B, are not designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part designed to give minimum protections to individual employees and to ensure that each employee covered by the NLRA receives mandated health insurance coverage. These laws are minimum standards independent of the collective-bargaining process. Pp. 753–756.

(d) There is no suggestion in the NLRA's legislative history that Congress intended to disturb the state laws that set minimum labor standards but were unrelated to the collective-bargaining or self-organization processes. To the contrary, Congress in the NLRA developed the framework for self-organization and collective bargaining within the larger body of state law promoting public health and safety. When a state law establishes a minimal employment standard not inconsistent with the NLRA's general goals, it conflicts with none of the NLRA's purposes. Section 47B is an insurance regulation designed to implement the Commonwealth's policy on mental-health care, and as such is a valid and unexceptional exercise of the Commonwealth's police power. Though § 47B potentially limits any employee's right to choose one thing by requiring that he be provided with something else, it does

not limit the right of self-organization or collective bargaining protected by the NLRA. Pp. 756–758.

391 Mass. 730, 463 N. E. 2d 548, affirmed.

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

Jay Greenfield argued the cause for appellant in No. 84–325. With him on the briefs was *Peter Buscemi*. *Lane McGovern* argued the cause for appellant in No. 84–356. With him on the brief was *Steven A. Kaufman*.

Sally A. Kelly, Assistant Attorney General of Massachusetts, argued the cause for appellee in both cases. With her on the brief were *Francis X. Bellotti*, Attorney General, and *Susan M. Roberts*, Assistant Attorney General.†

---

† Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *David M. Silberman*, *Marsha Berzon*, and *Laurence Gold;* for the Blue Cross and Blue Shield Association by *Philip S. Neal;* for the ERISA Industry Committee by *John M. Vine* and *Arvid E. Roach II;* for the Health Insurance Association of America by *Roger D. Redden* and *John P. Dineen;* for the International Brotherhood of Electrical Workers Local 421 Health and Welfare Fund et al. by *David L. Nixon;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder;* and for Milton R. Hill et al. by *James H. Clarke*.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Joseph I. Lieberman*, Attorney General of Connecticut, *Elliot F. Gerson*, Deputy Attorney General, *Arnold B. Feigin*, *Jonathon L. Ensign*, *John G. Haines*, *Richard T. Sponzo*, and *Robert E. Walsh*, Assistant Attorneys General, and by the Attorneys General of their respective States as follows: *John K. Van de Kamp* of California, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Greely* of Montana, *Irwin I. Kimmelman* of New Jersey, *Paul G. Bardacke* of New Mexico, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *T. Travis Medlock* of South Carolina, *Jeffrey L. Amestoy* of Vermont, *Bronson C. La Follette* of Wisconsin, and *Gerald L. Baliles* of Virginia; for the State of Oregon by *Dave Frohnmayer*, Attorney General, *William F. Gary*, Deputy Attorney

JUSTICE BLACKMUN delivered the opinion of the Court.

A Massachusetts statute requires that specified minimum mental-health-care benefits be provided a Massachusetts resident who is insured under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that covers hospital and surgical expenses. The first question before us in these cases is whether the state statute, as applied to insurance policies purchased by employee health-care plans regulated by the federal Employee Retirement Income Security Act of 1974, is pre-empted by that Act. The second question is whether the state statute, as applied to insurance policies purchased pursuant to negotiated collective-bargaining agreements regulated by the National Labor Relations Act, is pre-empted by the labor Act.

I

A

General health insurance typically is sold as group insurance to an employer or other group.[1] Group insurance presently is subject to extensive state regulation, including

---

General, *James E. Mountain, Jr.*, Solicitor General, *Virginia L. Linder*, Assistant Solicitor General, and *Kathleen G. Dahlin*, Assistant Attorney General; for the National Conference of State Legislatures et al. by *Joyce Holmes Benjamin* and *Lawrence R. Velvel;* for the American Chiropractic Association by *Harry N. Rosenfield;* for the American Optometric Association by *Ellis Lyons*, *Bennett Boskey*, and *Edward A. Groobert;* for the American Psychiatric Association et al. by *Joel I. Klein;* for the American Psychological Association et al. by *Donald N. Bersoff* and *Bruce J. Ennis;* for the American Public Health Association et al. by *Bruce H. Schneider* and *Herbert Semmel;* for the Committee for Comprehensive Insurance Coverage by *Edward A. Scallet;* and for the National Association of Alcoholism Treatment Programs, Inc., by *Paul L. Perito* and *Frederick H. Graefe.*

[1] See Health Insurance Association of America, 1982–1983 Source Book of Health Insurance Data 4–7 (1984 Update). Group health insurance is provided either by commercial insurance companies or service corporations such as Blue Cross-Blue Shield. *Ibid.*

regulation of the carrier, regulation of the sale and advertising of the insurance, and regulation of the content of the contracts.[2] Mandated-benefit laws, that require an insurer to provide a certain kind of benefit to cover a specified illness or procedure whenever someone purchases a certain kind of insurance, are a subclass of such content regulation.

While mandated-benefit statutes are a relatively recent phenomenon,[3] statutes regulating the substantive terms of insurance contracts have become commonplace in all 50 States over the last 30 years.[4] Perhaps the most familiar are those regulating the content of automobile insurance policies.[5]

---

[2] Laws regulating the insurer include, for example, those governing solvency or the qualification of management. Laws regulating aspects of transacting the business of group insurance include, for example, those regulating claims practices or rates. Finally, laws regulating the content of group policies include, in addition to the mandated-benefit statutes under consideration here, those requiring the policies to provide grace periods and conversion privileges. See Brummond, Federal Preemption of State Insurance Regulation Under ERISA, 62 Iowa L. Rev. 57, 81–84, 101 (1976). All three varieties of regulation are common. *Ibid.*

[3] The first mandated-benefit statutes regulating terms in group-health insurance appeared in 1971 and 1972, prior to the enactment of the federal Employee Retirement Income Security Act of 1974. See, *e. g.*, Ariz. Rev. Stat. Ann. § 20–1402(4)(b) (1975) (enacted 1971); Conn. Gen. Stat. § 38–174d (Supp. 1985) (enacted 1971); Ill. Rev. Stat., ch. 73, ¶ 979(7) (Supp. 1984–1985) (enacted 1972); 1971 Wis. Laws, ch. 325 (superseded).

[4] See Brummond, 62 Iowa L. Rev., at 82–84, 101. In particular, there are a wide variety of longstanding statutes that mandate that insurance contracts contain certain provisions. See, *e. g.*, *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190, 85 N. E. 410 (1908) (upholding statute prescribing provisions); Md. Ann. Code, Art. 48A, § 410(a)(5) (1979) (law enacted in 1956 mandating the inclusion of a clause in a life insurance policy that limits the exclusion from coverage for death by suicide to that occurring within two years of the issuance of the policy).

[5] See, *e. g.*, *California Automobile Assn. Inter-Insurance Bureau* v. *Maloney*, 341 U. S. 105 (1951) (upholding state statute requiring insurers to participate in a mandatory assigned-risk pool to assure the availability of automobile insurance). Like most States, Massachusetts at present

The substantive terms of group-health insurance contracts, in particular, also have been extensively regulated by the States. For example, the majority of States currently require that coverage for dependents continue beyond any contractually imposed age limitation when the dependent is incapable of self-sustaining employment because of mental or physical handicap; such statutes date back to the early 1960's.[6] And over the last 15 years all 50 States have required that coverage of infants begin at birth, rather than at some time shortly after birth, as had been the prior practice in the unregulated market.[7] Many state statutes require that insurers offer on an optional basis particular kinds of coverage to purchasers.[8] Others require insurers either to offer or mandate that insurance policies include coverage for services rendered by a particular type of health-care provider.[9]

Mandated-benefit statutes, then, are only one variety of a matrix of state laws that regulate the substantive content of health-insurance policies to further state health policy. Massachusetts Gen. Laws Ann., ch. 175, § 47B (West Supp. 1985), is typical of mandated-benefit laws currently in place in the majority of States.[10] With respect to a Massachusetts

---

mandates both the kinds of automobile policies insurers must offer to sell and the kinds of coverage insureds may purchase. See Mass. Gen. Laws Ann., ch. 175, § 113A *et seq.* (West 1972 and Supp. 1985).

[6] See App. to Brief for American Public Health Association et al. as *Amici Curiae* A7–A10 (APHA brief) (listing state statutes). See, *e. g.*, Mass. Gen. Laws Ann., ch. 175, § 108.2(a)(3) (West 1972) (enacted in 1962).

[7] See App. to APHA brief 1A–6A (listing statutes).

[8] There are approximately 50 such laws in over 20 States. See App. to Brief for Health Insurance Association of America as *Amicus Curiae* in Support of Juris. Statements 1a–2a (listing statutes).

[9] For example, a majority of States require that coverage for services offered by an optometrist be either mandated or at least offered in a health-insurance plan. See *id.*, at 4a (listing statutes).

[10] According to the Health Insurance Association of America, 26 States have promulgated 69 mandated-benefit laws. See *id.*, at 1a–2a; see also

resident, it requires any general health-insurance policy that provides hospital and surgical coverage, or any benefit plan that has such coverage, to provide as well a certain minimum of mental-health protection. In particular, § 47B requires that a health-insurance policy provide 60 days of coverage for confinement in a mental hospital, coverage for confinement in a general hospital equal to that provided by the policy for nonmental illness, and certain minimum outpatient benefits.[11]

Wayne Chemical, Inc. v. *Columbus Agency Service Corp.*, 426 F. Supp. 316, 324, n. 8 (ND Ill.) (citing statutes in 26 States), aff'd as modified, 567 F. 2d 692 (CA7 1977).

Different States mandate a great variety of different kinds of insurance coverage. For example, many require alcoholism coverage, see Conn. Gen. Stat. § 38–262b (Supp. 1985), while others require certain birth-defect coverage, see Md. Ann. Code, Art. 48A, § 477X (Supp. 1984), outpatient kidney-dialysis coverage, see Ohio Rev. Code Ann. § 3923.25 (Supp. 1984), or reconstructive surgery for insured mastectomies, see Ariz. Rev. Stat. Ann. § 20–1402(5) (Supp. 1984–1985).

[11] Section 47B reads:

"Any blanket or general policy of insurance . . . or any policy of accident and sickness insurance . . . or any employees' health and welfare fund which provides hospital expense and surgical expense benefits and which is promulgated or renewed to any person or group of persons in this commonwealth . . . shall, provide benefits for expense of residents of the commonwealth covered under any such policy or plan, arising from mental or nervous conditions as described in the standard nomenclature of the American Psychiatric Association which are at least equal to the following minimum requirements:

"*(a)* In the case of benefits based upon confinement as an inpatient in a mental hospital . . . the period of confinement for which benefits shall be payable shall be at least sixty days in any calender year . . . .

"*(b)* In the case of benefits based upon confinement as an inpatient in a licensed or accredited general hospital, such benefits shall be no different than for any other illness.

"*(c)* In the case of out-patient benefits, these shall cover, to the extent of five hundred dollars over a twelve-month period, services furnished (1) by a comprehensive health service organization, (2) by a licensed or accredited hospital (3) or subject to the approval of the department of mental health services furnished by a community mental health center or other mental

Section 47B was designed to address problems encountered in treating mental illness in Massachusetts. The Commonwealth determined that its working people needed to be protected against the high cost of treatment for such illness. It also believed that, without insurance, mentally ill workers were often institutionalized in large state mental hospitals, and that mandatory insurance would lead to a higher incidence of more effective treatment in private community mental-health centers. See Massachusetts General Court, Joint Committee on Insurance, Advances in Health Insurance in Massachusetts (1974), reprinted in App. 426, 430–432.

In addition, the Commonwealth concluded that the voluntary insurance market was not adequately providing mental-health coverage, because of "adverse selection" in mental-health insurance: good insurance risks were not purchasing coverage, and this drove up the price of coverage for those who otherwise might purchase mental-health insurance. The legislature believed that the public interest required that it correct the insurance market in the Commonwealth by mandating minimum-coverage levels, effectively forcing the good-risk individuals to become part of the risk pool, and enabling insurers to price the insurance at an average market rather than a market retracted due to adverse selection. See Findings of Fact of the Superior Court, App. to Juris. Statement in No. 84–325, pp. 50a–53a. Section 47B, then, was intended to help safeguard the public against the high costs of comprehensive inpatient and outpatient mental-health care, reduce nonpsychiatric medical-care expenditures for mentally related illness, shift the delivery of treatment from inpatient to outpatient services, and relieve the Commonwealth of some of the financial burden it otherwise would encounter with respect to mental-health problems. *Ibid.*

---

health clinic or day care center which furnishes mental health services or (4) consultations or diagnostic or treatment sessions . . . ."

It is our task in these cases to decide whether such insurance regulation violates or is inconsistent with federal law.

B

The federal Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (ERISA), comprehensively regulates employee pension and welfare plans. An employee welfare-benefit plan or welfare plan is defined as one which provides to employees "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death," whether these benefits are provided "through the purchase of insurance or otherwise." § 3(1), 29 U. S. C. § 1002(1). Plans may self-insure or they may purchase insurance for their participants. Plans that purchase insurance—so-called "insured plans"—are directly affected by state laws that regulate the insurance industry.

ERISA imposes upon pension plans a variety of substantive requirements relating to participation, funding, and vesting. §§ 201–306, 29 U. S. C. §§ 1051–1086. It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. §§ 101–111, 401–414, 29 U. S. C. §§ 1021–1031, 1101–1114. It does not regulate the substantive content of welfare-benefit plans. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 91 (1983).

ERISA thus contains almost no federal regulation of the terms of benefit plans. It does, however, contain a broad pre-emption provision declaring that the statute shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 514(a), 29 U. S. C. § 1144(a). Appellant Metropolitan in No. 84–325 argues that ERISA pre-empts Massachusetts' mandated-benefit law insofar as § 47B restricts the kinds of insurance policies that benefit plans may purchase.

While § 514(a) of ERISA broadly pre-empts state laws that relate to an employee-benefit plan, that pre-emption is substantially qualified by an "insurance saving clause," § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), which broadly states that, with one exception, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." The specified exception to the saving clause is found in § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B), the so-called "deemer clause," which states that no employee-benefit plan, with certain exceptions not relevant here, "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." Massachusetts argues that its mandated-benefit law, as applied to insurance companies that sell insurance to benefit plans, is a "law which regulates insurance," and therefore is saved from the effect of the general pre-emption clause of ERISA.

Wholly apart from the question whether Massachusetts' mandated-benefit law is pre-empted by ERISA, appellant Travelers in No. 84–356 argues that as applied to benefit plans negotiated pursuant to collective-bargaining agreements, § 47B is pre-empted by the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (NLRA), because it effectively imposes a contract term on the parties that otherwise would be a mandatory subject of collective bargaining. Unlike ERISA, the NLRA contains no statutory provision indicating the extent to which it was intended to pre-empt state law. Resolution of the NLRA pre-emption question, therefore, requires us to discern legislative intent from the general purpose of the NLRA, and not from any particular statutory language.

II

Appellants are Metropolitan Life Insurance Company and Travelers Insurance Company (insurers) who are located in New York and Connecticut respectively and who issue group-health policies providing hospital and surgical coverage to plans, or to employers or unions that employ or represent employees residing in Massachusetts. Under the terms of § 47B, both appellants are required to provide minimal mental-health benefits in policies issued to cover Commonwealth residents.

In 1979, the Attorney General of Massachusetts brought suit in Massachusetts Superior Court for declaratory and injunctive relief to enforce § 47B. The Commonwealth asserted that since January 1, 1976, the effective date of § 47B, the insurers had issued policies to group policyholders situated outside Massachusetts that provided for hospital and surgical coverage for certain residents of the Commonwealth. App. 8–9. It further asserted that those policies failed to provide Massachusetts-resident beneficiaries the mental-health coverage mandated by § 47B, and that the insurers intended to issue more such policies, believing themselves not bound by § 47B for policies issued outside the Commonwealth. In their answer, the insurers admitted these allegations.[12]

The complaint further asserted that the insurers had amended a number of policies in effect prior to January 1, 1976, but had failed to include the benefits mandated by § 47B in the amended policies, in violation of the law. App. 9–10. Finally, the Commonwealth asserted that the insurers refused to provide the mandated benefits in part on the ground that they believed ERISA and the NLRA pre-empted § 47B. App. 10. Though the insurers had not actually refused to provide the mandated benefits in any policy issued after January 1, 1976, within the Commonwealth, the insurers preserved their right to challenge the applicability of § 47B

[12] See Answer ¶¶ 8–14, App. 51–52. See also Stipulation ¶¶ 1–11, App. 459–462.

to any policy issued to an ERISA plan within the Commonwealth.[13] The Commonwealth accordingly requested broad preliminary and permanent injunctive relief, asking the court to require the insurers to provide the mandated benefits to all covered residents of the Commonwealth subject to the terms of § 47B, regardless of when their policies were issued or whether they were presently receiving such benefits. App. 11–12.

The Superior Court issued a preliminary injunction requiring the insurers to provide the coverage mandated by § 47B. App. 57–59. After trial, a different judge issued a permanent injunction to the same effect, see App. to Juris. Statement in No. 84–325, pp. 67a–70a, making extensive findings of fact concerning the cost, nature, purpose, and effect of the mandated-benefit law. See *id.*, at 36a–62a. The Supreme Judicial Court of Massachusetts granted the insurers' application for direct appellate review and affirmed the judgment of the Superior Court. *Attorney General* v. *Travelers Ins. Co.*, 385 Mass. 598, 433 N. E. 2d 1223 (1982).

Addressing first the ERISA pre-emption question, the court recognized that § 47B is a law that "'relate[s] to' benefit plans," and so would be pre-empted unless it fell within one of the exceptions to the pre-emption clause of ERISA. 385 Mass., at 605, 433 N. E. 2d, at 1227. The court went on to hold, however, that § 47B is a law "which regulates insurance," as understood by the ERISA saving clause, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), and therefore is not pre-empted by ERISA. 385 Mass., at 606–609, 433 N. E. 2d, at 1228–1230.[14] It rejected appellants' claim that

---

[13] See Answer to the Complaint, Second and Third Defenses, App. 53–54. See also Stipulation ¶ 9, App. 461–462.

[14] Section 47B also requires benefit plans that are self-insured to provide the mandated mental-health benefits. In light of ERISA's "deemer clause," § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B), which states that a benefit plan shall not "be deemed an insurance company" for purposes of the insurance saving clause, Massachusetts has never tried to enforce § 47B as applied to benefit plans directly, effectively conceding that such an

the saving clause was designed to save only "traditional" insurance laws rather than those that are designed to promote public health, finding no such limitation in the statutory language of ERISA. The court nonetheless was wary of a literal reading of the statute, lest the saving clause give the States unintended authority to regulate in areas otherwise governed by ERISA. It therefore understood the saving clause to save only state laws that were unrelated to the substantive provisions of ERISA. Since nothing in ERISA regulates the content of welfare plans, state regulation of insurance that indirectly affects the content of welfare plans is not pre-empted by ERISA. 385 Mass., at 606–607, 609, 433 N. E. 2d, at 1228–1229.

The court then went on to conclude that the NLRA does not pre-empt § 47B. Although § 47B regulates health benefits, a subject of mandatory collective bargaining, the NLRA does not pre-empt all local regulation affecting employment relations. A public health statute, § 47B does not regulate labor-management relations as such or affect the free play of economic forces between labor and management. "It is unlikely that Congress intended, by enacting the NLRA, to bind the hands of State Legislatures with respect to problems such as mental health." 385 Mass., at 613, 433 N. E. 2d, at 1232.

Moreover, the court pointed out, Congress has indicated in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, that federal laws should not be construed to supersede state laws "regulating the business of insurance." § 1012(b). Section 47B operates upon insurance and insurance policies. The McCarran-Ferguson Act

---

application of § 47B would be pre-empted by ERISA's pre-emption clause, § 514(a), 29 U. S. C. § 1144(a). See Stipulation ¶ 12, App. 462. In a part of its decision that is not challenged here, the Supreme Judicial Court held that that part of § 47B which applies to insurers is severable from the pre-empted provisions pertaining directly to benefit plans. See 385 Mass., at 601–602, 433 N. E. 2d, at 1225.

contains no limiting definition of the term "business of insurance" that would suggest a narrow reading excluding § 47B from its protection. 385 Mass., at 613–614, 433 N. E. 2d, at 1232. The court therefore found no pre-emption under either ERISA or the NLRA.

On appeal, this Court, 463 U. S. 1221 (1983), vacated the judgment of the Supreme Judicial Court and remanded the cases for further consideration in light of the intervening decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983). Appropriately refocusing on the ERISA pre-emption provisions that were the subject of that decision, the Supreme Judicial Court, with one justice dissenting, reinstated its former judgment. *Attorney General* v. *Travelers Ins. Co.*, 391 Mass. 730, 463 N. E. 2d 548 (1984). The court reasoned that this Court had not addressed the insurance exception in *Shaw*, and as that decision construed none of the exceptions listed in § 514(b), our statement that the exceptions were "narrow" was merely dictum that did not compel the Massachusetts court to change its result. 391 Mass., at 733, 463 N. E. 2d, at 550. Unlike the exemption from ERISA coverage at issue in *Shaw*, the exception in § 514(b) is phrased very broadly. Nor was there reason to alter the limiting construction given the saving clause. The Court in *Shaw* held that ERISA's broad pre-emption provision was intended to pre-empt any state law that "relate[d] to" an employee-benefit plan, not merely those state laws that directly conflicted with a substantive provision in the federal statute. Though the Court thus had rejected a conflict-based analysis of the broadly phrased pre-emption clause as being too narrow an interpretation of that provision, it did not follow that the conflict-based limitation on the saving clause imposed by the Supreme Judicial Court similarly should be rejected.

The dissenting justice felt that the *Shaw* Court had made clear that the exemptions and exceptions to ERISA's pre-emption clause should be read narrowly in order to preserve nationwide uniformity in the administration of welfare plans.

Reading the insurance saving clause narrowly, § 47B should not be understood as a statute that regulates insurance. As applied, § 47B concerns health benefits that an employer must provide, and only incidentally regulates insurance. *Shaw* established that it is "irrelevant whether State law dictating plan benefits conflicts with the substantive policies of ERISA." 391 Mass., at 736, 463 N. E. 2d, at 552.

The insurers once again appealed pursuant to 28 U. S. C. § 1257(2), and we noted probable jurisdiction. 469 U. S. 929 (1984).[15]

III

"In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. 'Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977).' *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982)." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S., at 95. The narrow statutory ERISA question presented is whether Mass. Gen. Laws Ann., ch. 175, § 47B (West Supp. 1985), is a law "which regulates insurance" within the meaning of § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), and so would not be pre-empted by § 514(a).

---

[15] Metropolitan, in its appeal No. 84–325, concerns itself with that part of the judgment that found no pre-emption under ERISA, while Travelers, in its appeal No. 84–356, separately emphasizes the part of the judgment that found no pre-emption under the NLRA. This division apparently was a tactical choice; the record indicates that both appellants have issued insurance contracts to plans that are the product of collective-bargaining agreements subject to the NLRA, and that "[v]irtually all" insurance policies issued by both appellants to cover Massachusetts employees were issued to provide benefits for plans subject to ERISA. Most contracts technically were issued to employers. See Stipulation, ¶¶ 8, 11, 12, App. 461–462. We consolidated the appeals when we noted probable jurisdiction. 469 U. S. 929 (1984).

A

Section 47B clearly "relate[s] to" welfare plans governed by ERISA so as to fall within the reach of ERISA's pre-emption provision, § 514(a). The broad scope of the pre-emption clause was noted recently in *Shaw* v. *Delta Air Lines, Inc.*, *supra*, where we held that the New York Human Rights Law and that State's Disability Benefits Law "relate[d] to" welfare plans governed by ERISA. The phrase "relate to" was given its broad common-sense meaning, such that a state law "relate[s] to" a benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U. S., at 97. The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Id.*, at 98–99. "[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 525 (1981).

Though § 47B is not denominated a benefit-plan law, it bears indirectly but substantially on all insured benefit plans, for it requires them to purchase the mental-health benefits specified in the statute when they purchase a certain kind of common insurance policy. The Commonwealth does not argue that § 47B as applied to policies purchased by benefit plans does not relate to those plans, and we agree with the Supreme Judicial Court that the mandated-benefit law as applied relates to ERISA plans and thus is covered by ERISA's broad pre-emption provision set forth in § 514(a).

B

Nonetheless, the sphere in which § 514(a) operates was explicitly limited by § 514(b)(2). The insurance saving clause preserves any state law "which regulates insurance, banking, or securities." The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly

pre-empts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.[16]

Fully aware of this statutory complexity, we still have no choice but to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 194 (1985). We also must presume that Congress did not intend to pre-empt areas of traditional state regulation. See *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977).

To state the obvious, § 47B regulates the terms of certain insurance contracts, and so seems to be saved from pre-emption by the saving clause as a law "which regulates insurance." This common-sense view of the matter, moreover, is reinforced by the language of the subsequent subsection of ERISA, the "deemer clause," which states that an employee-benefit plan shall not be deemed to be an insurance company "for purposes of any law of any State purporting to regulate insurance companies, *insurance contracts*, banks, trust com-

---

[16] Long aware of this problem, commentators have recommended that Congress amend the pre-emption provisions to clarify its intentions. See, *e. g.*, Manno, ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action, 52 Temp. L. Q. 51 (1979); Okin, Preemption of State Insurance Regulation by ERISA, 13 A. B. A. Forum 652, 678 (1978). Congress, too, is aware of the problem. A bill was introduced in 1979 to amend ERISA to provide that state mandated-benefit statutes are not preserved by the insurance saving clause. See S. 209, 96th Cong., 1st Sess., 125 Cong. Rec. 933, 937 (1979). The bill was intended to overrule the decision in *Wadsworth* v. *Whaland*, 562 F. 2d 70 (CA1 1977), cert. denied, 435 U. S. 980 (1978), holding that the saving clause saved a New Hampshire mandated-benefit law. See 125 Cong. Rec. 947 (1979) (remarks of Sen. Javits). The bill was reported to the Senate, but died without being debated. See Senate Committee on Labor and Human Resources, 96th Cong., Legislative Calendar 108, 111 (final ed., Jan. 4, 1981).

panies, or investment companies." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B) (emphasis added). By exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause. Unless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans.

The insurers nonetheless argue that § 47B is in reality a health law that merely operates on insurance contracts to accomplish its end, and that it is not the kind of traditional insurance law intended to be saved by § 514(b)(2)(A). We find this argument unpersuasive.

Initially, nothing in § 514(b)(2)(A), or in the "deemer clause" which modifies it, purports to distinguish between traditional and innovative insurance laws. The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope. Further, there is no indication in the legislative history that Congress had such a distinction in mind.

Appellants assert that state laws that directly regulate the insurer, and laws that regulate such matters as the way in which insurance may be sold, are traditional laws subject to the clause, while laws that regulate the substantive terms of insurance contracts are recent innovations more properly seen as health laws rather than as insurance laws, which § 514(b)(2)(A) does not save. This distinction reads the saving clause out of ERISA entirely, because laws that regulate only the insurer, or the way in which it may sell insurance, do not "relate to" benefit plans in the first instance. Because they would not be pre-empted by § 514(a), they do not need to be "saved" by § 514(b)(2)(A). There is no indication that Congress could have intended the saving clause to operate

only to guard against too expansive readings of the general pre-emption clause that might have included laws wholly unrelated to plans.[17] Appellants' construction, in our view, violates the plain meaning of the statutory language and renders redundant both the saving clause it is construing, as well as the deemer clause which it precedes, and accordingly has little to recommend it.[18]

Moreover, it is both historically and conceptually inaccurate to assert that mandated-benefit laws are not traditional insurance laws. As we have indicated, state laws regulating the substantive terms of insurance contracts were commonplace well before the mid-70's, when Congress considered ERISA.[19] The case law concerning the meaning of the phrase "business of insurance" in the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.*, also strongly supports the conclusion that regulation regarding the substantive terms of

---

[17] In light of the fact that the saving clause was in place well before the general pre-emption clause was amended to pre-empt broadly all laws that relate to plans, such an explanation is unacceptable. See n. 23, *infra*.

[18] Nearly every court that has addressed the question has concluded that laws regulating the substantive content of insurance contracts are laws that regulate insurance and thus are within the scope of the insurance saving clause. See, *e. g.*, *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 567 F. 2d 692, 700 (CA7 1977); *Wadsworth* v. *Whaland*, 562 F. 2d, at 77; *Eversole* v. *Metropolitan Life Ins. Co.*, 500 F. Supp. 1162, 1168–1170 (CD Cal. 1980); *Insurers' Action Council, Inc.* v. *Heaton*, 423 F. Supp. 921, 926 (Minn. 1976); *Insurance Comm'r* v. *Metropolitan Life Ins. Co.*, 296 Md. 334, 344–345, 463 A. 2d 793, 798 (1983); *Metropolitan Life Ins. Co.* v. *Whaland*, 119 N. H. 894, 900–902, 410 A. 2d 635, 639–640 (1979). Cf. *American Progressive Life and Health Ins. Co.* v. *Corcoran*, 715 F. 2d 784, 787 (CA2 1983). But see *Michigan United Food & Commercial Workers Union* v. *Baerwaldt*, 572 F. Supp. 943 (ED Mich. 1983), appeal docketed, No. 83–1570 (CA6 1983).

[19] See nn. 2–6, *supra*. See also, *e. g.*, *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 321 (1943) (States have "full power to prescribe the forms of contract [and] the terms of protection of the insured"); *California Automobile Assn. Inter-Insurance Bureau* v. *Maloney*, 341 U. S. 105 (1951); *Insurance Comm'r* v. *Metropolitan Life Ins. Co.*, 296 Md., at 340, 463 A. 2d, at 796 (citing cases). See Manno, 52 Temp. L. Q., at 56.

insurance contracts falls squarely within the saving clause as laws "which regulate insurance."

Cases interpreting the scope of the McCarran-Ferguson Act have identified three criteria relevant to determining whether a particular practice falls within that Act's reference to the "business of insurance": "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 129 (1982) (emphasis in original). See also *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979). Application of these principles suggests that mandated-benefit laws are state regulation of the "business of insurance."

Section 47B obviously regulates the spreading of risk: as we have indicated, it was intended to effectuate the legislative judgment that the risk of mental-health care should be shared. See Findings of Fact of the Superior Court, App. to Juris. Statement in No. 84–325, pp. 50a–51a. It is also evident that mandated-benefit laws directly regulate an integral part of the relationship between the insurer and the policyholder by limiting the type of insurance that an insurer may sell to the policyholder. Finally, the third criterion is present here, for mandated-benefit statutes impose requirements only on insurers, with the intent of affecting the relationship between the insurer and the policyholder. Section 47B, then, is the very kind of regulation that this Court has identified as a law that relates to the regulation of the business of insurance as defined in the McCarran-Ferguson Act:[20]

> "Congress was concerned [in the McCarran-Ferguson Act] with the type of state regulation that centers

---

[20] See also 91 Cong. Rec. 480 (1945) (remarks of Sen. Ferguson) ("A state law relating to . . . the fixing of the terms of a contract of insurance . . . would be permitted [under the McCarran-Ferguson Act]").

> around the contract of insurance . . . . The relationship between insurer and insured, *the type of policy which could be issued*, its reliability, its interpretation, and enforcement—these were the core of the 'business of insurance.' [T]he focus [of the statutory term] was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969) (emphasis added).

Nor is there any contrary case authority suggesting that laws regulating the terms of insurance contracts should *not* be understood as laws that regulate insurance. In short, the plain language of the saving clause, its relationship to the other ERISA pre-emption provisions, and the traditional understanding of insurance regulation, all lead us to the conclusion that mandated-benefit laws such as § 47B are saved from pre-emption by the operation of the saving clause.[21]

---

[21] That mandated-benefit laws fall within the terms of the definition of insurance in the McCarran-Ferguson Act is directly relevant in another sense as well. Congress' "primary concern" in enacting McCarran-Ferguson was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 217–218 (1979). That Act provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 59 Stat. 34, 15 U. S. C. § 1012(a). The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States. Moreover, § 514(d) of ERISA, 29 U. S. C. § 1144(d), explicitly states in part: "Nothing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." Thus application of the McCarran-Ferguson Act lends further support to

Nothing in the legislative history of ERISA suggests a different result. There is no discussion in that history of the relationship between the general pre-emption clause and the saving clause, and indeed very little discussion of the saving clause at all.[22] In the early versions of ERISA, the general pre-emption clause pre-empted only those state laws dealing with subjects regulated by ERISA. The clause was significantly broadened at the last minute, well after the saving clause was in its present form, to include all state laws that relate to benefit plans. The change was made with little explanation by the Conference Committee, and there is no indication in the legislative history that Congress was aware of the new prominence given the saving clause in light of the rewritten pre-emption clause, or was aware that the saving clause was in conflict with the general pre-emption provision.[23] There is a complete absence of evidence that Con-

---

our ruling that Congress did not intend mandated-benefit laws to be pre-empted by ERISA.

[22] The Conference Committee Report merely stated: "The preemption provisions of title I are not to exempt any person from any State law that regulates insurance." H. R. Conf. Rep. No. 93–1280, p. 383 (1974).

[23] See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 98–99, and nn. 18–20 (1983). The insurance saving clause appeared in its present form in bills introduced in 1970 that led to ERISA. See S. 3589, 91st Cong., 2d Sess., § 14, 116 Cong. Rec. 7284 (1970). The pre-emption clause apparently was broadened out of a fear that "state professional associations" would otherwise hinder the development of such employee-benefit programs as "prepaid legal service programs." See 120 Cong Rec. 29197 (1974) (remarks of Rep. Dent); *id.*, at 29933 (remarks of Sen. Williams); *id.*, at 29949 (remarks of Sen. Javits). There is no suggestion that the pre-emption provision was broadened out of any concern about state regulation of insurance contracts, beyond a general concern about "potentially conflicting State laws." See *id.*, at 29942 (remarks of Sen. Javits).

The Conference Committee that was convened to work out differences between the Senate and House versions of ERISA broadened the general pre-emption provision from one that pre-empted state laws only insofar as they regulated the same areas explicitly regulated by ERISA, to one that pre-empts all state laws unless otherwise saved. See H. R. Conf. Rep. No. 93–1280, p. 383 (1974). The change gave the insurance saving clause

gress intended the narrow reading of the saving clause suggested by appellants here. Appellants do call to our attention a few passing references in the record of the floor debate to the "narrow" exceptions to the pre-emption clause,[24] but these are far too frail a support on which to rest appellants' rather unnatural reading of the clause.

We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the "deemer clause" which modifies it. If a state law "regulates insurance," as mandated-benefit laws do, it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause, whether it be the Supreme Judicial Court's attempt to save only state regulations unrelated to the substantive pro-

---

a much more significant role, as a provision that saved an entire body of law from the sweeping general pre-emption clause. There were no comments on the floor of either Chamber specifically concerning the insurance saving clause, and hardly any concerning the exceptions to the pre-emption clause in general. See n. 24, *infra*.

The change in the pre-emption provision was not disclosed until the Report was filed with Congress 10 days before final action was taken on ERISA. The House conferees filed their Report, H. R. Conf. Rep. No. 93–1280, on August 12, 1974, while the Senate conferees filed their Report, S. Conf. Rep. No. 93–1090, the following day. 30 Cong. Q. Almanac 252 (1974). ERISA was passed by the House on August 20, and by the Senate on August 22. 120 Cong. Rec. 29215–29216, 29963 (1974).

[24] See *id.*, at 29197 (remarks of Rep. Dent) ("narrow exceptions specifically enumerated"); *id.*, at 29933 (remarks of Sen. Williams) ("narrow exceptions specified in the bill . . . eliminating the threat of conflicting or inconsistent State and local regulation"). See also *id.*, at 29942 (remarks of Sen. Javits) (avoiding danger of "potentially conflicting State laws hastily contrived"). We have previously made reference to these comments in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S., at 99, 105, finding them "not particularly illuminating," but lending support to our conclusion that the exception in § 514(d) should not be given an artificially broad construction. 463 U. S., at 104. We agree with the Supreme Judicial Court that our understanding of § 514(d) in *Shaw* is of little help in analyzing § 514(b)(2)(A), for, unlike § 514(d), the saving clause is broad on its face and specific in its reference.

visions of ERISA, or the insurers' more speculative attempt to read the saving clause out of the statute.

We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the "deemer clause," a distinction Congress is aware of and one it has chosen not to alter.[25] We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress.

IV

A

Unlike ERISA, the NLRA contains no statutory pre-emption provision. Still, as in any pre-emption analysis, "'[t]he purpose of Congress is the ultimate touchstone.'" *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963). Where the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circum-

---

[25] A 1977 Activity Report of the House Committee on Education and Labor recognized the difference in treatment between insured and non-insured plans: "To the extent that [certain programs selling insurance policies] fail to meet the definition of an 'employee benefit plan' [subject to the "deemer clause"], state regulation of them is not preempted by section 514, even though such state action is barred with respect to the plans which purchase these 'products.'" H. R. Rep. No. 94–1785, p. 48. A bill to amend the saving clause to specify that mandated-benefit laws are pre-empted by ERISA was reported to the Senate in 1981 but was not acted upon. See n. 16, *supra*.

stances that Congress sought to occupy the field to the exclusion of the States.'" *Allis-Chalmers Corp.* v. *Lueck*, *ante*, at 209, quoting *Malone* v. *White Motor Corp.*, 435 U. S., at 504.

Appellants contend first that because mandated-benefit laws require benefit plans whose terms are arrived at through collective bargaining to purchase certain benefits the parties may not have wished to purchase, such laws in effect mandate terms of collective-bargaining agreements. The Supreme Judicial Court of Massachusetts correctly found that "[b]ecause a plan that purchases insurance has no choice but to provide mental health care benefits, the insurance provisions of § 47B effectively control the content of insured welfare benefit plans." 385 Mass., at 605, 433 N. E. 2d, at 1227. More precisely, faced with § 47B, parties to a collective-bargaining agreement providing for health insurance are forced to make a choice: either they must purchase the mandated benefit, decide not to provide health coverage at all, or decide to become self-insured, assuming they are in a financial position to make that choice.

The question then becomes whether this kind of interference with collective bargaining is forbidden by federal law. Appellants argue that because Congress intended to leave the choice of terms in collective-bargaining agreements to the free play of economic forces, not subject either to state law or to the control of the National Labor Relations Board (NLRB), mandated-benefit laws should be pre-empted by the NLRA.

The Court has articulated two distinct NLRA pre-emption principles. The so-called *Garmon* rule, see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.[26] There is no claim here that

---

[26] See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498–499 (1983). *Garmon* pre-emption involves balancing the State's interest in controlling or rem-

Massachusetts has sought to regulate or prohibit any conduct subject to the regulatory jurisdiction of the NLRB, since the Act is silent as to the substantive provisions of welfare-benefit plans.

A second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act. 29 U. S. C. §§ 157, 158(a)(1) and (b). Such action falls outside the reach of *Garmon* pre-emption. See *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S. 519, 529–531 (1979) (plurality opinion).[27]

---

edying the effects of the conduct in question against the interference with the Board's ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects. *Ibid.* *Garmon* pre-emption accomplishes Congress' purpose of creating an administrative agency in charge of creating detailed rules to implement the Act, rather than having the Act enforced and interpreted by the state or federal courts. *San Diego Building Trades Council* v. *Garmon*, 359 U. S., at 241–245.

[27] Such analysis initially had been used to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation. See, *e. g.*, *Belknap, Inc.* v. *Hale*, *supra* (power to terminate replacements hired during a strike); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976) (concerted refusal to work overtime). It has been used more recently to determine the validity of state rules of general application that affect the right to bargain or to self-organization. See *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S., at 539–540 (plurality opinion) (state unemployment compensation laws).

Such pre-emption does not involve in the first instance a balancing of state and federal interests, see *Brown* v. *Hotel Employees*, 468 U. S. 491, 502–503 (1984), but an analysis of the structure of the federal labor law to determine whether certain conduct was meant to be unregulated. An

In *Teamsters* v. *Morton*, 377 U. S. 252 (1964), the Court struck down an Ohio labor law that prohibited a type of secondary boycott neither prohibited nor protected under the NLRA. The Court ruled that if state law were allowed to deprive the union of a self-help weapon permitted under federal law, "the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.*, at 260. Similarly, in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), the Court ruled that a State may not penalize a concerted refusal to work overtime that was neither prohibited nor protected under the NLRA, for "Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" *Id.*, at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971).

More recently, a divided Court struggled with a feature of New York's unemployment-insurance law that provided certain unemployment-insurance payments to striking workers. *New York Telephone Co.* v. *New York Labor Dept.*, *supra*. As in *Machinists* and *Morton*, the state law "altered the economic balance between labor and management." 440 U. S., at 532 (plurality opinion). A majority of the Justices nonetheless found the state law not pre-empted, on the ground that the legislative history of the Social Security Act of 1935, along with other federal legislation, suggested that Congress had decided to permit a State to pay unemployment benefits to strikers.[28]

---

appreciation of the State's interest in regulating a certain kind of conduct may still be relevant in determining whether Congress in fact intended the conduct to be unregulated. See *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S., at 539–540.

[28] A plurality opinion affirmed the state-court decision finding no pre-emption in part on the ground that the 1935 Congress intended to permit the States to make these payments, and in part on the ground that the unemployment insurance statute was a law of general application designed to

These cases rely on the understanding that in providing in the NLRA a framework for self-organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated:

> "The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.'" *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S., at 554 (dissenting opinion), quoting *Garner* v. *Teamsters*, 346 U. S. 485, 500 (1953).

All parties correctly understand this case to involve *Machinists* pre-emption.

B

Here, however, appellants do not suggest that § 47B alters the balance of power between the parties to the labor contract. Instead, appellants argue that, not only did Congress establish a balance of bargaining power between labor and management in the Act, but it also intended to prevent the States from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law. Appellants assert that such state regulation is permissible only when Congress has authorized its enactment. Because welfare benefits are a mandatory subject of bargaining under the

---

insure employment security in the State, and not to regulate the bargaining relationship between management and labor. *Id.*, at 532–533. Two opinions concurring in the result agreed with the plurality on only the legislative history ground. See *id.*, at 546 and 547.

labor law, see *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 159, and n. 1 (1971), and because Congress has never given States the authority to enact health regulations that affect the terms of bargaining agreements, appellants urge that the NLRA pre-empts any state attempt to impose minimum-benefit terms on the parties.[29]

Appellants assume that Congress' ultimate concern in the NLRA was in leaving the parties free to reach agreement about contract terms. The framework established in the NLRA was merely a means to allow the parties to reach such agreement fairly. A law that interferes with the end result of bargaining is, therefore, even worse than a law that interferes with the bargaining process. Thus, it is argued, this case is *a fortiori* to cases like *Morton*, *Machinists*, and *New York Telephone*.

The question has been before the Court in the past, see *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 312 (1949), and there is a surface plausibility to appellants' argument, which finds support in dicta in some prior Court deci-

---

[29] Even if we were to accept appellants' argument that state laws mandating contract terms on collectively bargained contracts are pre-empted unless Congress authorizes their imposition, we would still find § 47B not pre-empted here. For mandated-benefit laws are laws "regulating the business of insurance," see n. 21, *supra*, and Congress in the McCarran-Ferguson Act expressly left to the States the power to enact such regulation. 15 U. S. C. § 1012(a). That Act states: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." § 1012(b). Appellants argue that § 1012(a) does not apply to the NLRA because of § 1014, which states: "Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the . . . National Labor Relations Act." The federal laws excepted from the operation of § 1012(b), however, are listed in that subsection itself. Section § 1014 was meant, instead, to codify this Court's decision in *Polish National Alliance* v. *NLRB*, 322 U. S. 643 (1944), which held that the labor relations of insurance companies are subject to the NLRA. See, *e. g.*, 91 Cong. Rec. 1090 (1945) (remarks of Rep. Gwynne); 90 Cong. Rec. 6419 (1944) (remarks of Rep. Allen); *id.*, at 6526 (remarks of Rep. Brehm).

sions. See *Teamsters* v. *Oliver*, 358 U. S. 283, 295–296 (1959); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S., at 525–526. Upon close analysis, however, we find that *Morton*, *Machinists*, and *New York Telephone* all rest on a sound understanding of the purpose and operation of the Act that is incompatible with appellants' position here.

C

Congress apparently did not consider the question whether state laws of general application affecting terms of collective-bargaining agreements subject to mandatory bargaining were to be pre-empted.[30] That being so, "the Court must construe the Act and determine its impact on state law in light of the wider contours of federal labor policy." *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 520, n. 4 (1983) (opinion concurring in judgment).

The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions. See Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. L. J. 277, 297 (1980). The NLRA's declared purpose is to remedy "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." § 1, 29 U. S. C. § 151. The same section notes the desirability of "restoring

---

[30] We have found no relevant legislative history on the specific question. The right to bargain collectively was only gradually understood to include the right to bargain about each subject that the Board found to be comprehended by the phrase "wages, hours and other terms and conditions of employment." § 8(d), 29 U. S. C. § 158(d). Thus, Congress could not easily have anticipated the claim that a state labor standard would be pre-empted as a result of the right to bargain. See Cox & Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 242 (1950).

equality of bargaining power," among other ways, "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

One of the ultimate goals of the Act was the resolution of the problem of "depress[ed] wage rates and the purchasing power of wage earners in industry," 29 U. S. C. § 151, and "the widening gap between wages and profits," 79 Cong. Rec. 2371 (1935) (remarks of Sen. Wagner), thought to be the cause of economic decline and depression.[31] Congress hoped to accomplish this by establishing procedures for more equitable private bargaining.

The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of

---

[31] "It is well recognized today that the failure to spread adequate purchasing power among the vast masses of the consuming public disrupts the continuity of business operations and causes everyone to suffer. The piling up of excess capital reserves and plant capacities is a dead weight upon the whole economic structure. . . .

. . . . . .

"[Under the new program] [e]mployees were guaranteed protection in their cooperative efforts, in order that they might help the Government to insure a sufficient flow of purchasing power through adequate wages." Hearings on S. 1958 before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., 34–35 (1935) (statement of Sen. Wagner).

the state legislation is not incompatible with these general goals of the NLRA.

Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. See, *e. g.*, *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737, 739 (1981). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 51 (1974). Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated health insurance coverage. *Barrentine*, 450 U. S., at 739 (emphasis in original). Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." *Id.*, at 745.

It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Allis-Chalmers*

Corp. v. *Lueck*, *ante*, at 212. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

D

Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Slaughter-House Cases*, 16 Wall. 36, 62 (1873), quoting *Thorpe* v. *Rutland & Burlington R. Co*, 27 Vt. 140, 149 (1855). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *De Canas* v. *Bica*, 424 U. S. 351, 356 (1976). State laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny. See, *e. g.*, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952).

Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act. *Hines* v. *Davidowitz*, 312 U. S. 52, 67, n. 20 (1941); *Electrical Workers* v. *Wisconsin Employment Relations*

Bd., 315 U. S. 740, 749–751 (1942); *Malone* v. *White Motor Corp.*, 435 U. S., at 504. Thus the Court has recognized that it "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289 (1971). When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. "A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action . . . and would thereby artifically *create* a no-law area." *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 228 (1970) (concurring opinion) (emphasis in original).

Thus, in *Malone* v. *White Motor Corp.*, *supra*, the Court rejected a similar challenge to a pre-ERISA state pension Act which established minimum funding and vesting levels for employee pension plans. The Court found the law not pre-empted by the NLRA, in part for reasons relevant here:

> "There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." 435 U. S., at 504–505.[32]

---

[32] The Court previously has addressed this same issue in the related context of the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be

Massachusetts' mandated-benefit law is an insurance regulation designed to implement the Commonwealth's policy on mental-health care, and as such is a valid and unexceptional exercise of the Commonwealth's police power. It was designed in part to ensure that the less wealthy residents of the Commonwealth would be provided adequate mental-health treatment should they require it. Though § 47B, like many laws affecting terms of employment, potentially limits an employee's right to choose one thing by requiring that he be provided with something else, it does not limit the rights of self-organization or collective bargaining protected by the NLRA, and is not pre-empted by that Act.

V

We hold that Massachusetts' mandated-benefit law is a "law which regulates insurance" and so is not pre-empted by ERISA as it applies to insurance contracts purchased for plans subject to ERISA. We further hold that the mandated-benefit law as applied to a plan negotiated pursuant to a collective-bargaining agreement subject to the NLRA is not pre-empted by federal labor law.

The judgment of the Supreme Judicial Court of Massachusetts is therefore affirmed.

It is so ordered.

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

---

reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. . . .

"State laws have long regulated a great variety of conditions in transportation and industry . . . . But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State . . . from making the order in question." *Terminal Railroad Assn.* v. *Railroad Trainmen*, 318 U. S. 1, 6–7 (1943) (footnote omitted).

Syllabus

MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS

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

No. 83–2161. Argued January 15, 1985—Reargued April 23, 1985—Decided June 3, 1985

The 1891 Act that first authorized mineral leasing of Indian lands was amended by a 1924 Act that provided that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located." The Indian Mineral Leasing Act of 1938, which was enacted to obtain uniformity of Indian mineral leasing laws, also permitted mineral leasing of Indian lands, but contained no provision authorizing state taxation nor did it repeal specifically such authorization in the 1924 Act. A general repealer clause of the 1938 Act, however, provides that "[a]ll Act[s] or parts of Acts inconsistent herewith are hereby repealed." Respondent Indian Tribe filed suit in Federal District Court challenging the application of several Montana taxes to respondent's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the 1938 Act, and seeking declaratory and injunctive relief. The District Court granted summary judgment for the State, holding that the taxes were authorized by the 1924 Act and that the 1938 Act did not repeal this authorization. The Court of Appeals reversed in pertinent part.

Held: Montana may not tax respondent's royalty interests from leases issued pursuant to the 1938 Act. Pp. 764–768.

(a) Two canons of statutory construction apply to this case: the States may tax Indians only when Congress has manifested clearly its consent to such taxation, and statutes are to be construed liberally in favor of Indians. Pp. 764–766.

(b) When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize Montana to impose the taxes in question. Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The Act contains no explicit consent to state taxation nor is there any indication that it was intended to incorporate implicitly the 1924 Act's taxing authority. The 1938 Act's general repealer clause cannot be taken to incorporate consistent provisions of earlier laws and surely does not satisfy the requirement that Congress clearly consent to state taxation. Moreover, the language of the 1924 Act's taxing provision belies

any suggestion that it carries over to the 1938 Act, since the words "such lands" in the taxing provision refer to lands subject to mineral leases under the 1891 Act and its 1924 amendment. Pp. 766–768.

729 F. 2d 1192, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined, *post*, p. 768.

Deirdre Boggs, Special Assistant Attorney General of Montana, reargued the cause for petitioners. With her on the briefs were *Michael T. Greely*, Attorney General, *Chris D. Tweeten*, Assistant Attorney General, and *Helena S. Maclay*, Special Assistant Attorney General.

Jeanne S. Whiteing reargued the cause for respondent. With her on the brief was *Richard B. Collins*.

Edwin S. Kneedler reargued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *Martin W. Matzen*.*

---

*Briefs of *amici curiae* urging affirmance were filed for Cotton Petroleum Corp. et al. by *Daniel H. Israel* and *Scott B. McElroy;* for the Assiniboine and Sioux Tribes of the Fort Peck Reservation el al. by *Harry R. Sachse*, *Kevin A. Griffin*, *Thomas Acevedo*, *Arthur Lazarus, Jr.*, and *W. Richard West, Jr.;* for the Crow Tribe of Indians by *Robert S. Pelcyger*.

Briefs of *amici curiae* were filed for the State of California by *John K. Van de Kamp*, Attorney General, and *Timothy G. Laddish* and *Julian O. Standen*, Deputy Attorneys General; for the State of New Mexico et al. by *Paul Bardacke*, Attorney General of New Mexico, and *Paula Forney-Thompson* and *Frank D. Katz*, Special Assistant Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony Ching*, Solicitor General, *Norman C. Gorsuch*, Attorney General of Alaska, *John K. Van de Kamp*, Attorney General of California, *Richard D. Martland*, Chief Assistant Attorney General, *Arthur C. De Goede*, Assistant Attorney General, and *James B. Cuneo*, Deputy Attorney General, *Jim Jones*, Attorney General of Idaho, and *Robie G. Russell*, Assistant Attorney General, *David L. Wilkinson*, Attorney General of Utah, *Dallin W. Jensen*, Solicitor General, and *Michael M. Quealy*, Assistant Attorney General, and *A. G. McClintock*, Attorney General of Wyoming.

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the State of Montana may tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U. S. C. § 396a *et seq.* (1938 Act).

I

Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes[1] to the Tribe's royalty interests in oil and gas produced under leases issued by the Tribe. The leases involved unallotted lands on the Tribe's reservation and were granted to non-Indian lessees in accordance with the 1938 Act. The taxes at issue were paid to the State by the lessees and then deducted by the lessees from the royalty payments made to the Tribe. The Blackfeet sought declaratory and injunctive relief against enforcement of the state tax statutes.[2] The Tribe argued to the District Court that the 1938 Act did not authorize the State to tax tribal royalty interests and thus that the taxes were unlawful. The District Court rejected this claim and

---

[1] At issue are the taxes adopted in the following statutes: the Oil and Gas Severance Tax, Mont. Code Ann. § 15–36–101 *et seq.* (1983); Oil and Gas Net Proceeds, Mont. Code Ann. § 15–23–601 *et seq.* (1983); Oil and Gas Conservation, Mont. Code Ann. § 82–11–101 *et seq.* (1983); and the Resource Indemnity Trust Tax, Mont. Code Ann. § 15–38–101 *et seq.* (1983).

[2] The Blackfeet properly invoked the jurisdiction of the District Court pursuant to 28 U. S. C. § 1362, which provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

As we ruled in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under § 1362 despite the general ban in 28 U. S. C. § 1341 against seeking federal injunctions of such laws. See *id.*, at 474–475.

granted the State's motion for summary judgment. The court held that the state taxes were authorized by a 1924 statute, Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U. S. C. § 398 (1924 Act), and that the 1938 Act, under which the leases in question were issued, did not repeal this authorization. The District Court was not persuaded by a 1977 opinion of the Department of the Interior supporting the Blackfeet's position, noting that the Department previously had expressed contrary views, 507 F. Supp. 446, 451 (1981).

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. On rehearing en banc, the Court of Appeals reversed in part and remanded the case for further proceedings. 729 F. 2d 1192 (1984). The court held that the tax authorization in the 1924 Act was not repealed by the 1938 Act and thus remained in effect for leases executed pursuant to the 1924 Act. The court also held, however, that the 1938 Act did not incorporate the tax provision of the 1924 Act, and therefore that its authorization did not apply to leases executed after the enactment of the 1938 Act. The court reasoned that the taxing provision of the 1924 Act was inconsistent with the policies of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* (IRA). Since the 1938 Act was adopted specifically to harmonize Indian leasing laws with the IRA, Congress could not have intended the 1924 Act to apply to leases issued under the 1938 Act. The court remanded the case to the District Court to determine where the legal incidence of the taxes fell, and directed the court to consider whether, if the taxes fell on the oil and gas producers instead of the Indians, the taxes were pre-empted by federal law. We granted the State's petition for certiorari to resolve whether Montana may tax Indian royalty interests arising out of leases executed after the adoption of the 1938 Act. 469 U. S. 815 (1984). We affirm the decision of the en banc Court of Appeals that it may not.

II

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, 26 Stat. 795, 25 U. S. C. § 397 (1891 Act). The Act authorized leases for terms not to exceed 10 years on lands "bought and paid for" by the Indians. The 1891 Act was amended by the 1924 Act. The amendment provided in pertinent part:

> "Unallotted land . . . subject to lease for mining purposes for a period of ten years under section 397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian] council . . . , for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner." Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U. S. C. § 398.

Montana relies on the first proviso in the 1924 Act in claiming the authority to tax the Blackfeet's royalty payments.

In 1938, Congress adopted comprehensive legislation in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess., 2 (1937) (hereafter Senate Report). Like the 1924 Act, the 1938 Act permitted,

subject to the approval of the Secretary of the Interior, mineral leasing of unallotted lands for a period not to exceed 10 years and as long thereafter as minerals in paying quantities were produced. The Act also detailed uniform leasing procedures designed to protect the Indians. See 25 U. S. C. §§ 396b–396g. The 1938 Act did not contain a provision authorizing state taxation; nor did it repeal specifically the authorization in the 1924 Act. A general repealer clause was provided in § 7 of the Act: "All Act *[sic]* or parts of Acts inconsistent herewith are hereby repealed." The question presented by this case is whether the 1924 Act's proviso that authorizes state taxation was repealed by the 1938 Act, or if left intact, applies to leases executed under the 1938 Act.

III

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 670 (1974), citing *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In *The Kansas Indians*, 5 Wall. 737 (1867), for example, the Court ruled that lands held by Indians in common as well as those held in severalty were exempt from state taxation. It explained that "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." *Id.*, at 755. Likewise, in *The New York Indians*, 5 Wall. 761 (1867), the Court characterized the State's attempt to tax Indian reservation land as extraordinary, an "illegal" exercise of state power, *id.*, at 770, and "an unwarrantable interference, inconsistent with the original

title of the Indians, and offensive to their tribal relations," *id.*, at 771. As the Government points out, this Court has never wavered from the views expressed in these cases. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 375–378, 392–393 (1976); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 475–476 (1976); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. *E. g.*, *Bryan* v. *Itasca County*, *supra*, at 392–393; *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367 (1930). The 1924 Act contains such an explicit authorization. As a result, in *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U. S. 159 (1936), the Court held that the State of Montana could tax oil and gas produced under leases executed under the 1924 Act.[3]

The State urges us that the taxing authorization provided in the 1924 Act applies to leases executed under the 1938 Act as well. It argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. It cites decisions of this Court that a clause repealing only inconsistent Acts "implies very strongly that there may be acts on the same subject which are not thereby repealed," *Hess* v. *Reynolds*, 113 U. S. 73, 79 (1885), and that such a clause indicates Congress' intent "to leave in force some portions of former acts relative to the same subject-matter," *Henderson's Tobacco*, 11 Wall.

[3] In *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, the Court interpreted the statutory leasing authority over lands "bought and paid for by the Indians" to include land reserved for the Indians in exchange for their cession or surrender of other lands or rights, as well as that acquired by Indians for money.

652, 656 (1871). The State also notes that there is a strong presumption against repeals by implication, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939), especially an implied repeal of a specific statute by a general one, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.

The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County* v. *Oneida Indian Nation*, 470 U. S. 226, 247 (1985). Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e. g.*, *Bryan* v. *Itasca County*, *supra*, at 393; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e. g.*, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).[4] When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize Montana to enforce its tax statutes with respect to leases issued under the 1938 Act.

IV

Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state

---

[4] Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in "the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal . . . ." *Choate* v. *Trapp*, 224 U. S., at 675.

taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act.[5] Contrary to the State's suggestion, under the applicable principles of statutory construction, the general repealer clause of the 1938 Act cannot be taken to incorporate consistent provisions of earlier laws. The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. Nor would the State's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians.

Moreover, the language of the taxing provision of the 1924 Act belies any suggestion that it carries over to the 1938 Act.[6] The tax proviso in the 1924 Act states that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located . . . ." 25 U. S. C. § 398. Even applying ordinary principles of statutory construction, "such lands" refers to "[u]nallotted land . . . subject to lease for mining purposes . . . under section 397 [the 1891 Act]." When the statute is "liberally

---

[5] In fact, the legislative history suggests that Congress intended to replace the 1924 Act's leasing scheme with that of the 1938 Act. As the Court of Appeals recognized, Congress had three major goals in adopting the 1938 Act: (i) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," Senate Report 2; H. R. Rep. No. 1872, 75th Cong., 3d Sess., 1 (1938); (ii) to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," Senate Report 3; H. R. Rep. No. 1872, *supra*, at 3; and (iii) to ensure that Indians receive "the greatest return from their property," Senate Report 2; H. R. Rep. No. 1872, *supra*, at 2. As the Court of Appeals suggested, these purposes would be undermined if the 1938 Act were interpreted to incorporate the taxation proviso of the 1924 Act. See 729 F. 2d 1192, 1196–1198 (CA9 1984).

[6] The Court of Appeals held that the 1938 Act did not repeal implicitly the 1924 consent to state taxation and thus that this consent continues in force with respect to leases issued under the 1924 or 1891 Acts. *Id.*, at 1200. Because the Blackfeet have not sought review on this question, we need not decide whether the Court of Appeals was correct. We assume for purposes of this case that the 1924 Act's authorization remains in effect for leases executed pursuant to that statute.

construed . . . in favor of the Indians," *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918), it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment.[7]

V

In the absence of clear congressional consent to taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, dissenting.

The question is whether the proviso to the Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U. S. C. § 398, authorizes a

---

[7] We are likewise unpersuaded by the State's contention that we should defer to the administrative interpretation that the 1924 taxing proviso applies to leases executed under the 1938 Act. The State relies on opinions of the Department of the Interior in making this argument. As the Court of Appeals pointed out, however, the administrative record is not as strongly consistent as the State contends. *Id.*, at 1202–1203. The opinions issued prior to 1956 did not mention the 1938 Act or leases executed pursuant thereto. Thus, at best, they did not address the issue presented by this case, but simply assumed that the 1924 Act and this Court's decision in *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U. S. 159 (1936), applied to leases executed under the 1938 Act. It was not until its 1956 opinion that the Department of the Interior considered the relationship between the 1938 and 1924 Acts. The Department then held that the taxing provision had not been repealed by the 1938 Act. This 1956 opinion was unpublished and did not analyze whether Congress had intended the 1924 Act's provision to apply to leases entered pursuant to the 1938 Act. A 1966 opinion relied on the 1956 opinion. In 1977, the Department reconsidered the issue carefully and in far greater detail than it had in 1956, and reversed its prior decision. See 729 F. 2d, at 1202–1203. On this record, we cannot accept the premise of the State's argument for deference to agency interpretation, that is, that the Department had a *consistent* 40-year practice. This is particularly true where, as here, the language and purpose of the 1938 Act are—for the reasons set forth above—clearly to the contrary.

State to tax oil and gas production under leases entered into under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U. S. C. §§ 396a–396g. In my view, the proviso constitutes a sufficiently explicit expression of congressional intent to permit such taxation.

The majority apparently does not rest its contrary holding on the conclusion that the 1938 Act *repealed* the taxing authority contained in the 1924 Act. Although the majority does not appear to come to rest on the question whether the taxing proviso has been repealed, it is clear to me (as it was to both the majority and the dissent in the Court of Appeals) that the 1938 Act did not repeal the proviso. The 1938 Act repealed only Acts inconsistent with its terms, see ch. 198, § 7, 52 Stat. 347, and there is no suggestion that taxation of mineral leases is actually inconsistent with any of the provisions of the 1938 Act. Indeed, given that the 1938 Act and its legislative history are completely silent on the question of taxation, it cannot seriously be suggested that the 1938 Act specifically repealed any taxing authority that might otherwise exist under the 1924 Act.

The question thus boils down to whether the taxing proviso, by its terms, applies to leases under the 1938 Act.* The answer must be sought in the terms of the proviso itself. The majority concludes that the 1924 Act cannot be read to apply to leases under the 1938 Act. I must disagree.

The proviso to the 1924 Act states that "the production of oil and gas and other minerals *on such lands* may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands" (emphasis added). The permission to tax in the proviso depends only on the

*The majority frames the question as whether the 1938 Act "incorporate[s]" the proviso to the 1924 Act. See *ante*, at 767. To me, the discussion of "incorporation" seems beside the point. The 1924 proviso remains on the books, and it covers leases of a certain description. The question is whether leases under the 1938 Act fit that description. If they do, a specific congressional intent to "incorporate" the proviso into the 1938 Act is unnecessary.

character of the lands on which production takes place; accordingly, the dispositive question here is whether the lands the Blackfeet have leased under the 1938 Act are "such lands" within the meaning of the proviso.

The phrase "such lands" in the proviso refers to "[u]nallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 [ch. 383, § 3, 26 Stat. 795]." The 1891 Act, now codified at 25 U. S. C. § 397, allowed mineral leasing of "lands . . . occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments." Thus, the proviso by its express terms applies to unallotted lands on Indian reservations "bought and paid for" by the Indians and not needed for agricultural purposes.

The lands that the Blackfeet have leased under the 1938 Act clearly fall within this description: they are unallotted reservation lands not needed for agricultural purposes. Moreover, in *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U. S. 159 (1936), this Court held that the Blackfeet Reservation was "bought and paid for" within the meaning of the proviso—that is, the reservation is the product of an agreement by which the Blackfeet gave up certain rights in exchange for the reservation. See *id.*, at 162–164. Because the leases are located "on such lands" as are described by the 1924 proviso, I can only conclude that the taxation of oil and gas production under the leases is expressly authorized by the proviso and is therefore lawful.

In so concluding, I am mindful of the general rule that statutes are to be liberally construed in favor of Indian tribes. But more to the point, to my way of thinking, is the proposition that this rule is no more than a canon of construction, and "[a] canon of construction is not a license to disregard

clear expressions of . . . congressional intent." *Rice* v. *Rehner*, 463 U. S. 713, 733 (1983). The proviso to the 1924 Act is a clear expression of congressional intent to allow the States to tax mineral production under leases of lands described in the Act; the proviso has never been repealed; and the lands that the Blackfeet have leased under the 1938 Act fall within the proviso's description of lands on which mineral production is subject to taxation.

Respondent suggests, and the majority seems to agree, see *ante*, at 767, n. 5, that this result is to be avoided because state taxation of mineral production on leaseholds created under the 1938 Act is somehow contrary to the "policy" of the 1938 Act. The relevant policies seem to have been promoting uniformity in the law governing tribal authority to enter into mineral leases, preserving the independence of Indian tribes, and guaranteeing the tribes a fair return on properties leased for mineral production. But it is far from clear that Congress saw state taxation of mineral production to be a threat to any of these goals; as the majority concedes, the legislative history is barren of any indication that taxation by the States was one of the evils Congress sought to eradicate through the 1938 Act. This omission is particularly striking given that at the time the statute was under consideration, this Court had just handed down its ruling in *British-American Oil Producing Co.*, *supra*, which held that production on leases located on reservations created by treaty or legislation was subject to state taxation under the proviso to the 1924 Act. To me, the absence of any comment in the legislative history pertaining to state taxation confirms that we should give effect to the express language of the 1924 proviso authorizing the state taxes at issue here.

Finally, I consider it relevant, though not dispositive, that the suggestion that the 1924 Act does not authorize taxation of production on 1938 Act leases is contrary to the interpretation of both Acts that apparently prevailed in the Department of the Interior until 1977. Opinions issued by the

Office of the Solicitor of the Interior in the years following the passage of the 1938 Act discussed the scope of state authority to tax under the proviso to the 1924 Act with no mention of the possibility that the 1938 Act had had any effect on such authority. See 58 I. D. 535 (1943); Opinion of the Department of Interior, M–36246, Oct. 29, 1954, 2 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917–1974, p. 1652 (1979); Opinion of the Department of Interior, M–36310, Oct. 13, 1955. In 1956, the Department issued an opinion explicitly concluding that the 1924 proviso applied to leases under the 1938 Act, and the Department reaffirmed this position in 1966. See Opinion of the Department of Interior, M–36345, May 4, 1956; Letter from Harry R. Anderson, Asst. Secretary of the Interior, Oct. 27, 1966, reprinted at App. to Pet. for Cert. 301. Not until 1977 did the Department change its view of the effect of the 1938 Act on the taxation authority contained in the proviso. This history admittedly does not conclusively establish what the Department's position was at the time of the passage of the 1938 Act and in the years immediately following. Still, it is significant that it was not until years after the passage of the 1938 Act that the Department first suggested that the 1924 proviso's explicit authorization of taxation did not extend to leases under the 1938 Act. Had Congress really intended to cut off the State's authority to tax mineral production on all leases entered into after 1938, it would seem odd that no one in the Interior Department was aware of this intention.

Because the proviso to the 1924 Act explicitly authorizes state taxation of mineral production on "such lands" as are concerned in this case, and because nothing in the language of the 1938 Act, its legislative history, its underlying policies, or its administrative construction suggests that the express language of the proviso should not govern this case, I would hold that the state taxes at issue here are authorized by federal law.

I therefore dissent.

GARRETT *v.* UNITED STATES

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

No. 83–1842. Argued January 16, 1985—Decided June 3, 1985

In March 1981, petitioner was charged in a multicount indictment in the Western District of Washington for his role in the off-loading and landing of marihuana from a "mother ship" at a Washington location on specified days in October 1979 and August 1980. He pleaded guilty to one count of importation of marihuana and was sentenced to five years' imprisonment and a $15,000 fine. The remaining counts were dismissed without prejudice to the Government's right to prosecute petitioner on any other offenses he might have committed. Thereafter, in July 1981, petitioner was indicted in the Northern District of Florida on several drug counts, including a count for engaging in a continuing criminal enterprise (CCE) from January 1976 to July 1981 in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848. The District Court denied petitioner's pretrial motion to dismiss the CCE charge on the asserted ground that it encompassed the Washington importation operation in violation of the Double Jeopardy Clause of the Fifth Amendment. At trial, evidence underlying petitioner's prior conviction was introduced to prove one of three predicate offenses that must be shown to make out a CCE violation, and petitioner was convicted on the CCE count and on other counts. He was sentenced to 40 years' imprisonment and a $100,000 fine on the CCE count, the prison term being concurrent with the prison terms on the other counts but consecutive to the prison term from the Washington conviction. Rejecting petitioner's contention that his Washington conviction barred the subsequent CCE prosecution in Florida, the Court of Appeals held that the Washington offense and the CCE offense were not the same under the Double Jeopardy Clause, and hence that successive prosecutions and cumulative sentences for these offenses were permissible.

Held:

1. The language, structure, and legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 show that Congress intended the CCE offense to be a separate offense that is punishable in addition to, and not as a substitute for, the predicate offenses. It would be illogical for Congress to intend that a choice be made between the predicate offenses and the CCE offense in pursuing major drug dealers. Pp. 777–786.

2. It did not violate the Double Jeopardy Clause to prosecute the CCE offense after the prior conviction for one of the predicate offenses. The CCE offense is not the "same" offense as one or more of its predicate offenses within the meaning of that Clause. Nor was the Washington offense a "lesser included" offense of the CCE offense. *Brown* v. *Ohio*, 432 U. S. 161, distinguished. The conduct with which petitioner was charged in Florida, when compared with that with which he was charged in Washington, does not lend itself to the simple analogy of a single course of conduct comprising a lesser included misdemeanor within a felony. The CCE was alleged to have spanned more than five years, whereas the acts charged in Washington were alleged to have occurred on single days in 1979 and 1980. But even assuming that the Washington offense was a lesser included offense, petitioner's double jeopardy claim is not sustainable. The CCE charge in Florida had not been completed at the time the Washington indictment was returned, and evidence of the importation in Washington could be used to show one of the predicate offenses. *Diaz* v. *United States*, 223 U. S. 442. Pp. 786–793.

3. The Double Jeopardy Clause does not bar the cumulative punishments. The presumption when Congress creates two distinct defenses, as it did here, is that it intended to permit cumulative sentences. To disallow cumulative sentences would have the anomalous effect in many cases of converting into ceilings the large fines provided by 21 U. S. C. § 848 to deprive big-time drug dealers of their enormous profits. Logic, as well as the legislative history, supports the conclusion that Congress intended separate punishments for the underlying substantive predicate offenses and for the CCE offense. Pp. 793–795.

727 F. 2d 1003, affirmed.

REHNQUIST, J., delivered the opinion of the Court in which BURGER, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 795. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 799. POWELL, J., took no part in the decision of the case.

Philip A. DeMassa argued the cause for petitioner. With him on the briefs was *Richard M. Barnett.*

Mark I. Levy argued the cause for the United States. With him on the brief were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Joel M. Gershowitz.*

JUSTICE REHNQUIST, delivered the opinion of the Court.

This case requires us to examine the double jeopardy implications of a prosecution for engaging in a "continuing criminal enterprise" (CCE), in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 848, when facts underlying a prior conviction are offered to prove one of three predicate offenses that must be shown to make out a CCE violation. Petitioner Jonathan Garrett contends that his prior conviction is a lesser included offense of the CCE charge, and, therefore, that the CCE prosecution is barred under *Brown* v. *Ohio*, 432 U. S. 161 (1977).

Between 1976 and 1981, Garrett directed an extensive marihuana importation and distribution operation involving off-loading, transporting, and storing boatloads of marihuana. These activities and related meetings and telephone calls occurred in several States, including Arkansas, Florida, Georgia, Louisiana, Massachusetts, Michigan, Texas, and Washington.

In March 1981, Garrett was charged in three substantive counts of an indictment in the Western District of Washington for his role in the off-loading and landing of approximately 12,000 pounds of marihuana from a "mother ship" at Neah Bay, Washington. He was named as a co-conspirator, but not indicted, in a fourth count charging conspiracy to import marihuana. Having learned that he was being investigated on CCE charges in Florida, Garrett moved to consolidate in the Washington proceedings "all charges anticipated, investigated and currently pending against [him]." The Government opposed the motion on the ground that no other charges had then been filed against Garrett, and the District Court denied it.

Garrett pleaded guilty to one count of importation of marihuana in violation of 21 U. S. C. §§ 952, 960(a)(1), 960(b)(2) and 18 U. S. C. § 2. He was sentenced to five years' imprisonment and a $15,000 fine; and the remaining counts against him, including possession of marihuana with intent to distrib-

ute, were dismissed without prejudice to the Government's right to prosecute him on any other offenses he may have committed.

Approximately two months after his guilty plea in Washington, Garrett was indicted in the Northern District of Florida for conspiring to import marihuana, 21 U. S. C. §§ 952, 960, 963, conspiring to possess marihuana with intent to distribute, 21 U. S. C. §§ 841, 846, using a telephone to facilitate illegal drug activities, 21 U. S. C. §§ 963, 846, 843(b), and engaging in a continuing criminal enterprise, 21 U. S. C. § 848. The District Court denied Garrett's pretrial motion to dismiss the CCE charge, made on the ground that it encompassed the Washington importation operation in violation of the Double Jeopardy Clause.

In the Florida trial, the Government introduced extensive evidence of Garrett's ongoing and widespread drug activities, including proof of the marihuana smuggling operation at Neah Bay, Washington. The court instructed the jury on the CCE count that it had to find beyond a reasonable doubt that Garrett had committed "a felony under Title 21 of the United States Code" that "was a part of a continuing series of violations," defined to be "three or more successive violations of Title 21 over a definite period of time with a single or substantially similar purpose." The court further instructed the jury that it had to find that Garrett acted "in concert with five or more other persons," that with respect to them Garrett occupied "a position of organizer, supervisor, or any position of management," and that he "received substantial income from this operation." As to the predicate violations making up the "series," the court instructed the jury that in addition to the offenses charged as substantive counts in the Florida indictment, the felony offenses of possession of marihuana with intent to distribute it, distribution of marihuana, and importation of marihuana would qualify as predicate offenses. 14 Record 16–20. The Washington evidence, as

well as other evidence introduced in the Florida trial, tended to prove these latter three offenses.

The jury convicted Garrett on the CCE count, the two conspiracy counts, and the telephone facilitation count. He received consecutive prison terms totaling 14 years and a $45,000 fine on the latter three counts, and 40 years' imprisonment and a $100,000 fine on the CCE count. The CCE prison term was made concurrent with the prison terms on the other counts, but consecutive to the prison term from the Washington conviction. The CCE fine was in addition to the fine on the other counts and the Washington fine.

On appeal, the Court of Appeals for the Eleventh Circuit rejected Garrett's contention that his conviction in Washington for importing marihuana barred the subsequent prosecution in Florida for engaging in a continuing criminal enterprise. 727 F. 2d 1003 (1984). The court held that the Washington importation offense and the CCE offense were not the same under the Double Jeopardy Clause; hence successive prosecutions and cumulative sentences for these offenses were permissible. We granted certiorari to consider this question. 469 U. S. 814 (1984).

I

This case presents two of the three aspects of the Double Jeopardy Clause identified in *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969): protection against a second prosecution for the Washington importation conviction; and protection against multiple punishments for that conviction. Garrett focuses primarily on the former protection, which we address first.

The heart of Garrett's argument entails two steps: First, notwithstanding *Jeffers* v. *United States*, 432 U. S. 137 (1977) (plurality opinion), CCE is a separate substantive offense and not a conspiracy offense because it requires completion of the criminal objective and not merely an agree-

ment. Thus CCE is not distinct from its underlying predicates in the way that conspiracy is a distinct offense from the completed object of the conspiracy. Cf. *Pinkerton* v. *United States*, 328 U. S. 640, 643 (1946). Second, applying the test of *Blockburger* v. *United States*, 284 U. S. 299 (1932), each of the predicate offenses is the "same" for double jeopardy purposes as the CCE offense because the predicate offense does not require proof of any fact not necessary to the CCE offense. Because the latter requires proof of additional facts, including concerted activity with five other persons, a supervisory role, and substantial income, the predicates are lesser included offenses of the CCE provision. The relationship is the same, Garrett argues, as the relationship between the joyriding and auto theft statutes involved in *Brown* v. *Ohio*, *supra*, and thus a subsequent prosecution for the greater CCE offense is barred by the earlier conviction of the lesser marihuana importation offense.

Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature—in this case Congress—intended that each violation be a separate offense. If Congress intended that there be only one offense—that is, a defendant could be convicted under either statutory provision for a single act, but not under both—there would be no statutory authorization for a subsequent prosecution after conviction of one of the two provisions, and that would end the double jeopardy analysis. Cf. *Albrecht* v. *United States*, 273 U. S. 1, 11 (1927).

This question of legislative intent arose in *Blockburger* in the context of multiple punishments imposed in a single prosecution. Based on one drug sale, Blockburger was convicted of both selling a drug not in the original stamped package and selling it not in pursuance of a written order of the purchaser. The sale violated two separate statutory provisions, and the question was whether "the accused committed two offenses or only one." 284 U. S., at 303–304. The rule stated in *Blockburger* was applied as a rule of statutory construction to

help determine legislative intent. Significantly, after setting out the rule, the Court cited a paragraph in *Albrecht*, *supra*, at 11, which included the following statement: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction*" (emphasis added). We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. *Missouri* v. *Hunter*, 459 U. S. 359, 368 (1983); *Albernaz* v. *United States*, 450 U. S. 333, 340 (1981); *Whalen* v. *United States*, 445 U. S. 684, 691–692 (1980). Indeed, it would be difficult to contend otherwise without converting what is essentially a factual inquiry as to legislative intent into a conclusive presumption of law.

In the present case the application of the *Blockburger* rule as a conclusive determinant of legislative intent, rather than as a useful canon of statutory construction, would lead to the conclusion urged by Garrett: that Congress intended the conduct at issue to be punishable either as a predicate offense, or as a CCE offense, but not both. The language, structure, and legislative history of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, however, show in the plainest way that Congress intended the CCE provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses. Insofar as the question is one of legislative intent, the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress.

The language of 21 U. S. C. § 848, which is set out in full in the margin,[1] affirmatively states an offense for which punishment will be imposed. It begins:

---

[1] "§ 848. Continuing criminal enterprise

"(a) Penalties; forfeitures

"(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years

"Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be

---

and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

"(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

"(A) the profits obtained by him in such enterprise, and

"(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

"(b) 'Continuing criminal enterprise' defined

"For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources.

"(c) Suspension of sentence and probation prohibited

"In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932 (D. C. Code, secs. 24–203—24–207), shall not apply.

"(d) Jurisdiction of courts

"The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper."

> up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2)." § 848(a)(1).

At this point there is no reference to other statutory offenses, and a separate penalty is set out, rather than a multiplier of the penalty established for some other offense. This same paragraph then incorporates its own recidivist provision, providing for twice the penalty for repeat violators of this section. Significantly the language expressly refers to "one or more prior *convictions . . . under this section.*" Next, subparagraph (2), which sets out various forfeiture provisions, also refers to any person "who is *convicted* under paragraph (1) of engaging in a continuing criminal enterprise," again suggesting that § 848 is a distinct offense for which one is separately convicted.

Subsection (b) of § 848 defines the conduct that constitutes being "engaged in a continuing criminal enterprise":

> "(1) he violates any provision of this subchapter or subchapter II of this chapter [establishing various drug offenses] the punishment for which is a felony, and
>
> "(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> "(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> "(B) from which such person obtains substantial income or resources."

A common-sense reading of this definition reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the "top brass" in the drug rings, not the lieutenants and foot soldiers.

The definition of a continuing criminal enterprise is not drafted in the way that a recidivist provision would be

drafted. Indeed § 848(a)(1), as already noted, contains language that is typical of that sort of provision. Moreover, the very next section of the statute entitled "Dangerous Special Drug Offender Sentencing" is a recidivist provision. It is drafted in starkly contrasting language which plainly is not intended to create a separate offense. For example, it provides for a special hearing before the court sitting without a jury to consider the evidence of prior offenses, and the determination that a defendant is a dangerous special drug offender is made on a preponderance of the information by the court. See 21 U. S. C. § 849.

This conclusion as to Congress' intent is fortified by the legislative history. H. R. 18583 is the bill that was enacted to become the Comprehensive Drug Abuse Prevention and Control Act of 1970. In its section-by-section analysis, the House Committee Report states:

> "Section 408(a) [21 U. S. C. § 848(a)] provides that any person who engages in a continuing criminal enterprise shall upon *conviction* for that *offense* be sentenced to a term of imprisonment for not less than 10 years and up to life . . . . If the person engages in this activity subsequent to one or more *convictions under this section*, he shall receive a penalty of not less than 20 years' imprisonment . . . ." H. R. Rep. No. 91–1444, pt. 1, p. 50 (1970) (emphasis added).

The intent to create a separate offense could hardly be clearer.

As originally introduced in the House, H. R. 18583 had a section entitled "Continuing Criminal Enterprises" which in reality was a recidivist provision, like the current 21 U. S. C. § 849, that provided for enhanced sentences for "a special offender," who "committed [a drug] felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise." The House Committee substituted for this provision

an amendment offered by Representative Dingell that ultimately became the current § 848. "Instead of providing a post-conviction-presentencing procedure, [the Dingell amendment] made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." H. R. Rep. No. 91–1444, pt. 1, pp. 83–84 (1970) (additional views); see 116 Cong. Rec. 33302 (1970) (remarks of Rep. Eckhardt).

During consideration of the bill by the full House, Representative Poff offered an amendment which would restore the recidivist provision to the bill in addition to the Dingell provision. Explaining the differences between the two approaches, Representative Eckhardt stated:

> "[T]he Dingell amendment created a new offense which would have to be triable in all its parts by admissible evidence brought before the court, whereas the post-conviction presentence [procedure] of the original bill similar to the Poff provisions provided that some report upon which sentence would be based would be available to the judge, cross-examination would be available of those who presented the report, but not of those who may have contributed to it." *Ibid.*

Later in the debate, Representative Poff explained his proposed amendment further:

> "Mr. Chairman, the most dangerous criminal in the criminal drug field is the organized crime offender, the habitual offender, the professional criminal.
>
> "Mr. Chairman, we need special penalties in my opinion for these special criminals. Constitutional scholars have suggested two approaches to deal with such offenders. The first is the creation of a separate crime with separate penalties. The second approach is the imposition of longer sentences upon those convicted first of the basic crime and then shown to be dangerous offenders.
>
> "Mr. Chairman, the first approach, the separate crime approach, is the approach taken by section 408 of the

> Committee bill [21 U. S. C. § 848]. The second is found in the amendment which I have just offered which adds two new sections to the bill, sections 409 and 410 [21 U. S. C. §§ 849 and 850]." *Id.*, at 33630.

The distinction between the two approaches was emphasized in the continuing debate. For example, Representative Eckhardt stated: "Under the Dingell amendment, if you are going to prove a man guilty, you have to come into court and prove every element of the continuing criminal offense." Representative Poff concurred in this characterization of the CCE provision "which embodies a new separate criminal offense with a separate criminal penalty." Representative Poff distinguished this approach from his proposed amendment which "authorizes the judge to impose the extended sentence upon the defendant in the dock who has already been found guilty by the jury of the basic charge." *Id.*, at 33631. The Poff amendment was adopted, *id.*, at 33634, and both approaches are contained in the statute, 21 U. S. C. §§ 848, 849, and 850.

In view of this legislative history, it is indisputable that Congress intended to create a separate CCE offense. One could still argue, however, that having created the separate offense, Congress intended it, where applicable, to be a substitute for the predicate offenses. Nowhere in the legislative history is it stated that a big-time drug operator could be prosecuted and convicted for the separate predicate offenses as well as the CCE offense. The absence of such a statement, however, is not surprising; given the motivation behind the legislation and the temper of the debate, such a statement would merely have stated the obvious. Congress was seeking to add a new enforcement tool to the substantive drug offenses already available to prosecutors. During the debate on the Poff amendment, for example, Representative Fascell stated: "I see no reason to treat a drug trafficker any less harshly than an organized crime racketeer. Their acts are equally heinous, the consequences equally severe,

and their punishment equally justified." Representative Weicker stated: "The penalty structure has been designed to accommodate all types of drug offenders, from the casual drug user and experimenter to the organized crime syndicates engaged in unlawful transportation and distribution of illicit drugs." He continued, "This bill goes further in providing those persons charged with enforcing it a wide variety of enforcement tools which will enable them to more effectively combat the illicit drug trafficker and meet the increased demands we have imposed on them." Representative Taft stated: "[T]his amendment will do much at least to help a coordinated attack on the organized crime problem within the purview of this legislation. . . . Hopefully, we will see other legislation coming along broadening the attack on the crime syndicates even further." 116 Cong. Rec. 33630–33631 (1970). It runs counter to common sense to infer from comments such as these, which pervade the entire debate and which stand unrebutted, that Congress intended to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer rather than to permit prosecution for CCE in addition to prosecution for the predicate offenses.

Finally, it would be illogical for Congress to intend that a choice be made between the predicate offenses and the CCE offense in pursuing major drug dealers. While in the instant case Garrett claims that the Government was aware of the possibility of bringing the CCE charge before he was indicted on the Washington offenses, in many cases the Government would catch a drug dealer for one offense before it was aware of or had the evidence to make a case for other drug offenses he had committed or in the future would commit. The Government would then be forced to choose between prosecuting the dealer on the offense of which it could prove him guilty or releasing him with the idea that he would continue his drug-dealing activities so that the Government might catch him twice more and then be able to prosecute him on the CCE

offense. Such a situation is absurd and clearly not what Congress intended.

II

Having determined that Congress intended CCE to be a separate offense and that it intended to permit prosecution for both the predicate offenses and the CCE offense, we must now determine whether prosecution for a CCE offense after an earlier prosecution for a predicate offense is constitutional under the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause provides:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The critical inquiry is whether a CCE offense is considered the "same offense" as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause.

Quite obviously the CCE offense is not, in any commonsense or literal meaning of the term, the "same" offense as one of the predicate offenses. The CCE offense requires the jury to find that the defendant committed a predicate offense, and in addition that the predicate offense was part of a continuing series of predicate offenses undertaken by the defendant in concert with five or more other persons, that the defendant occupied the position of an organizer or manager, and that the defendant obtained substantial income or resources from the continuing series of violations.

In order to properly analyze the successive prosecution issue, we must examine not only the statute which Congress has enacted, but also the charges which form the basis of the Government's prosecution here. Petitioner pleaded guilty in the Western District of Washington in May 1981 to a count charging importation of 12,000 pounds of marihuana at Neah Bay, Washington, on August 26, 1980. He was indicted in the Northern District of Florida in July 1981, on charges of conspiring to import "multi-ton quantities of marihuana and marihuana 'Thai sticks'" from January 1976 to July 16, 1981;

of conspiring to possess with intent to distribute marihuana over the same period of time; and of engaging in a continuing criminal enterprise over the same period of time. Thus at the very moment he made his motion to require "consolidation" of all the charges against him in the Western District of Washington, he was engaging in criminal conduct of which he was later found guilty by a jury in the Northern District of Florida.

Petitioner contends that the marihuana importation charge to which he pleaded guilty in Washington was a "lesser included offense" of the CCE offense of which he was convicted in Florida. He points out that evidence of the Washington offense was introduced at the Florida trial, and that the jury was permitted to find that the Washington violation was one of the "predicate offenses" for the CCE charge in Florida. He relies on *Brown* v. *Ohio*, 432 U. S. 161 (1977), for his conclusion that the use of the Washington offense as an element of the Florida charge placed him twice in jeopardy in violation of the Fifth Amendment to the United States Constitution.

Brown v. *Ohio* held that, where the misdemeanor of joyriding was a lesser included offense in the felony of auto theft, a prosecution for the misdemeanor barred a second prosecution for the felony. We think there is a good deal of difference between the classic relation of the "lesser included offense" to the greater offense presented in *Brown*, on the one hand, and the relationship between the Washington marihuana offense and the CCE charge involved in this case, on the other. The defendant in *Brown* had stolen an automobile and driven it for several days. He had engaged in a single course of conduct—driving a stolen car. The very same conduct would support a misdemeanor prosecution for joyriding or a felony prosecution for auto theft, depending only on the defendant's state of mind while he engaged in the conduct in question. Every moment of his conduct was as relevant to the joyriding charge as it was to the auto theft charge.

In the case before us the situation is quite different. The count in the Washington indictment to which Garrett pleaded guilty charged importation of 12,000 pounds of marihuana at Neah Bay on August 26, 1980. The Washington indictment was returned on March 17, 1981, and a guilty plea entered on May 18, 1981. Two other counts of the indictment, including causing interstate travel to facilitate importation of marihuana on or about October 24, 1979, were dismissed without prejudice to the Government's right subsequently to prosecute any other offense Garrett may have committed.

The CCE indictment returned against Garrett in Florida was returned on July 16, 1981. It charged that he had, from January 1976, "up to and including [July 16, 1981]," conspired in that district and "divers other districts" to import multiton quantities of marihuana and marihuana "Thai sticks" in violation of applicable federal law. Another count charged conspiracy to possess with intent to distribute marihuana over the same period of more than five years. A third count of the Florida indictment charged that Garrett had engaged in the Northern District of Florida and in "divers other districts" in a continuing criminal enterprise over the same 5½-year period.

Obviously the conduct in which Garrett was charged with engaging in the Florida indictment, when compared with that with which he was charged in the Washington indictment, does not lend itself to the simple analogy of a single course of conduct—stealing a car—comprising a lesser included misdemeanor within a felony. Here the continuing criminal enterprise was alleged to have spanned more than five years; the acts charged in the Washington indictment were alleged to have occurred on single days in 1979 and 1980, respectively. Whenever it was during the 5½-year period alleged in the indictment that Garrett committed the first of the three predicate offenses required to form the basis for a CCE prosecution, it could not then have been said with any certainty that he would necessarily go ahead and commit the

other violations required to render him liable on a CCE charge. Every minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony, but the same simply is not true of Garrett. His various boatload smuggling operations in Louisiana, for example, obviously involved incidents of conduct wholly separate from his "mother boat" operations in Washington. These significant differences caution against ready transposition of the "lesser included offense" principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case.

Were we to sustain Garrett's claim, the Government would have been able to proceed against him in either one of only two ways. It would have to have withheld the Washington charges, alleging crimes committed in October 1979 and August 1980, from the grand jury which indicted Garrett in March 1981, until it was prepared to present to a grand jury the CCE charge which was alleged to have been, and found by a jury to be, continuing on each of those dates; or it would have to have submitted the CCE charge to the Washington grand jury in March 1981, even though the indictment ultimately returned against Garrett on that charge alleged that the enterprise had continued until July 1981.[2] We do not

[2] JUSTICE STEVENS in dissent argues that, although the Neah Bay prosecution in Washington does not bar Garrett's later prosecution for a CCE that ended before the Neah Bay importation took place, none of the evidence pertaining to the latter crime could be used consistently with the Double Jeopardy Clause to show a CCE. While it may be true that with the benefit of hindsight the Government could have indicted and the jury convicted for a CCE that began in December 1976, and continued until October 1979, that is not the crime which the indictment charged nor for which the jury convicted. The Government indicted for a CCE beginning in 1976 and continuing through July 1981, months after the Neah Bay indictment had been returned. Nothing in the record indicates that the Government's inclusion of the months following the Neah Bay indictment

think that the Double Jeopardy Clause may be employed to force the Government's hand in this manner, however we were to resolve Garrett's lesser-included-offense argument. One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting.

Petitioner urges that "[w]here the charges arise from a single criminal act, occurrence, episode, or transaction, they must be tried in a single proceeding. *Brown* v. *Ohio*, 432 U. S., at 170 (BRENNAN, J., concurring)." We have steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause. But it would seem to strain even that doctrine to describe Garrett's multifarious multistate activities as a "single transaction." For the reasons previously stated, we also have serious doubts as to whether the offense to which Garrett pleaded guilty in Washington was a "lesser included offense" within the CCE charge so that the prosecution of the former would bar a prosecution of the latter. But we may assume, for purposes of decision here, that the Washington offense was a lesser included offense, because in our view Garrett's claim of double jeopardy would still not be sustainable.

---

within the time of the CCE charge was unsupported by the evidence which would be adduced, and therefore merely an artificial attempt by the Government to extend the time period covered by the indictment to avoid a double jeopardy claim.

The Government, and not the courts, is responsible for initiating a criminal prosecution, and subject to applicable constitutional limitations it is entitled to choose those offenses for which it wishes to indict and the evidence upon which it wishes to base the prosecution. Whether or not JUSTICE STEVENS is correct in asserting that the Neah Bay charge was not necessary to establish one of the three predicate offenses for a CCE charge, the Government obviously viewed the matter differently. We think that for the reasons stated in the text at 786–793, the Double Jeopardy Clause does not require the Government to dispense with the use of the Neah Bay operation as a predicate offense in the CCE prosecution in Florida.

In *Diaz* v. *United States*, 223 U. S. 442 (1912), the Court had before it an initial prosecution for assault and battery, followed by a prosecution for homicide when the victim eventually died from injuries inflicted in the course of the assault. The Court rejected the defendant's claim of double jeopardy, holding that the two were not the "same offense":

> "The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense." *Id.*, at 448–449.

In the present case, as in *Diaz*, the continuing criminal enterprise charged against Garrett in Florida had not been completed at the time that he was indicted in Washington. The latter event took place in March 1981, whereas the continuing criminal enterprise charged in the Florida indictment and found by the trial jury extended from January 1976 to July 1981. The evidence at trial showed, for example, that Garrett was arrested for traffic offenses and other violations on July 23, 1981, while out on bail pending sentencing for the Washington conviction. He told the arresting officer that the officer had caught "somebody big" and that he was a "smuggler." At the time of the arrest, Garrett was carrying $6,253 in cash. About $30 of this was in quarters. He explained that he needed them to make long-distance phone calls, on which he sometimes spent $25 to $50 a day. He also told the arresting officer and a federal agent who interviewed him the next morning that he had just bought the truck he

had been driving for $13,000 cash and that he used it for smuggling. He further stated that he had a yacht in Hawaii which he had purchased for $160,000 cash. This evidence is consistent with the jury's verdict that Garrett continued his CCE activities into July 1981.

We think this evidence not only permits but requires the conclusion that the CCE charged in Florida, alleged to have begun in January 1976, and continued up to mid-July 1981, was under *Diaz* a different offense from that charged in the Washington indictment. We cannot tell, without considerable sifting of the evidence and speculating as to what juries might do, whether the Government could in March 1981 have successfully indicted and prosecuted Garrett for a different continuing criminal enterprise—one ending in March 1981. But we do not think any such sifting or speculation is required at the behest of one who at the time the first indictment is returned is continuing to engage in other conduct found criminal by the jury which tried the second indictment.

It may well be, as JUSTICE STEVENS suggests in his dissenting opinion, that the Florida indictment did not by its terms indicate that the Neah Bay importation would be used as evidence to support it, *post*, at 804–805, and therefore at the time the pretrial motion to dismiss on double jeopardy grounds was made the District Court in Florida could not have rendered an informed decision on petitioner's motion. But there can be no doubt that by the time the evidence had all been presented in the Florida trial, and the jury was charged, only one reasonable conclusion could be drawn by the District Court: the Government's evidence with respect to the CCE charge included acts which took place after March 1981, the date of the Washington indictment, and up to and including July 1981. Therefore, the continuing criminal enterprise charged by the Government had not been completed at the time the Washington indictment was returned, and under the *Diaz* rule evidence of the Neah

Bay importation might be used to show one of the predicate offenses.[3]

Having concluded that Congress intended CCE to be a separate offense and that it does not violate the Double Jeopardy Clause under the facts of this case to prosecute the CCE offense after a prior conviction for one of the predicate offenses, the only remaining issue is whether the Double Jeopardy Clause bars cumulative punishments. Garrett's sentence on the CCE conviction was consecutive to his sentence on the Washington conviction. In this connection, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U. S., at 366; *Albernaz* v. *United States*, 450 U. S., at 344. As discussed above, Congress intended to create a separate offense. The presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish an ambiguity or rebut this presumption:

> "[The defendants] read much into nothing. Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we have previously noted, Congress is 'predominantly a lawyer's body,' . . . and it is appropriate for us 'to assume that our elected representatives . . . know the law.' . . . As a result if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind. It is not a function of this Court to presume that

---

[3] The Government argues as an alternative basis for sustaining successive prosecutions of the predicate offense and the CCE offense that the CCE offense can be likened to a recidivist statute. See *Graham* v. *West Virginia*, 224 U. S. 616 (1912), and *Oyler* v. *Boles*, 368 U. S. 448 (1962). Because of our disposition of the case, we have no need to consider this submission.

'Congress was unaware of what it accomplished.'" *Id.*, at 341–342.

Here, of course, Congress was not silent as to its intent to create separate offenses notwithstanding *Blockburger*, and we can assume it was aware that doing so would authorize cumulative punishments absent some indication of contrary intent.

Moreover, disallowing cumulative sentences would have the anomalous effect in many cases of converting the large fines provided by § 848 into ceilings. Congress established the large fines in § 848 in an effort to deprive big-time drug dealers of some of their enormous profits, which often cannot be traced directly to their crimes for forfeiture purposes. The fines for a three-time offender who has been previously convicted of a drug felony could amount to $150,000 for the predicate offenses standing alone—an amount that exceeds the ceiling for a first-time CCE fine. Compare § 841(b)(1)(A) with § 848(a)(1). Congress was bent on depriving the big-time drug dealer of his profits; it is doubtful that Congress intended to force an election of a lower maximum fine in such a situation in order to attempt to obtain the life imprisonment penalty available under the CCE provision.

In *Jeffers* v. *United States*, 432 U. S., at 156–157, a plurality of this Court stated that § 848 "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970." The focus of the analysis in *Jeffers* was the permissibility of cumulative punishments for conspiracy under § 846 and for CCE under § 848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties. The same is not true of the substantive offenses created by the Act and conspiracy, and by the same logic, it is not true of the substantive offenses and CCE. We have been required in the present case, as we were not in *Jeffers*, to consider the relationship between substantive predicate offenses and a

CCE. We think here logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense. Congress may, of course, so provide if it wishes.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

JUSTICE O'CONNOR, concurring.

I agree that, on the facts of this case, the Double Jeopardy Clause does not bar prosecution and sentencing under 21 U. S. C. § 848 for engaging in a continuing criminal enterprise even though Garrett pleaded guilty to one of the predicate offenses in an earlier prosecution. This conclusion is admittedly in tension with certain language in prior opinions of the Court. *E. g., Brown* v. *Ohio*, 432 U. S. 161, 166 (1977). I write separately to explain why I believe that today's holding comports with the fundamental purpose of the Double Jeopardy Clause and with the method of analysis used in our more recent decisions.

The Double Jeopardy Clause declares: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5. This constitutional proscription serves primarily to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching. See, *e. g., Ohio* v. *Johnson*, 467 U. S. 493, 498–499 (1984); *United States* v. *DiFrancesco*, 449 U. S. 117, 128, 136 (1980). In *Green* v. *United States*, 355 U. S. 184 (1957), the Court explained:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him

to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.*, at 187–188.

Decisions by this Court have consistently recognized that the finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law. *Tibbs* v. *Florida*, 457 U. S. 31, 40 (1982); *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). The Court accordingly has held that a defendant who successfully appeals a conviction generally is subject to retrial. *Tibbs*, *supra*, at 40. Similarly, double jeopardy poses no bar to another trial where a judge declares a mistrial because of "manifest necessity." *Illinois* v. *Somerville*, 410 U. S. 458 (1973). Such decisions indicate that absent "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," *United States* v. *Scott*, 437 U. S. 82, 91 (1978), the compelling public interest in punishing crimes can outweigh the interest of the defendant in having his culpability conclusively resolved in one proceeding. *Tibbs*, *supra*, at 41–44.

Brown v. *Ohio*, *supra*, held that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on a lesser included offense. *Id.*, at 168–169. The concerns for finality that support this conclusion, however, are no more absolute than those involved in other contexts. See *Jeffers* v. *United States*, 432 U. S. 137, 152 (1977) (plurality opinion). Instead, successive prosecution on a greater offense may be permitted where justified by the public interest in law enforcement and the absence of prosecutorial overreaching. For example, in *Diaz* v. *United States*, 223 U. S. 442, 449 (1912), the Court found no double jeopardy bar to a prosecution for murder where the victim of an assault died after the defendant's trial for assault and battery. *Diaz* implies that prosecution for a lesser offense does not prevent subsequent prosecution for a greater offense where the latter

depends on facts occurring after the first trial. Dicta in *Brown* v. *Ohio* suggested that the same conclusion would apply where the later prosecution rests on facts that the government could not have discovered earlier through due diligence. 432 U. S., at 169, n. 7. See also *Jeffers* v. *United States*, *supra*, at 151–152.

Application of the rule of *Brown* v. *Ohio* is also affected by the actions of the defendant himself. In *Jeffers* v. *United States*, *supra*, the plurality opinion rejected a claim of double jeopardy where prosecution for a greater offense followed a guilty verdict for a lesser offense, and the successive prosecution resulted from the defendant's opposition to consolidated trials. *Id.*, at 152–154. Last Term, the Court relied on *Jeffers* to hold that where a court accepts, over the prosecution's objection, a defendant's guilty plea to lesser included offenses, double jeopardy does not prevent further prosecution on remaining, greater offenses. *Ohio* v. *Johnson*, *supra*, at 501–502. After noting the State's interest in convicting those who have violated its laws and the absence of governmental overreaching, *Johnson* observed that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." 467 U. S., at 502.

Turning to the circumstances of this case, I conclude that Garrett cannot validly argue that the Government is prevented from using evidence relating to his May 1981 conviction to prove his participation in a continuing criminal enterprise from January 1976 through July 1981. I am willing to assume, *arguendo*, that the 1981 conviction for importation of marihuana is a lesser included offense of the charges for violating 18 U. S. C. § 848. As noted *ante*, at 788, 791–793, the Government both alleged and presented evidence that Garrett's violation of § 848 continued after the conviction on the lesser included offense. Although the Government alleged participation in the unlawful continuing enterprise through July 1981, none of the events occurring after the date of the earlier prosecution were essential elements to

prove a violation of § 848. Thus, this case falls somewhere between *Diaz* and *Brown* v. *Ohio*. The dissent reads the latter decision as limiting application of *Diaz* to circumstances where the facts *necessary* to the greater offense occur or are discovered after the first prosecution. *Post*, at 806–807. Although I find merit to this position, I reach a different conclusion upon balancing the interests protected by the Double Jeopardy Clause.

The approach advocated by the dissent would effectively force the Government's hand with respect to prosecution under § 848. Under that approach, once the Government believes that facts sufficient to prove a continuing criminal enterprise exist, it can either bring charges under § 848 or seek conviction only for a predicate offense while forgoing its later use to prove a continuing violation of § 848. The decision to bring charges under § 848, however, will necessarily and appropriately depend on prosecutorial judgments concerning the adequacy of the evidence, the efficient allocation of enforcement resources, and the desirability of seeking the statute's severe sanctions. These considerations may be affected by events occurring after the last necessary predicate offense. Where the defendant continues unlawful conduct after the time the Government prosecutes him for a predicate offense, I do not think he can later contend that the Government is foreclosed from using that offense in another prosecution to prove the continuing violation of § 848. Cf. *Jeffers*, *supra*, at 154. As the Court noted in another context, "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, *supra*, at 99.

The Court's holding does not leave the defendant unduly exposed to oppressive tactics by the Government. Any acquittal on a predicate offense would of course bar the Government from later attempting to relitigate issues in a prosecution under § 848. *Ashe* v. *Swenson*, 397 U. S. 436 (1970).

This fact will prevent the Government from "treat[ing] the first trial as no more than a dry run for the second prosecution," *id.*, at 447. Moreover, I note that we do not decide in this case whether a defendant would have a valid double jeopardy claim if the Government failed in a later prosecution to allege and to present evidence of a continuing violation of § 848 after an earlier conviction for a predicate offense. Certainly the defendant's interest in finality would be more compelling where there is no indication of continuing wrongdoing after the first prosecution.

For the reasons stated, I agree that under the circumstances of this case the Double Jeopardy Clause does not bar Garrett's prosecution under § 848. Because I also agree that Congress intended to authorize separate punishment for the underlying predicate offenses and the violation of § 848, I join the opinion of the Court.

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

While I agree with the Court that petitioner's conviction for importing 12,000 pounds of marihuana into Neah Bay, Washington, on August 26, 1980, does not bar his prosecution for a continuing criminal enterprise that began in December 1976, and continued into October 1979, I do not agree with the Court's analysis of the double jeopardy implications of the first conviction or with its decision to affirm the judgment of the Court of Appeals. In my opinion, the separate indictment, conviction, and sentencing for the Neah Bay transaction make it constitutionally impermissible to use that transaction as one of the predicate offenses needed to establish a continuing criminal enterprise in a subsequent prosecution under 21 U. S. C. § 848.

In order to explain my position, I shall first emphasize the difference between the Washington and the Florida proceedings and the limited extent of their overlap, then identify the relevant constraint that is imposed by the Double Jeopardy Clause, and finally note the flaw in the Court's analysis.

I

The Washington and Florida indictments were returned within three months of each other; they focus on two sets of transactions that occurred in almost mutually exclusive time periods. The fact that the later Florida indictment deals with the earlier series of events is a source of some confusion that, I believe, can be put to one side if we begin by describing the Florida indictment—the one that gave rise to the case we are now reviewing.

The Florida Indictment

On July 16, 1981, a grand jury in the Northern District of Florida returned an 11-count indictment against petitioner and five other defendants.[1] Petitioner was named as a defendant in seven counts, four of which refer to the use of a telephone on a specific date in 1978 or 1979. The three counts relevant to the present issue charged petitioner with conspiracy to import marihuana (Counts I and II) and with conducting a continuing criminal enterprise (Count XI) in violation of 21 U. S. C. § 848.[2]

The contours of the prosecution's case are suggested by the 34 overt acts alleged in Count I as having been performed by the six defendants and five named co-conspirators.[3] Each of the first 33 overt acts was alleged to have occurred in the period between December 1976 and August 1979; the 34th occurred on October 25, 1979. The three principal transactions involved (1) the unloading of about 30,000 pounds of marihuana from the vessel *Buck Lee* at Fourchan Land-

[1] The six defendants were Jonathan Garrett, Robert Hoskins, Christopher Garrett, Donald McMichaels, Caesar Garcia, Sr., a/k/a Papasan, and Norman Vick. App. 56.

[2] *Id.*, at 55–65. Count I alleged violations of 21 U. S. C. §§ 952, 960 and 963; Count II alleged violations of 21 U. S. C. §§ 841 and 846.

[3] The five named co-conspirators were Jack Nichols, Thomas Ruth, Robert Gorman, Doug Hoskins, and Joe Knowles. App. 58–62.

ing, Louisiana, in December 1976; (2) the arrival of the vessel *Mr. Frank* with a multiton load of marihuana at a boatyard near Crown Point, Louisiana, in June 1977; and (3) the voyage of the vessel *Morning Star* from Mobile, Alabama, to Santa Marta, Colombia, to pick up 28,145 pounds of marihuana in June 1979.[4] Notably, although each of the three principal transactions would obviously have supported a substantive charge of importation in violation of 21 U. S. C. § 812 and § 952, no such charge was made against petitioner. Instead, Count XI charged that he had engaged in a continuing criminal enterprise (CCE) in violation of 21 U. S. C. § 848 "from in or about the month of January, 1976, and continuing thereafter up to and including the date of the filing of this indictment."[5]

The Washington Indictment

On March 17, 1981, a grand jury in the Western District of Washington returned a four-count indictment against petitioner and three other defendants.[6] None of these codefendants was named as a defendant in the Florida indictment.[7] Count I alleged a conspiracy beginning in or about September 1979 and continuing through August 26, 1980, to import 12,000 pounds of marihuana. The 15 alleged overt acts all occurred between September 1979 and October 1980, and all related to the unloading of 12,000 pounds of marihuana from a "mother ship" to fishing vessels in Neah Bay, Washington.[8] In addition to the conspiracy count, the

---

[4] *Id.*, at 58–61.

[5] *Id.*, at 64.

[6] The three other defendants were Robert Gorman, Don DePoe and Michael Johnson a/k/a Michael Minikin. *Id.*, at 3.

[7] Robert Gorman, who is referred to in the briefs as a "cooperating defendant," was however named as a co-conspirator in the Florida indictment. *Id.*, at 59. Moreover, Joseph Knowles, who apparently was an informer, was named as a co-conspirator in both cases. *Id.*, at 4, 59.

[8] *Id.*, at 3–5.

indictment also contained three substantive counts, but it did not make a CCE charge.[9]

There is some overlap between the Florida and the Washington indictments. The 34th overt act alleged in the Florida indictment was a meeting in Bellevue, Washington, on October 25, 1979, to discuss plans to import a shipload of marihuana.[10] The first three overt acts in the Washington indictment refer to activities in Bellevue, Washington, in September and October 1979, which apparently related to the Neah Bay landing in August of the following year.[11] Moreover, the final allegation in Count XI of the Florida indictment refers to the yacht *Sun Chaser III*, which apparently was the "mother ship" in the Neah Bay incident.[12]

Thus, the two indictments appear to identify a series of four major importations in four different vessels over a 4-year period. The first three, together with the initial planning of the fourth, are plainly adequate to constitute a CCE. The question in the case, therefore, is whether the conviction on the fourth transaction, at Neah Bay—which occurred before the Florida case went to trial—makes it impermissible to use that transaction as a predicate offense to establish the CCE violation in the later prosecution.

II

Proper analysis of the double jeopardy implications of petitioner's conviction for importing marihuana into Neah Bay, Washington, in August 1980 requires consideration not only of the general rule prohibiting successive prosecutions for greater and lesser offenses but also of an exception that may apply when the lesser offense is first prosecuted. The general rule is easily stated. The "Double Jeopardy Clause prohibits a State or the Federal Government from trying a

---

[9] *Id.*, at 6–7.

[10] *Id.*, at 62.

[11] *Id.*, at 4.

[12] *Id.*, at 65.

defendant for a greater offense after it has convicted him of a lesser included offense."[13] This rule applies to "complex statutory crimes."[14] The CCE offense proscribed by § 848 is clearly such a crime.

In *Brown* v. *Ohio*, 432 U. S. 161 (1977), after making a full statement of the general rule,[15] we noted the exception that may preserve the government's right to prosecute for a greater offense after a prosecution for a lesser offense. We stated:

> "An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have

---

[13] *Jeffers* v. *United States*, 432 U. S. 137, 150 (1977) (opinion of BLACKMUN, J.).

[14] *Id.*, at 151.

[15] The Court wrote:

"The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it.

"This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889. In that case the Court endorsed the rule that

'where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' 131 U. S., at 188.

"Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial. Thus, the Court treated the formulation as just one application of the rule that two offenses are the same unless each requires proof that the other does not. *Id.*, at 188, 190, citing *Morey* v. *Commonwealth*, [108 Mass.], at 434. And as another application of the same rule, the Court cited, 131 U. S., at 190, with approval the decision of *State* v. *Cooper*, 13 N. J. L. 361 (1833), where the New Jersey Supreme Court held that a conviction for arson barred a subsequent felony-murder indictment based on the death of a man killed in the fire. Cf. *Waller* v. *Florida*, 397 U. S. 387, 390 (1970). Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." 432 U. S., at 168–169 (footnote omitted).

not occurred or have not been discovered despite the exercise of due diligence. See *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912); *Ashe* v. *Swenson*, [397 U. S.], at 453 n. 7 (BRENNAN, J., concurring)."[16]

The fact that the general rule and the exception may be easily stated does not mean that either may be easily applied to this case. The problem may, however, be clarified by a somewhat oversimplified statement of the elements of the CCE offense. It, of course, requires that the defendant be a manager, organizer, or supervisor of the enterprise, that he act in concert with at least five other persons, and that he obtain substantial income from it.[17] The most important requirement for present purposes, however, is that he must commit a felony as "a part of a continuing series of violations of this subchapter . . . ."[18] I assume that the words "continuing series" contemplate at least three successive felony violations, but of course the series could involve more.[19]

Thus, if we view the entire course of petitioner's conduct as alleged in both indictments, it would appear that the Government could have alleged that all four importations constituted proof of a single CCE. Moreover, even though the prosecutor was clearly aware of the fourth importation when the Florida indictment was returned, I see no reason why he could not properly establish a CCE violation based on only the first three importations.[20] As written, the Florida indict-

---

[16] *Id.*, at 169, n. 7.

[17] *Jeffers* v. *United States*, 432 U. S., at 141–142.

[18] See *ante*, at 780, n. 1.

[19] Several Courts of Appeals have held that a "continuing series" consists of three or more violations. See, *e. g.*, *United States* v. *Sterling*, 742 F. 2d 521, 526 (CA9 1984); *United States* v. *Sinito*, 723 F. 2d 1250, 1261 (CA6 1983), cert. denied, 469 U. S. 817 (1984); *United States* v. *Chagra*, 653 F. 2d 26, 27–28 (CA1 1981), cert. denied, 455 U. S. 907 (1982).

[20] In fact, the United States plainly concedes as much:

"Petitioner does not dispute that the CCE prosecution could be maintained if predicated on a series of Title 21 violations for which he had not previously been prosecuted, and the proof at trial showed many such viola-

ment did not raise any double jeopardy problem because it did not rely on the Neah Bay importation and, indeed, did not separately charge any of the three earlier importations as substantive violations. Evidence of those felonies was offered to establish the greater CCE offense rather than separate, lesser offenses.

A double jeopardy issue was, however, created because the Government did not limit its proof to the three earlier importations. Instead, it offered extensive and dramatic evidence concerning the Neah Bay importation. Moreover, the jury was expressly instructed that the evidence concerning the *Sun Chaser III* "can only be considered by you in your deliberations concerning Count 11 of the indictment, which is the so called continuing criminal enterprise count, that's the allegation that Jonathan Garrett was engaged in, a continuing criminal enterprise."[21]

It therefore seems clear to me that even though the indictment properly alleged a CCE violation predicated only on the three earlier importations, as the case was actually tried, and as the jury was instructed, it is highly likely that the CCE conviction rested on the Neah Bay evidence and not merely on the earlier transactions. The error, in my opinion, does not bar a retrial on the CCE count. But I think that it is perfectly clear that the CCE conviction cannot stand because

---

tions. *The Washington offense was therefore by no means indispensable to establishment of the CCE offense . . . .*" Brief for United States 5 (emphasis added).

Moreover, the United States later states that "the substantive Washington offense was not an essential part of the government's proof on the CCE count" and that "in this case the Washington offense is not a necessary predicate for the CCE violation." *Id.*, at 10, n. 3. I also note that the fact that the Government might have proved a CCE by relying on felonies A, B, C, and D, or perhaps B, C, and D, would not prevent it from relying just on A, B, and C.

[21] 9 Record 18–19. Petitioner pleaded guilty to importation of marihuana in Washington; the District Court in Florida specifically instructed the jury that "[i]mportation of marijuana into the United States is another Title 21 offense you may consider." 14 Record 19.

the instructions on the CCE count did not inform the jury that the Neah Bay incident could not constitute a predicate felony to the CCE charge.[22]

It is also clear that the exception identified in *Brown* v. *Ohio*, 432 U. S. 161 (1977), is not applicable to this case. All of the facts necessary to sustain the CCE charge in the Florida indictment occurred before the Washington indictment was returned. Moreover, the Government has not claimed that the evidence necessary to sustain the CCE charge in the Florida indictment was not discovered until after the Washington conviction.[23] Indeed, if one compares the indictments, and if one assumes that the Government was prepared to prove what it alleged in the Florida indictment, the Neah Bay evidence was not needed in order to sustain the

---

[22] There is no need to reach the question whether the Neah Bay evidence may have been admissible for a limited purpose because no instructions regarding a limited use were given.

[23] This is plainly indicated by the Government at a bail hearing in Washington, where the prosecutor stated the following:

"Your Honor, the investigation by the grand jury in this district and the investigation which is being coordinated from the Narcotics Section in Washington, D. C., indicates that between 1977 and 1980 Mr. Garrett was involved in about four or five mother boat operations. *The Department of Justice had originally authorized this district to present a continuing criminal enterprise count to the grand jury.*

"I can represent as an officer of the court that I think there was probable cause to believe he had been responsible for a continuing criminal enterprise and the grand jury would have returned an indictment." Tr. CR81–62M, pp. 6–7 (Apr. 8, 1981) (emphasis added).

The Government now agrees that it "does appear that all of the elements required for a CCE charge had occurred at the time of petitioner's prosecution in Washington." Brief for United States 44. However, it "advises" us, contrarily, that "the CCE investigation had not yet been completed and the case had not yet been presented to the grand jury." *Ibid.* More disturbing, the Government offers the outside-the-record, unsworn submission that the Justice Department "had not authorized a CCE charge in Washington" and that "the Assistant United States Attorney now acknowledges that such authority was never granted and that his statement to the contrary was in error." *Id.*, at 44, n. 36.

CCE charge.[24] The record discloses no basis for applying the exception identified in *Brown* to this case.

III

The Court's reasons for not applying the general rule to this case are somewhat unclear. It seems to place its entire reliance on the fact that the CCE charge alleges that the enterprise continued to the date of the Florida indictment on July 16, 1981, together with the fact that when petitioner was arrested a week later, he made some damaging admissions.[25] Neither of these considerations has any constitutional significance that I can discern. Further, although I did not subscribe to the analysis in the plurality opinion in *Jeffers* v. *United States*, 432 U. S. 137 (1977), I had thought every Member of the Court endorsed this proposition: "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for the 'the same offense.' See *United States* v. *Wilson*, 420 U. S. 332, 343 (1975)."[26] In my opinion it is far more important to vindicate that constitutional principle than to create a new doctrine in order to avoid the risk that a retrial may result in freeing this petitioner after only 19 years of imprisonment.[27]

I respectfully dissent.

---

[24] See n. 20, *supra*.

[25] See *ante*, at 791–792.

[26] 432 U. S., at 150.

[27] As the Court points out, *ante*, at 775, 777, the petitioner's 40-year sentence on the CCE count was concurrent to the consecutive sentences of 5 years for the Washington conviction and 14 years for the three Florida convictions.

CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE

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

No. 83–1919. Argued January 8, 1985—Decided June 3, 1985

An officer on petitioner city's police force shot and killed respondent's husband outside a bar in which a robbery had been reported in progress. Respondent brought suit in Federal District Court under 42 U. S. C. § 1983 against the officer and petitioner, alleging that their actions had deprived her husband of certain constitutional rights. With respect to the liability of petitioner city, the trial judge informed the jury that petitioner could be held liable only if a municipal "policy" had caused the deprivation, and further instructed the jury that it could "infer," from "a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." The jury returned a verdict in favor of the officer but against petitioner, and awarded respondent damages. Rejecting petitioner's claim that the jury instruction was improper, the Court of Appeals held that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability.

Held: The judgment is reversed.

728 F. 2d 456, reversed.

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Part II, concluding that where the question was not raised until she mentioned it in her brief on the merits in this Court and later at oral argument, it was too late for respondent to argue that the jury instruction issue was not properly preserved because petitioner failed to object at trial to the instruction in question with sufficient specificity to satisfy Federal Rule of Civil Procedure 51. Nonjurisdictional defects of this sort should be brought to the Court's attention *no later* than in respondent's brief in opposition; if not, it is within the Court's discretion to deem the defect waived. Pp. 815–816.

JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, delivered an opinion with respect to Part III, concluding that the instruction at issue improperly instructed the jury concerning the standard for imposing liability on municipalities under § 1983. The inference in the instruction was unwarranted in its assump-

tion that the act at issue arose from inadequate training and in its further assumption concerning the state of mind of the municipal policymakers. More importantly, the inference allowed a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The requirement of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, that municipal liability under § 1983 can only be imposed for injuries inflicted pursuant to government "policy or custom," makes it clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. The fact that in this case respondent introduced independent evidence of inadequate training makes no difference, because the instruction allowed the jury to impose liability even if it did not believe respondent's expert witness' testimony that the police officer's training was inadequate. There must at the very least be an affirmative link between the municipality's policy and the particular constitutional violation alleged. Here, the jury instruction allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on petitioner's part from the single incident in question, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Pp. 816–824.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, concluded that to infer the existence of a city policy from the misconduct of a single, low-level officer, as the jury instruction here allowed, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell* v. *New York City Dept. of Social Services*, *supra*. There may be many ways of proving the existence of a municipal policy or custom that can cause a deprivation of a constitutional right, but the scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful actions of a single city employee not authorized to make city policy. Pp. 827–833.

REHNQUIST, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part II, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 824. STEVENS, J., filed a dissenting opinion, *post*, p. 834. POWELL, J., took no part in the decision of the case.

Burck Bailey argued the cause and filed a brief for petitioner.

Carl Hughes argued the cause for respondent. With him on the brief were *J. LeVonne Chambers* and *Eric Schnapper.**

JUSTICE REHNQUIST announced the judgment of the Court, and delivered the opinion of the Court with respect to Part II, and an opinion with respect to Part III, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), this Court held that municipalities are "persons" subject to damages liability under § 1 of the Ku Klux Act of 1871, 42 U. S. C. § 1983, for violations of that Act visited by municipal officials. The Court noted, however, that municipal liability could not be premised on the mere fact that the municipality employed the offending official. Instead, we held that municipal liability could only be imposed for injuries inflicted pursuant to government "policy or custom." *Id.*, at 694. We noted at that time that we had "no occasion to address . . . the full contours of municipal immunity under § 1983 . . . ," *id.*, at 695, and expressly left such development "to another day." Today we take a small but necessary step toward defining those contours.

I

On October 4, 1980, Officer Julian Rotramel, a member of the Oklahoma City police force, shot and killed Albert Tuttle outside the We'll Do Club, a bar in Oklahoma City. Officer Rotramel, who had been on the force for 10 months, had

---

**Michael C. Turpen*, Attorney General, and *David W. Lee*, Assistant Attorney General, filed a brief for the State of Oklahoma as *amicus curiae* urging reversal.

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

responded to an all points bulletin indicating that there was a robbery in progress at the Club. The bulletin, in turn, was the product of an anonymous telephone call. The caller had reported the robbery in progress, and had described the robber and reported that the robber had a gun. The parties stipulated at trial that Tuttle had placed the call.

Rotramel was the first officer to reach the bar, and the testimony concerning what happened thereafter is sharply conflicting. Rotramel's version was that when he entered the bar Tuttle walked toward him, and Rotramel grabbed Tuttle's arm and requested that he stay within the bar. Tuttle matched the description contained in the bulletin. Rotramel proceeded to question the barmaid concerning the reported robbery, but while doing so he once again had to restrain Tuttle from leaving, this time by grabbing Tuttle's arm and holding it. The barmaid testified that she told Rotramel that no robbery had occurred. Rotramel testified that while he was questioning the barmaid Tuttle kept bending towards his boots, and attempting to squirm from the officer's grip. Tuttle finally broke away from Rotramel, and, ignoring the officer's commands to "halt," went outside. When Rotramel cleared the threshold to the outside door, he saw Tuttle crouched down on the sidewalk, with his hands in or near his boot. Rotramel again ordered Tuttle to halt, but when Tuttle started to come out of his crouch Rotramel discharged his weapon. Rotramel testified at trial that he believed Tuttle had removed a gun from his boot, and that his life was in danger. Tuttle died from the gunshot wound. When his boot was removed at the hospital prior to surgery, a toy pistol fell out.

Respondent Rose Marie Tuttle is Albert Tuttle's widow, and the administratrix of his estate. She brought suit under § 1983 in the United States District Court, Western District of Oklahoma, against Rotramel and the city, alleging that their actions had deprived Tuttle of certain of his constitutional rights. At trial respondent introduced evidence concerning the facts surrounding the incident, and also adduced

testimony from an expert in police training practices. The expert testified that, based upon Rotramel's conduct during the incident in question and the expert's review of the Oklahoma City police training curriculum, it was his opinion that Rotramel's training was grossly inadequate. Respondent introduced no evidence that Rotramel or any other member of the Oklahoma City police force had been involved in a similar incident.

The case was presented to the jury on the theory that Rotramel's act had deprived Tuttle of life without due process of law, or that he had violated Tuttle's rights by using "excessive force in his apprehension." App. 38. With respect to respondent's suit against Rotramel individually, the jury was charged that Rotramel was entitled to qualified immunity to the extent that he had acted in good faith and with a reasonable belief that his actions were lawful.[1] Respondent also sought to hold the city liable under *Monell*, presumably on the theory that a municipal "custom or policy" had led to the constitutional violations. With respect to municipal liability the trial judge instructed the jury:

> "If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of the right simply because of the employment relationship. . . . But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
>
> . . . . . .
>
> "It is the plaintiff's contention that such a policy existed and she relies upon allegations that the city is

[1] This case was tried some three weeks prior to our decision in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), which modified the standard for qualified executive immunity. An executive official is now entitled to immunity unless he violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818.

grossly negligent in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes deliberate indifference to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. . . .

. . . . . .

"Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability . . . under the federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; *but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge.* The city cannot be held liable for simple negligence. Furthermore, the plaintiff must show a causal link between the police misconduct and the adoption of a policy or plan by the defendant municipality." *Id.*, at 42–44. (Emphasis supplied.)

The jury returned a verdict in favor of Rotramel but against the city, and awarded respondent $1,500,000 in damages. The city appealed to the Court of Appeals for the Tenth Circuit, arguing, *inter alia*, that the trial court had improperly instructed the jury on the standard for municipal liability. In particular, petitioner claimed it was error to instruct the jury that a municipality could be held liable for a "policy" of "inadequate training" based merely upon evidence of a single incident of unconstitutional activity. The Court of Appeals rejected petitioner's claims. 728 F. 2d 456 (1984).

Viewing the instructions "as a whole," that court first determined that the trial court properly had instructed the

jury that proof of "gross negligence" was required to hold the city liable for inadequate training. The court then addressed petitioner's contention that the trial court nevertheless had erred in instructing the jury that petitioner could be held liable based on proof of a single unconstitutional act. It distinguished cases indicating that proof of more than a single incident is required, and decided that where, as here, the act "was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training . . . ," the "single incident rule is not to be considered as an absolute . . . ." *Id.*, at 461. The instruction at issue was therefore "proper." *Id.*, at 459. The court also referred to "independent evidence" of inadequate training, and concluded that the "action, coupled with the clearly inadequate training," was sufficient to justify municipal liability. *Id.*, at 461. We granted certiorari because the Court of Appeals' holding that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability seemed to conflict with the decisions of other Courts of Appeals. 469 U. S. 814 (1984). See, *e. g.*, *Languirand* v. *Hayden*, 717 F. 2d 220, 228–230 (CA5 1983); *Wellington* v. *Daniels*, 717 F. 2d 932, 936–937 (CA4 1983). But cf. *Owens* v. *Haas*, 601 F. 2d 1242, 1246–1247 (CA2 1979).[2] We reverse.

---

[2] The actual "question presented" in the petition for certiorari is:

"Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U. S. C. § 1983." Pet. for Cert. i.

Although much of the petition for certiorari was directed to pointing out the general uncertainties concerning municipal liability for "inadequate training" of its police force, and although respondent's brief in opposition said nothing to dispel the notion that this general question was presented, we confine our holding to the above question. In reaching our conclusion, however, we find it necessary to discuss the many unanswered questions concerning municipal liability that we must assume have an answer in order to properly address this question.

II

Before proceeding to the merits, we must address respondent's procedural argument that petitioner failed to object at trial to the "single incident" instruction with sufficient specificity to satisfy Federal Rule of Civil Procedure 51, and that therefore the question is not preserved for our review. We disagree. Respondent first referred to the requirements of Rule 51 in one sentence of her brief on the merits in this Court, at which time respondent did not even suggest that the "single incident" question was not preserved. The issue was raised again at oral argument, and respondent has filed a supplemental postargument brief on the question. But respondent's present protests cannot obscure her prior failures. In the Court of Appeals petitioner argued that proof of a single incident of the use of unreasonable force was insufficient to justify municipal liability, and specifically referred to the trial court's single-incident instruction highlighted above. The claim was rejected on the merits, and the Court of Appeals' opinion does not even mention the requirements of Rule 51, so it seems clear that respondent did not refer to the Rule below. The petition for certiorari again centered on the single-incident issue, but respondent's brief in opposition did not hint that the "questions presented" might not be properly preserved. Respondent's attempt to avoid the question now comes far too late.

We do not mean to give short shrift to the provisions of Rule 51. Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals.[3] But we do not think that judicial economy is served by invoking the

[3] Federal Rule of Civil Procedure 51 requires counsel objecting to a jury instruction to "stat[e] distinctly the matter to which he objects and the grounds of his objection." Apparently, the only objection to the single-incident instruction contained in the record consists of the statement: "we make a second objection, your honor, particularly to the one, the Oklahoma City language, the language in the light of the City of Oklahoma City, which is single occurrence language." Tr. 693

Rule at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it. Cf. *On Lee* v. *United States*, 343 U. S. 747, 749–750, n. 3 (1952).

III

Respondent's lawsuit is brought pursuant to 42 U. S. C. § 1983. Although this Court has decided a host of cases under this statute in recent years, it can never hurt to embark on statutory construction with the Act's precise language in mind. The statute states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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. . . ."

By its terms, of course, the statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. See *Baker* v. *McCollan*, 443 U. S. 137, 140, 144, n. 3 (1979). Here respondent's claim is that her husband was deprived of his life "without due process of law," in violation of the Fourteenth Amendment, or that he was deprived of his right to be free from the use of "excessive force in his apprehension"—presumably a right secured by

the Fourth and Fourteenth Amendments.[4] Having established a deprivation of a constitutional right, however, respondent still must establish that the city was the "person" who "cause[d] [Tuttle] to be subjected" to the deprivation. *Monell* teaches that the city may only be held accountable if the deprivation was the result of municipal "custom or policy."

In *Monell*, the plaintiffs challenged the defendant's policy of compelling pregnant employees to take unpaid sick leave before such leave was necessary for medical reasons, on the ground that the policy violated the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Since the defendant was a municipal entity, this Court first addressed whether such an entity was a suable "person" as that term is used in § 1983. The Court's analysis focused on § 1983's legislative history, and in particular on the debate surrounding the proposed "Sherman amendment" to the 1871 Ku Klux Act, from which § 1983 is derived. The Sherman amendment would have held municipalities responsible for damage to person or property caused by *private* persons "riotously and tumultuously assembled." Cong. Globe, 42d Cong., 1st Sess., 749 (1871). Congress' refusal to adopt this

[4] The trial court correctly charged the jury that a federal right—here a constitutional right—had to be violated to establish liability under § 1983. Petitioner did not object to the trial court's description of the rights at issue, and we do not pass on whether the jury was correctly charged on this aspect of the case. The facts of this case are, of course, very similar to the facts of *Tennessee* v. *Garner*, *ante*, p. 1, in which we recently held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Ante*, at 11. Here the jury's verdict in favor of Rotramel must have been based upon a finding that he acted in "good faith and with a reasonable belief in the legality of his actions." We note that this Court has never held that every instance of use of "unreasonable force" in effecting an arrest constitutes a violation of the Fourth Amendment; nor has this Court held under circumstances such as these that there has been a deprivation of life "without due process of law."

amendment, and the reasons given, were the basis for this Court's holding in *Monroe* v. *Pape*, 365 U. S. 167, 187–192 (1961), that municipalities were not suable "persons" under § 1983; a more extensive analysis of the Act's legislative history led this Court in *Monell* to overrule that part of *Monroe*. The principal objections to the Sherman amendment voiced in the 42d Congress were that the section appeared to impose a federal obligation to keep the peace—a requirement the Congressmen thought was of doubtful constitutionality, but which in any event seemed to place the municipalities in the position of insurers for harms suffered within their borders. The *Monell* Court found that these concerns, although fatal to the Sherman amendment, were nevertheless consistent with holding a municipality liable "for *its own* violations of the Fourteenth Amendment." *Monell*, 436 U. S., at 683 (emphasis supplied).

Having determined that municipalities were suable "persons," the *Monell* Court went on to discuss the circumstances under which municipal liability could be imposed. The Court's holding that a city could not be held liable under § 1983 based upon theories akin to *respondeat superior* was based in part upon the language of the statute, and in part upon the rejection of the proposed Sherman amendment mentioned above. The Court noted that § 1983 only imposes liability for deprivations "cause[d]" by a particular defendant, and that it was hard to find such causation where liability is imposed merely because of an employment relationship. It also considered Congress' rejection of the Sherman amendment to be telling evidence that municipal liability should not be imposed when the municipality was not itself at fault. Given this legislative history, the *Monell* Court held that only deprivations visited pursuant to municipal "custom" or "policy" could lead to municipal liability. This language tracks the language of the statute; it also provides a fault-based analysis for imposing municipal liability.[5]

[5] Although apparently agreeing with the result we reach in light of *Monell*, see *post*, at 842, JUSTICE STEVENS' dissent would have us overrule

The *Monell* Court went on to hold that the sick-leave policy at issue was "unquestionably" "the moving force of the constitutional violation found by the District Court," and that it therefore had "no occasion to address . . . what the full con-

---

Monell's limitation on municipal liability altogether. We see no reason here to depart from the important and established principle of *stare decisis*. The question we address involves only statutory construction, so any error we may commit is subject to reversal by Congress. Cf. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (Brandeis, J., dissenting). In addition, the law in this area has taken enough 90-degree turns in recent years. *Monell* was decided only seven years ago. That decision, of course, overruled *Monroe* v. *Pape*'s 17-year-old holding that municipalities were never subject to suit under § 1983. One reason why courts render decisions and written opinions is so that parties can order their conduct accordingly, and we may assume that decisions on issues such as this are appropriately considered by municipalities in ordering their financial affairs. The principle of *stare decisis* gives rise to and supports these legitimate expectations, and, where our decision is subject to correction by Congress, we do a great disservice when we subvert these concerns and maintain the law in a state of flux.

We note in addition that JUSTICE STEVENS' position, which is based substantially on his perception of the common law of municipal liability at the time § 1983 was enacted, is by no means representative of all the contemporary authorities. Both the majority and dissenting opinions in *Owen* v. *City of Independence*, 445 U. S. 622 (1980), recognized that certain rather complicated municipal tort immunities existed at the time § 1983 was enacted, see *id.*, at 644–650; *id.*, at 676–679 (POWELL, J., dissenting); we are therefore somewhat surprised to learn that the "common law" at the time applied the doctrine of *respondeat superior* "to municipal corporations, and to the wrongful acts of police officers." *Post*, at 836–837. Even those cases known to allow municipal liability at the time hardly support the broad vicarious liability suggested by the dissent; the famous case of *Thayer* v. *Boston*, 36 Mass. 511, 516–517 (1837), for example, spoke in guarded language that seems in harmony with the limitations on municipal liability expressed in *Monell*. That court stated:

"As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii;* it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation." 36 Mass., at 316–317.

tours of municipal liability may be." *Id.*, at 694–695. Subsequent decisions of this Court have added little to the *Monell* Court's formulation, beyond reaffirming that the municipal policy must be "the moving force of the constitutional violation." *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981). Cases construing *Monell* in the Courts of Appeals, however, have served to highlight the full range of questions, and subtle factual distinctions, that arise in administering the "policy" or "custom" standard. See, *e. g.*, *Bennett* v. *City of Slidell*, 728 F. 2d 762 (CA5 1984); *Gilmere* v. *City of Atlanta*, 737 F. 2d 894 (CA11 1984), reheard en banc, January 1985; *Languirand*, 717 F. 2d, at 220.

With the development of municipal liability under § 1983 in this somewhat sketchy state, we turn to examine the basis upon which respondent seeks to have liability imposed upon the city. Respondent did not claim in the District Court that Oklahoma City had a "custom" or "policy" of authorizing its police force to use excessive force in the apprehension of suspected criminals, and the jury was not instructed on that theory of municipal liability. Rather, respondent's theory of liability was that the "policy" in question was the city's policy of training and supervising police officers, and that this "policy" resulted in inadequate training, and the constitutional violations alleged. Respondent in her brief says:

> "Respondent offered direct evidence that the shooting was caused by municipal policies. The officer who shot Tuttle testified that city training policies were inadequate and had led to Tuttle's death. The official who was Chief of Police when Tuttle was shot insisted that the shooting was entirely consistent with city policy." Brief for Respondent 13–14.

The District Court apparently accepted this theory of liability, though it charged the jury that the city's "policymakers" could not merely have been "negligent" in establishing training policies, but that they must have been guilty of

"gross negligence" or "deliberate indifference" to the "police misconduct" that they could thus engender.

Respondent then proceeds to argue that the question presented by petitioner—whether a single isolated incident of the use of excessive force by a police officer establishes an official custom or policy of a municipality—is in truth not presented by this record because there was more evidence of an official "policy" of "inadequate training" than might be inferred from the incident giving rise to Tuttle's death. But unfortunately for respondent, the instruction given by the District Court allowed the jury to impose liability on the basis of such a single incident without the benefit of the additional evidence. The trial court stated that the jury could "infer," from "a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." App. 44.

We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The foregoing discussion of the origins of *Monell*'s "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple."

The fact that in this case respondent introduced independent evidence of inadequate training makes no difference, be-

cause the instruction allowed the jury to impose liability even if it did not believe respondent's expert at all. Nor can we read this charge "as a whole" to avoid the difficulty. There is nothing elsewhere in this charge that would detract from the jury's perception that it could impose liability based solely on this single incident. Indeed, that was the intent of the charge, and that is what the Court of Appeals held in upholding it. The Court of Appeals' references to "independent evidence" in portions of its opinion are thus irrelevant; the general verdict yields no opportunity for determining whether liability was premised on the independent evidence, or solely on the inference sanctioned by the instruction. Cf. *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931).

Respondent contends that *Monell* suggests the contrary result, because it "expressly provided that an official 'decision' would suffice to establish liability, although a single decision will often have only a single victim." App. 14. But this very contention illustrates the wide difference between the municipal "policy" at issue in *Monell* and the "policy" alleged here. The "policy" of the New York City Department of Social Services that was challenged in *Monell* was a policy that by its terms compelled pregnant employees to take mandatory leaves of absence before such leaves were required for medical reasons; this policy in and of itself violated the constitutional rights of pregnant employees by reason of our decision in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974). Obviously, it requires only one application of a policy such as this to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.

Here, however, the "policy" that respondent seeks to rely upon is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*. To establish the constitutional violation in *Monell* no evidence was needed other than a statement of the policy

by the municipal corporation, and its exercise; but the type of "policy" upon which respondent relies, and its causal relation to the alleged constitutional violation, are not susceptible to such easy proof. In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives;[6] it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training," unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate. And in the second place, some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Here the instructions allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Such an approach provides a means for circumventing *Monell*'s limitations altogether. Proof of a single

---

[6] One well-known dictionary, for example, defines "policy" as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." Webster's Ninth New Collegiate Dictionary 910 (1983).

incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality,[7] and the causal connection between the "policy" and the constitutional deprivation.[8] Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly

Reversed.

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

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

I agree that the "single incident" instruction, *ante*, at 813, is properly before us and therefore join Part II of JUSTICE

---

[7] We express no opinion on whether a policy that itself is not unconstitutional, such as the general "inadequate training" alleged here, can ever meet the "policy" requirement of *Monell*. In addition, even assuming that such a "policy" would suffice, it is open to question whether a policymaker's "gross negligence" in establishing police training practices could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required.

[8] In this regard, we cannot condone the loose language in the charge leaving it to the jury to determine whether the alleged inadequate training would likely lead to "police misconduct." The fact that a municipal "policy" might lead to "police misconduct" is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the "moving force" behind a *constitutional* violation. There must at least be an affirmative

REHNQUIST's opinion. Although I concur in the judgment reached by the Court today, I am unable to join the balance of the plurality opinion.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that municipalities, like other state actors, are subject to liability under § 1983 when their policies "subjec[t], or caus[e] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U. S. C. § 1983. I agree with the plurality that today we must take a "small but necessary step," *ante*, at 810, toward defining the full contours of municipal liability pursuant to § 1983.[1] However, because I believe that the plurality opinion needlessly complicates this task and in the process unsettles more than it clarifies, I write separately to suggest a simpler explanation of our result.

I

Given the result in this case, in which a jury verdict in favor of the respondent is overturned, it is useful to keep in mind respondent's theory of the case. Respondent introduced two types of evidence at trial. First, respondent elicited testimony concerning the circumstances surrounding Tuttle's killing. This included Rotramel's admission that he never saw a weapon in Tuttle's possession, App. 150, 158, 225, and evidence that there was no reasonable ground to believe that Tuttle had committed a felony. *Id.*, at 155.[2]

---

link between the training inadequacies alleged, and the particular constitutional violation at issue.

[1] See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695 (1978). Since *Monell*, of course, the contours of municipal liability have become substantially clearer. See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (punitive damages not permitted); *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (qualified immunity not available to municipalities).

[2] Rotramel himself admitted at the time he entered the bar, Tuttle was standing with a drink in his hand. App. 155. There was also testimony that the bartender told Rotramel that no robbery had occurred, *id.*, at

It also included evidence that Rotramel made no effort to employ alternative measures to apprehend Tuttle, *id.*, at 225–226. Second, respondent introduced substantial direct evidence concerning what she alleged to be the city's grossly inadequate policies of training and supervising police officers. An expert testified that Rotramel's training included only 24 minutes of instruction in how to answer calls concerning a robbery in progress, although "these are statistically one of the most dangerous calls that an officer has to handle." *Id.*, at 288. In addition, there was evidence that Rotramel had little or no training in when or how to enter a "blind" building with an armed robbery in progress and whether to wait for a backup unit to arrive. *Id.*, at 146–147. Finally, Rotramel himself seemed to believe that he had been inadequately trained. *Id.*, at 153, 159, 165.

Respondent thus attempted in two ways to show the city's responsibility for the killing of Tuttle. First, respondent proposed to prove that Rotramel's killing of Tuttle was so egregiously out of accord with accepted police practice that the jury could infer from the killing alone that the city's policies and customs concerning the training of police were grossly deficient and were to blame for the incident. Second, respondent hoped to prove the policy or custom of inadequate training by means of direct evidence of the scope and nature of that training.

The trial court permitted respondent to submit both theories to the jury. The jury was instructed that "a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." *Id.*, at 44. The court had previously instructed that "deliberate indifference" or "gross negligence" on the part of the city was sufficient to prove the existence of a city policy. *Id.*, at 43. Putting these instructions together, the

---

82–83, 106, 234, and Rotramel conceded that no one in the bar told him that a robbery *had* occurred. *Id.*, at 209.

jury could infer solely from evidence concerning the conduct of a single policeman on a single night that the city was liable under § 1983. As for the second theory, the jury was instructed that the city could be held liable "only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent." *Ibid.*

Having been thus instructed, the jury returned a verdict against the city. There is no way to determine on which theory the jury relied. The trial court denied petitioner's motion for judgment notwithstanding the verdict, holding that "the plaintiff brought forward sufficient evidence regarding inadequate training and procedures to warrant submission to the jury of the issue of municipal liability." *Id.*, at 58. The court believed that "there was considerably more evidence presented here than the fact that [Rotramel], a young man, shot someone in deprivation of their civil rights." Tr. 704. In discussing petitioner's judgment n.o.v. motion, the court explicitly noted that it was "impressed with the evidence that was presented in this case" concerning "the curriculum methods and the lack of supervision and training." *Id.*, at 704–705. The Court of Appeals affirmed. 728 F. 2d 456 (CA10 1984).

The question presented in the petition for certiorari is "[w]hether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U. S. C. § 1983." The thrust of petitioner's argument is that it was improper to instruct the jury that it could impose liability on petitioner based solely on evidence regarding Rotramel's actions on the night of Tuttle's killing.

II

A

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), held that "Congress *did* intend municipal-

ities and other local government units to be included among those persons to whom § 1983 applies." *Id.*, at 690 (emphasis in original). Nonetheless, we recognized certain limits on the theories of liability that could be asserted against a municipality. As the plurality correctly notes, *ante*, at 817–818, our reading in *Monell* of the legislative history of § 1983, including its rejection of the Sherman amendment, see 436 U. S., at 664–704, led us to conclude that Congress desired not to subject municipalities to liability "without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages." *Id.*, at 681, n. 40. We therefore concluded that a city could not be held liable under a vicarious liability or *respondeat superior* theory in a § 1983 suit, for such liability would violate the evident congressional intent to preclude municipal liability in cases in which the city itself was not at fault.

Because Congress intended that § 1983 be broadly available to compensate individuals for violations of constitutional rights, see *Owen* v. *City of Independence*, 445 U. S. 622, 650–653 (1980); *Monell*, *supra*, at 683–687, a municipality *could* be held liable where a plaintiff could show that it was the city itself that was at fault for the damage suffered. To make this showing, a plaintiff must prove, in the broad causal language of the statute, that a policy or custom of the city "subjected" him, or "caused him to be subjected" to the deprivation of constitutional rights. In a case in which the plaintiff carries this burden, the city's liability would be mandated by the language, the legislative history, and the underlying purposes of § 1983.

B

I agree with the plurality that it is useful to begin with the terms of the statute:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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 . . . ."

In the language of the statute, the elements of a § 1983 cause of action might be summarized as follows: The plaintiff must prove that (1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States. Element (4) involves the question of whether there has been a violation of the Constitution or laws of the United States; that issue is not raised by the parties in this case and thus may be ignored here.

Of the three remaining elements of a § 1983 cause of action of relevance here, respondent clearly established two. After *Monell*, a municipality like Oklahoma City undoubtedly is a "person" to whom § 1983 applies. And there can be little doubt that the city's actions establishing particular police training procedures were actions taken "under color of state law," as that term is commonly understood.

The remaining question is causation. In a § 1983 case involving a municipal defendant, the causation element to be proved by the plaintiff may be seen as divided into two parts. First, the plaintiff must predicate his recovery on some particular action taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee. This is the inquiry required by *Monell*, and the plaintiff would carry his burden by proving the existence of a particular official municipal policy or established custom.[3] In this case, the municipal policies involved were the set of procedures for training and supervising police officers.[4] Second, the plain-

---

[3] Of course, nothing hinges on whether the "policy or custom" inquiry is seen as a part of the plaintiff's burden to prove causation, or whether instead it is seen as an independent element of a § 1983 cause of action.

[4] These included official decisions concerning the following matters: whether to permit rookie police officers to patrol alone; what rules should govern whether a police officer should wait for backup units before entering a felony-in-progress situation; how much time and emphasis to be

tiff must prove that this policy or custom "subjected" or "caused him to be subjected" to a deprivation of a constitutional right.

The instruction in question in this case permitted the plaintiff to carry his burden of proving "policy or custom" by merely introducing evidence concerning the particular actions taken by Rotramel on the night of October 4, 1980.[5] To isolate the defect in this instruction, it is useful to assume that the jury disbelieved Rotramel's testimony concerning the inadequacy of his training, rejected the evidence presented by respondent's expert concerning the content of the city's police training and supervision practices, and found unconvincing all of respondent's independent and documentary evidence concerning those practices. While perhaps unlikely, such disbelief must be assumed to test an instruction that might have permitted liability without any such evidence. Under the instruction in question, the jury could have found the city liable solely because Rotramel's actions on the night in question were so excessive and out of the ordinary.

A jury finding of liability based on this theory would unduly threaten petitioner's immunity from *respondeat superior* liability. A single police officer may grossly, outrageously, and recklessly misbehave in the course of a single incident. Such misbehavior may in a given case be fairly

---

placed on training in such matters as how to approach felony-in-progress situations, when to use firearms, and when to shoot to kill. Respondent bore the burden at trial of proving that the alleged deprivation of constitutional rights (the killing of Tuttle) resulted from these "conscious choices," *ante*, at 823, made by the city concerning police training and supervision.

[5] Rotramel was a low-level police officer. Some officials, of course, may occupy sufficiently high policymaking roles that any action they take under color of state law will be deemed official policy. See *Monell*, 436 U. S., at 694 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983").

attributable to various municipal policies or customs, either those that authorized the police officer so to act or those that did not authorize but nonetheless were the "moving force," *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981), or cause of the violation. In such a case, the city would be at fault for the constitutional violation. Yet it is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible; the police officer's own unbalanced mental state is the most obvious example. Cf. *Brandon* v. *Holt*, 469 U. S. 464, 466 (1985). In such a case, the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it. Thus, without some evidence of municipal policy or custom independent of the police officer's misconduct, there is no way of knowing whether the city is at fault. To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*.[6]

Respondent objects that in *Monell* and *Owen* v. *City of Independence*, 445 U. S. 622 (1980), we found a municipality liable despite evidence that showed only a single instance of misconduct. If the city's argument here depended on the premise that municipal conduct that resulted in only a single

---

[6] This is in some respects analogous to the doctrine of *res ipsa loquitur* in ordinary tort cases. Only in certain circumstances in ordinary tort cases may a jury infer defendant's fault from the fact that an injury of a certain type occurred. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 39, p. 243 (5th ed. 1984). The purpose of the restriction is of course to protect the defendant from liability in a case in which he is not at fault and has not caused the injury. The jury instruction in question here similarly would have permitted the city to be held liable, absent fault and causation. This suggests that there may be cases, analogous to those in which the *res ipsa loquitur* doctrine applies, where the evidence surrounding a given incident is sufficient to permit a jury to infer that it was caused by a city policy or custom.

incident was immune from liability, I would have to agree with respondent that *Monell* and *Owen* provide authority to the contrary. A rule that the city should be entitled to its first constitutional violation without incurring liability—even where the first incident was the taking of the life of an innocent citizen—would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.

The city's argument, however, does not depend on any such unlikely or extravagant premise. It depends instead merely on that fact that a single incident of police misbehavior by a single policeman is insufficient as *sole* support for an inference that a municipal policy or custom caused the incident. And *this* was not an inference comparable to any on which the plaintiffs in *Monell* or *Owen* relied. In *Monell*, both parties agreed that the City of New York had a policy of forcing women to take maternity leave before medically necessary. 436 U. S., at 661, n. 2. This policy, of course, violated the interest we recognized in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974). In *Owen*, the municipality's city council, in the course of dismissing the plaintiff from his post as Chief of Police, passed a resolution releasing to the press material that smeared the reputation of the plaintiff. There was no doubt that the release of the information was an official action—that is, a policy or custom—of the city. Thus, the crucial factor in both cases was that the plaintiff introduced direct evidence that the city itself had acted.[7] In both cases, the jury was not required to draw *any*

[7] The distinction between *Monell* and *Owen*, on the one hand, and the instant case, on the other, is thus rather simple. In *Monell* and *Owen*,

further inference concerning the existence of the city policy, let alone an inference from the isolated conduct of a single nonpolicymaking city employee on a single occasion.[8]

III

For the reasons given above, I agree with the Court that the judgment in this case should be reversed; there may be many ways of proving the existence of a municipal policy or custom that can cause a deprivation of a constitutional right, but the scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful actions of a single city employee not authorized to make city policy.[9]

---

the plaintiff introduced evidence of official actions taken by the defendant municipality. Respondent here, of course, also introduced evidence concerning official actions taken by the city, mostly centering on the city policies governing training and supervision of police officers. However, as the plurality points out, *ante*, at 821–822, the judgment must be reversed in this case because the instructions permitted the jury to find the city liable even if the jury did not believe this direct evidence. Cf. *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931).

[8] I do not understand, nor do I see the necessity for, the metaphysical distinction between policies that are themselves unconstitutional and those that cause constitutional violations. See *ante*, at 823–824, and n. 7. If a municipality takes actions—whether they be of the type alleged in *Monell*, *Owen*, or this case—that cause the deprivation of a citizen's constitutional rights, § 1983 is available as a remedy.

[9] The plurality seems to believe that there is a serious threat that a court might submit to a jury the theory that a municipal policy of having a police department was the "cause" of a deprivation of a constitutional right. *Ante*, at 823. Of course, I agree that such a theory should never be submitted to a jury, but the reason has little to do with the presence of the municipality as the defendant in the case or the structure of § 1983. Ordinary principles of causation used throughout the law of torts recognize that "but for" causation, while probably a necessary condition for liability, is never a sufficient condition of liability. See generally Prosser & Keeton on Law of Torts § 41, at 265–266. I would think that these principles are sufficient to avoid the unusual theory of liability suggested by the plurality.

JUSTICE STEVENS, dissenting.

When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty, and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission, I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. This conclusion is supported by the text of 42 U. S. C. § 1983, by its legislative history, and by the holdings and reasoning in several of our major cases construing the statute. The Court's contrary conclusion rests on nothing more than a recent judicial fiat that no litigant had asked the Court to decree.

I

As we have frequently noted, § 1983 "came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13."[1] The law was an especially important, remedial measure, drafted in expansive language.[2] The class of potential defendants is broadly defined by the words "every person."[3] It is now settled that the word "person" encompasses munici-

---

[1] *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961).

[2] The section reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

[3] "Title 42 U. S. C. § 1983 provides that '[e]very person' who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976) (footnotes omitted).

pal corporations,[4] and, of course, it was true in 1871 as it is today, that corporate entities can only act through their human agents.[5] Thus, if Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents.

At the time the statute was enacted the doctrine of *respondeat superior* was well recognized in the common law of the several States and in England.[6] An employer could

[4] *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 (1978). It should be noted that the contrary proposition announced in Part III of the Court's opinion in *Monroe* v. *Pape*, 365 U. S., at 187–192, had not been advanced by respondent city of Chicago in that case. Indeed, the primary defense asserted on behalf of the city was that neither the city nor the individual detectives were liable because the officers' conduct was forbidden by Illinois law and therefore ultra vires. The city did not take issue with petitioners' submission that the doctrine of *respondeat superior* applied to the city. Compare Brief for Petitioners in *Monroe* v. *Pape*, O. T. 1960, No. 39, pp. 8, 21 ("The theory of the complaint is that under the circumstances here alleged the City is liable for the acts of its police officers, by virtue of *respondeat superior*"), and *id.*, at 25–27, with Brief for Respondents in *Monroe* v. *Pape*, O. T. 1960, No. 39, p. 3.

[5] Indeed, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U. S., at 687. Moreover, "municipal corporations were routinely sued in the federal courts and this fact was well known to Members of Congress." *Id.*, at 688 (footnotes omitted). See, *e. g.*, *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558 (1844); see also *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869).

[6] Thus William Blackstone wrote the following in 1765:

"As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: not that the servant is excused, for he is only to obey his master in matters that are honest and lawful. If an inn-keeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui*

be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions,[7] and the rule had been specifically applied to municipal corporations,[8] and to

---

non prohibet, cum prohibere possit, jubet. So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command." 1 W. Blackstone, Commentaries *429–*430.

He continued in the same volume:

"We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong." *Id.*, at *432.

[7] In 1862, in *Limpus* v. *London General Omnibus Co.*, 1 Hurl. & C. 526, the Exchequer Chamber held that the owner of an omnibus company could be liable for injury inflicted on a rival omnibus company by a driver who violated the defendant's specific instructions. Judge Willes wrote:

"It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. . . . It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?" *Id.*, at 539.

[8] See, *e. g.*, *Allen* v. *City of Decatur*, 23 Ill. 332, 335 (1860), where the court stated:

"Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents for which they are

the wrongful acts of police officers.[9] Because it "is always appropriate to assume that our elected representatives, like other citizens, know the law,"[10] it is equally appropriate to

---

responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued."

See also *Thayer* v. *Boston*, 36 Mass. 511, 516–517 (1837), where the court stated:

"That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. *Yarborough* v. *Bank of England*, 16 East, 6; *Smith* v. *Birmingham & Gas Light Co.*, 1 Adolph. & Ellis, 526. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations. *Clark* v. *Washington*, 12 Wheaton, 40; *Baker* v. *Boston*, 12 Pick. 184.

"Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case. As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii;* it must further appear, that they were expressly authorized to do the acts, by the city government, *or that they were done bona fide in pursuance of a general authority to act for the city, on the subject to which they relate;* or that, in either case, the act was adopted and ratified by the corporation." (Emphasis added.)

In 1871, the year the Ku Klux Act was passed, *Thayer* was cited in support of the following statement:

"When officers of a town, acting as its agents, do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done." *Hawks* v. *Charlemont*, 107 Mass. 414, 417–418 (1871).

[9] In *Johnson* v. *Municipality No. One*, 5 La. Ann. 100 (1850), a Louisiana court affirmed a $600 damages judgment against a city for the illegal detention in its jail of the plaintiff's slave. In the course of its decision, the court acknowledged the correctness of the following statement:

"The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned." *Ibid.*

[10] *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979).

assume that the authors of the Civil Rights Act recognized that the rule of *respondeat superior* would apply to "a species of tort liability that on its face admits of no immunities."[11] Indeed, we have repeatedly held that § 1983 should be construed to incorporate common-law doctrine "absent specific provisions to the contrary."[12] We have consistently applied this principle of construction to federal legislation enacted in the 19th century.[13]

The legislative history of the Ku Klux Act supports this conclusion for two reasons. First, the fact that "nobody" objected to § 1[14] is consistent with the view that Congress expected normal rules of tort law to be applied in enforcing it.

---

[11] *Imbler* v. *Pachtman*, 424 U. S., at 417.

[12] The passage from which this language is taken is worth quoting in full:

"It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981).

See also *Briscoe* v. *LaHue*, 460 U. S. 325, 330, 334 (1983); *Pierson* v. *Ray*, 386 U. S. 547, 553–554 (1967).

In *Newport*, the Court further noted:

"Given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.' *Pierson* v. *Ray*, 386 U. S., at 555. Nothing in the legislative debates suggests that, in enacting § 1 of the Civil Rights Act, the 42d Congress intended any such abolition." 453 U. S., at 263–264.

[13] See, *e. g.*, *Briscoe* v. *LaHue*, 460 U. S., at 330; *Associated General Contractors* v. *Carpenters*, 459 U. S. 519, 531 (1983).

[14] *Monroe* v. *Pape*, 365 U. S., at 171 (referring to § 1, which of course is now § 1983, Senator Edmunds, Chairman of the Senate Committee on the Judiciary, stated: "'The first section is one that I believe nobody objects to'").

Second, the debate on the Sherman Amendment—an amendment that would have imposed an extraordinary and novel form of absolute liability on municipalities—indicates that Congress seriously considered imposing *additional* responsibilities on muncipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person.[15] The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the commands of the Fourteenth Amendment.

Of greatest importance, however, is the nature of the wrong for which § 1983 provides a remedy. The Act was primarily designed to provide a remedy for violations of the United States Constitution—wrongs of the most serious kind.[16] As the plurality recognizes, the individual officer in this case was engaged in "unconstitutional activity."[17] But the conduct of an individual can be characterized as "unconstitutional" only if it is attributed to his employer. The Fourteenth Amendment does not have any application to purely private conduct.[18] Unless an individual officer acts under color of official authority, § 1983 does not authorize any recovery against him. But if his relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship

---

[15] *Monell*, 436 U. S., at 666–676.

[16] *Id.*, at 683–686.

[17] *Ante*, at 824.

[18] As the Court in *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948), correctly noted:

"Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action.

The central holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961), confirms this analysis. In that case, the city of Chicago had rested its entire defense on the claim that the individual officers had acted "ultra vires" when they invaded the petitioners' home.[19] Putting to one side the question whether the city was a "person" within the meaning of the Act, the only issue that separated the Members of the Court was whether liability could attach without proof of a recurring "custom or usage." In terms of today's decision, the question was whether it was necessary for the petitioners to prove that the conduct of the police officers represented the city's official "policy." Over Justice Frankfurter's vehement dissent,[20] the Court held that a "single incident" could constitute a violation of the statute.[21]

Justice Harlan's statement of the opposing positions identifies the central issue in *Monroe:*

> "One can agree with the Court's opinion that:
>
> "'It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. . . .'
>
> "without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to 'custom, or usage.' One can agree with my Brother FRANKFURTER, in dissent, that Congress had no intention

---

[19] See n. 4, *supra.*

[20] 365 U. S., at 202–259.

[21] *Id.*, at 187.

> of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern."[22]

If the action of a police officer is "far more serious than an ordinary state tort" because it is "made possible by his position," the underlying reason that such an action is a "matter of federal concern" is that it is treated as the action of the officer's employer. If the doctrine of *respondeat superior* would impose liability on the city in an ordinary tort case, *a fortiori*, that doctrine must apply to the city in a § 1983 case.

II

While the plurality purports to answer a question of statutory construction—which it properly introduces with a quotation of the statutory text, see *ante*, at 816—its opinion actually provides us with an interpretation of the word "policy" as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word "policy" does not appear in the text of § 1983, but it provides the theme for today's decision.[23] The plurality concludes:

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved."[24]

---

[22] *Id.*, at 193 (Harlan, J., concurring).

[23] Notwithstanding the absence of the word "policy" in the statute, the plurality makes the remarkable statement that "custom or policy" is language that "tracks the language of the statute." *Ante*, at 818.

[24] *Ante*, at 823–824.

This parsimonious construction of the word "policy" may well be a fair interpretation of what the Court wrote in Part II of *Monell*, but I am persuaded that Congress intended no such bizarre result.

Part II of *Monell* contains dicta of the least persuasive kind. As JUSTICE POWELL noted in his separate concurrence, language that is "not necessary to the holding may be accorded less weight in subsequent cases."[25] Moreover, as he also pointed out, "we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations."[26] The commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party[27] and was not even relevant to the Court's actual holding.[28] Moreover, in the Court's earlier decision in *Monroe* v. *Pape*, although the petitioners had explained why it would be appropriate to apply the doctrine of *respondeat superior* in § 1983 litigation, no contrary argument had been advanced by the city.[29] Thus, the views expressed in Part II of *Monell* constitute judicial legislation of the most blatant kind. Having overruled its earlier—and, ironically also volunteered—misconstruction of the word "person" in *Monroe* v. *Pape*, in my opinion, the Court in *Monell* should simply have held that municipalities are liable for the unconstitutional activities of their agents that are performed in the course of their official duties.[30]

---

[25] *Monell*, 436 U. S., at 709, n. 6.

[26] *Ibid.*

[27] Compare Brief for Petitioners and Brief for Respondents in *Monell* v. *New York City Dept. of Social Services*, O. T. 1977, No. 75–1914, with the Court's dicta in Part II of *Monell*, 436 U. S., at 690–695.

[28] For that reason I did not join Part II of the opinion and did not express the views that I am expressing today. See 436 U. S., at 714 (STEVENS, J., concurring in part). Today the plurality deems it appropriate to characterize the discussion of *respondeat superior* as a "holding," see *ante*, at 818; thus one *ipse dixit* is used to describe another.

[29] See n. 4, *supra*.

[30] The plurality's principal response to this dissent is based on the doctrine of *stare decisis*. See *ante*, at 830, n. 5. That doctrine, however, does

III

In a number of decisions construing § 1983, the Court has considered whether its holding is supported by sound considerations of policy.[31] In this case, all of the policy considerations that support the application of the doctrine of *respondeat superior* in normal tort litigation against municipal corporations apply with special force because of the special quality of the interests at stake. The interest in providing fair compensation for the victim,[32] the interest in deterring future violations by formulating sound municipal policy,[33] and the interest in fair treatment for individual

---

not apply to Part II of *Monell* because that part of the opinion was wholly irrelevant to the *ratio decidendi* of the case. See *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287 (1854); *Cohens* v. *Virginia*, 6 Wheat. 264, 399–400 (1821). As is so often true, Justice Cardozo has provided us with the proper response:

"I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta." B. Cardozo, The Nature of the Judicial Process 29 (1921).

[31] See, *e. g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U. S., at 266–271; *Owen* v. *City of Independence*, 445 U. S. 622, 650–656 (1980).

[32] Cf. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection").

[33] As one observer stated:

"The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to a community respect for officers of the law that in turn serves to promote their enforcement of the law. Once they set an example of lawful conduct they are in a position to set up lines of communication with the community and to gain its support." R. Traynor, Lawbreakers, Courts, and Law-Abiders, 41 Journal of the State Bar of California 458, 478 (July–August 1966).

See also *Owen* v. *City of Independence*, 445 U. S., at 652, n. 36 ("In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute systemwide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, par-

officers who are performing difficult and dangerous work,[34] all militate in favor of placing primary responsibility on the municipal corporation.

The Court's contrary conclusion can only be explained by a concern about the danger of bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress—perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of appropriate liability insurance—rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of "every person" covered by § 1983.[35]

The injection into § 1983 litigation of the kind of debate over policy that today's decision will engender can only complicate the litigation process. My rather old-fashioned and simple approach to the statute would eliminate from this class of civil-rights litigation the time-consuming "policy" issues that *Monell* gratuitously engrafted onto the statute. Of greatest importance, it would serve the administration of justice and effectuate the intent of Congress.

I respectfully dissent.

---

ticularly acute where the frontline officers are judgment-proof in their individual capacities").

[34] "A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier* v. *Navarette*, 434 U. S. 555, 569 (1978) (STEVENS, J., dissenting).

[35] D. Dobbs, Handbook on the Law of Remedies 1 (1973) ("The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he has followed appropriate procedure in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure").

Syllabus

NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL.

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

No. 84–320. Argued April 16, 1985—Decided June 3, 1985

Respondent Crow Indian minor was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation but on land owned by the State of Montana. Through his guardian, the minor brought a damages action in the Crow Tribal Court against petitioner School District, a political subdivision of the State, and obtained a default judgment. Thereafter, the School District and its insurer, also a petitioner, brought an action in Federal District Court for injunctive relief, invoking as a basis for federal jurisdiction 28 U. S. C. § 1331, which provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The District Court held that the Tribal Court had no jurisdiction over a civil action against a non-Indian and accordingly entered an injunction against execution of the Tribal Court judgment. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction.

Held:

1. Section 1331 encompasses the federal question whether the Tribal Court exceeded the lawful limits of its jurisdiction. Since petitioners contend that federal law has divested the Tribe of its power to compel a non-Indian property owner to submit to the civil jurisdiction of the Tribal Court, it is federal law on which petitioners rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. Pp. 850–853.

2. Exhaustion of Tribal Court remedies is required, however, before petitioners' claim may be entertained by the District Court. The existence and extent of the Tribal Court's jurisdiction requires a careful examination of tribal sovereignty and the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Such an examination and study should be conducted in the first instance by the Tribal Court. Pp. 853–857.

3. Until petitioners have exhausted the available remedies in the Tribal Court, it would be premature for the District Court to consider

any relief. Whether the federal action should be dismissed or merely held in abeyance pending the development of the Tribal Court proceedings is a question that should be addressed in the first instance by the District Court. P. 857.

736 F. 2d 1320, reversed and remanded.

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

Rodney T. Hartman argued the cause for petitioners. With him on briefs was *Jack Ramirez.*

Clay Riggs Smith, Assistant Attorney General of Montana, argued the cause for the State of Montana et al. as *amici curiae* urging reversal. With him on the brief were *Michael T. Greely,* Attorney General of Montana, *Rick Bartos, Norman C. Gorsuch,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, *Jim Jones,* Attorney General of Idaho, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Paul Bardacke,* Attorney General of New Mexico, *Lacy Thornburg,* Attorney General of North Carolina, and *Robert E. Cansler,* Assistant Attorney General, *Michael Turpen,* Attorney General of Oklahoma, *Mark V. Meierhenry,* Attorney General of South Dakota, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Archie G. McClintock,* Attorney General of Wyoming.

Clarence T. Belue, by appointment of the Court, 469 U. S. 1104, argued the cause for respondents and filed a brief for respondents Sage et al. *Robert S. Pelcyger* filed a brief for the Crow respondents.

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,* and *Assistant Attorney General Habicht.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of Washington by *Kenneth O. Eikenberry,* Attorney General, and *Timothy R. Malone,* Assistant Attorney General; and for the Salt River Project Agricultural Improvement and Power District et al. by *Robert B. Hoffman* and *Frederick J. Martone.*

Briefs of *amici curiae* urging affirmance were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al. by *Arthur Lazarus,*

JUSTICE STEVENS delivered the opinion of the Court.

A member of the Crow Tribe of Indians filed suit against the Lodge Grass School District No. 27 (School District) in the Crow Tribal Court and obtained a default judgment. Thereafter, the School District and its insurer, National Farmers Union Insurance Companies (National), commenced this litigation in the District Court for the District of Montana; that court was persuaded that the Crow Tribal Court had no jurisdiction over a civil action against a non-Indian and entered an injunction against further proceedings in the Tribal Court. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction. We granted certiorari to consider whether the District Court properly entertained petitioners' request for an injunction under 28 U. S. C. § 1331. 469 U. S. 1032 (1984).

The facts as found by the District Court are not substantially disputed. On May 27, 1982, Leroy Sage, a Crow Indian minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot while returning from a school activity. The school has a student body that is 85% Crow Indian. It is located on land owned by the State within the boundaries of the Crow Indian Reservation. Through his guardian, Flora Not Afraid, Sage initiated a lawsuit in the Crow Tribal Court against the School District, a political subdivision of the State, alleging damages of $153,000, including medical expenses of $3,000 and pain and suffering of $150,000.

On September 28, 1982, process was served by Dexter Falls Down on Wesley Falls Down, the Chairman of the School Board. For reasons that have not been explained, Wesley Falls Down failed to notify anyone that a suit had been filed. On October 19, 1982, a default judgment was entered pursuant to the rules of the Tribal Court, and on

---

Jr., W. Richard West, Jr., Reid Peyton Chambers, Kevin A. Griffin, and *George E. Fettinger;* and for the Salt River Pima-Maricopa Indian Community et al. by *Rodney B. Lewis* and *Richard B. Wilks.*

October 25, 1982, Judge Roundface entered findings of fact, conclusions of law, and a judgment for $153,000 against the School District. *Sage* v. *Lodge Grass School District*, 10 Indian L. Rep. 6019 (1982). A copy of that judgment was hand-delivered by Wesley Falls Down to the school Principal who, in turn, forwarded it to National on October 29, 1982.

On November 3, 1982, National and the School District (petitioners) filed a verified complaint and a motion for a temporary restraining order in the District Court for the District of Montana. The complaint named as defendants the Crow Tribe of Indians, the Tribal Council, the Tribal Court, judges of the court, and the Chairman of the Tribal Council. It described the entry of the default judgment, alleged that a writ of execution might issue on the following day, and asserted that a seizure of school property would cause irreparable injury to the School District and would violate the petitioners' constitutional and statutory rights. The District Court entered an order restraining all the defendants "from attempting to assert jurisdiction over plaintiffs or issuing writs of execution out of Cause No. Civ. 82–287 of the Crow Tribal Court until this court orders otherwise."[1]

In subsequent proceedings, the petitioners filed an amendment to their complaint, invoking 28 U. S. C. § 1331 as a basis for federal jurisdiction,[2] and added Flora Not Afraid and Leroy Sage as parties defendant. After the temporary restraining order expired, a hearing was held on the defendants' motion to dismiss the complaint and on the plaintiffs' motion for a preliminary injunction. On December 29, 1982, the District Court granted the plaintiffs a permanent injunction against any execution of the Tribal Court judgment. 560 F. Supp. 213, 218 (1983). The basis "for the injunction

---

[1] Record, Doc. No. 6.

[2] Record, Doc. No. 14. In their original complaint, petitioners relied on 25 U. S. C. § 1302 and on 28 U. S. C. § 1343 as bases for federal jurisdiction.

was that the Crow Tribal Court lacked subject-matter jurisdiction over the tort that was the basis of the default judgment." *Id.*, at 214.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 736 F. 2d 1320 (1984). Without reaching the merits of petitioners' challenge to the jurisdiction of the Tribal Court, the majority concluded that the District Court's exercise of jurisdiction could not be supported on any constitutional, statutory, or common-law ground. *Id.*, at 1322–1323.[3] One judge dissented in part and concurred in the result, expressing the opinion that petitioners stated a federal common-law cause of action involving a substantial federal question over which subject-matter jurisdiction was conferred by 28 U. S. C. § 1331. He concluded, however, that the petitioners had a duty to exhaust their Tribal Court remedies before invoking the jurisdiction of a federal court, and therefore concurred in the judgment directing that the complaint be dismissed. *Id.*, at 1324–1326.[4]

---

[3] The Court of Appeals believed that the petitioners' due process and equal protection claims had no merit because Indian tribes are not constrained by the provisions of the Fourteenth Amendment. Further, although recognizing that the Tribe is bound by the Indian Civil Rights Act, 25 U. S. C. § 1301 *et seq.*, the Court of Appeals held that a federal court has no jurisdiction to enjoin violations of that Act. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978). Finally, although the majority assumed that a complaint alleging that a tribe had abused its regulatory jurisdiction would state a claim arising under federal common law, it concluded that a claim that a tribe had abused its adjudicatory jurisdiction could not be recognized because Congress, by enacting the Indian Civil Rights Act, had specifically restricted federal court interference with tribal court proceedings to review on petition for habeas corpus.

[4] After the District Court's injunction was vacated, tribal officials issued a writ of execution on August 1, 1984, and seized computer terminals, other computer equipment, and a truck from the School District. A sale of the property was scheduled for August 22, 1984. On that date, the School District appeared in the Tribal Court, attempting to enjoin the sale and to set aside the default judgment. App. to Brief in Opposition 1a–9a. The

I

Section 1331 of the Judicial Code provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[5] It is well settled that this statutory grant of "jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."[6] Federal common law as articulated in rules that are fashioned by court decisions are "laws" as that term is used in § 1331.[7]

Thus, in order to invoke a federal district court's jurisdiction under § 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It was, however, necessary to assert a claim "arising under" federal law. As Justice Holmes wrote for the Court, a "suit arises under the law that creates the cause

---

Tribal Court stated that it could not address the default-judgment issue "without a full hearing, research, and briefs by counsel," *id.*, at 4a; that it would consider a proper motion to set aside the default judgment; and that the sale should be postponed. Petitioners also proceeded before the Court of Appeals, which denied an emergency motion to recall the mandate on August 20, 1984. The next day JUSTICE REHNQUIST granted the petitioners' application for a temporary stay. On September 10, 1984, he continued the stay pending disposition of the petitioners' petition for certiorari. 469 U. S. 1032 (1984). On September 19, the Tribal Court entered an order postponing a ruling on the motion to set aside the default judgment until after final review by this Court. App. to Brief in Opposition 15a. Subsequently, the Court of Appeals stayed all proceedings in the District Court. On April 24, 1985, JUSTICE REHNQUIST denied an application to "dissolve" the Court of Appeals' stay. *Post*, p. 1301.

[5] 28 U. S. C. § 1331.

[6] *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 100 (1972).

[7] See *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 392–393 (1959) (opinion of BRENNAN, J.); cf. *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 235–236 (1985); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981); *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 592–593 (1973); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938).

of action."[8] Petitioners contend that the right which they assert—a right to be protected against an unlawful exercise of Tribal Court judicial power—has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians.

As we have often noted, Indian tribes occupy a unique status under our law.[9] At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary.[10] Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.[11]

This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.[12] We

---

[8] *American Well Works Co.* v. *Layne and Bowler Co.*, 241 U. S. 257, 260 (1916).

[9] See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978); *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975); cf. *Turner* v. *United States*, 248 U. S. 354, 354–355 (1919).

[10] *Escondido Mutual Water Co.* v. *La Jolla Bands of Mission Indians*, 466 U. S. 765, 788, n. 30 (1984) ("[A]ll aspects of Indian sovereignty are subject to defeasance by Congress"); *Rice* v. *Rehner*, 463 U. S. 713, 719 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980); *United States* v. *Wheeler*, 435 U. S., at 323.

[11] *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 142; *Santa Clara Pueblo* v. *Martinez*, 436 U. S., at 55–56.

[12] Thus, in recent years we have decided whether a tribe has the power to regulate the sale of liquor on a reservation, *Rice* v. *Rehner*, *supra;* the power to impose a severance tax on oil and gas production by non-Indian lessees, *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982); the power to regulate hunting and fishing, *Montana* v. *United States*, 450 U. S. 544

have also been confronted with a series of questions concerning the extent to which a tribe's power to engage in commerce has included an immunity from state taxation.[13] In all of these cases, the governing rule of decision has been provided by federal law. In this case the petitioners contend that the Tribal Court has no power to enter a judgment against them. Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attribute of inherent tribal sovereignty, the petitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of sovereignty. More particularly, when they invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum.

The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331.[14] Because petitioners contend that federal law has

---

(1981), *Puyallup Tribe* v. *Washington Dept. of Game*, 433 U. S. 165 (1977); and the power to tax the sale of cigarettes to non-Indians, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980).

[13] See, *e. g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973); cf. *White Mountain Apache Tribe* v. *Bracker*, *supra*.

[14] We have recognized that federal law has sometimes diminished the inherent power of Indian tribes in significant ways. As we stated in *United States* v. *Wheeler*, 435 U. S., at 323–326:

"Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

. . . . .

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–668; *Johnson* v. *M'Intosh*,

divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

II

Respondents' contend that, even though the District Court's jurisdiction was properly invoked under § 1331, the Court of Appeals was correct in ordering that the complaint be dismissed because the petitioners failed to exhaust their remedies in the tribal judicial system. They further assert that the underlying tort action "has turned into a procedural and jurisdictional nightmare" because petitioners did not pursue their readily available Tribal Court remedies. Petitioners, in response, relying in part on *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), assert that resort to exhaustion as a matter of comity "is manifestly inappropriate."

In *Oliphant* we held that the Suquamish Indian Tribal Court did not have criminal jurisdiction to try and to punish non-Indians for offenses committed on the reservation. That holding adopted the reasoning of early opinions of two United States Attorneys General,[15] and concluded that fed-

---

8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Cherokee Nation* v. *Georgia*, 5 Pet., at 17–18; *Fletcher* v. *Peck*, 6 Cranch 87, 147 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant* v. *Suquamish Indian Tribe* [435 U. S. 191 (1978)]."

[15] We stated:

"Faced by attempts of the Chocktaw Tribe to try non-Indian offenders in the early 1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians is, *inter alia*, inconsistent with treaty

eral legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction. We wrote:

> "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions." *Id.*, at 204.

If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians. For several reasons, however, the reasoning of *Oliphant* does not apply to this case. First, although Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.[16] Moreover, the opinion of one Attorney General on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. Speaking of civil jurisdiction, Attorney General Cushing wrote:

> "But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Chocktaw nation; nor is there any written law which

---

provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States." 435 U. S., at 198–199.

[16] F. Cohen, Handbook of Federal Indian Law 253 (1982) ("The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction").

> confers jurisdiction of such a case in any court of the United States.
>
> . . . . .
>
> "The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Chocktaws.
>
> . . . . .
>
> "Now, it is admitted on all hands . . . that Congress has 'paramount right to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Chocktaw Nation.*" 7 Op. Atty. Gen. 175, 179–181 (1855) (emphasis added).[17]

Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.[18] Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been

---

[17] A leading treatise on Indian law suggests strongly that Congress has had a similar understanding:

"In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians." *Id.*, at 253–254.

[18] Cf. *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971); *Williams* v. *Lee*, 358 U. S. 217 (1959).

altered, divested, or diminished,[19] as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and adminstrative or judicial decisions.

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.[20] That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.[21] Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.[22] The risks of the kind of "procedural nightmare" that has allegedly developed in this case

---

[19] See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 331–332 (1983); *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S., at 137; *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S., at 152.

[20] *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 332; *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S., at 138, n. 5; *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 143–144, and n. 10; *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974); *Williams* v. *Lee*, 358 U. S., at 223.

[21] We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. *Juidice* v. *Vail*, 430 U. S. 327, 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

[22] Four days after receiving notice of the default judgment, petitioners requested that the District Court enter an injunction. Crow Tribal Court Rule of Civil Procedure 17(d) provides that a party in a default may move to set aside the default judgment at any time within 30 days. App. 17. Petitioners did not utilize this legal remedy. It is a fundamental principle of long standing that a request for an injunction will not be granted as long as an adequate remedy at law is available. See, *e. g.*, *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 57 (1975); *Sampson* v. *Murray*, 415 U. S. 61, 88 (1974).

will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[23] and to rectify any errors it may have made.[24] Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[25]

III

Our conclusions that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court, require that we reverse the judgment of the Court of Appeals. Until petitioners have exhausted the remedies available to them in the Tribal Court system, n. 4, *supra*, it would be premature for a federal court to consider any relief. Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[23] C. Wright, Handbook of the Law of Federal Courts § 16 (1976).

[24] Cf. *Weinberger* v. *Salfi*, 422 U. S. 749, 765 (1975).

[25] *Ibid.*; see, *e. g.*, *North Dakota ex rel. Wefald* v. *Kelly*, 10 Indian L. Rep. 6059 (1983); *Crow Creek Sioux Tribe* v. *Buum*, 10 Indian L. Rep. 6031 (1983).

RUSSELL *v.* UNITED STATES

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

No. 84–435. Argued April 24, 1985—Decided June 3, 1985

Title 18 U. S. C. § 844(i) makes it a crime to maliciously damage or destroy, or attempt to damage or destroy, by means of fire or an explosive, "any building . . . used . . . in any activity affecting interstate or foreign commerce." Petitioner, who was earning rental income from a two-unit apartment building and treated it as business property for tax purposes, was convicted for violating § 844(i) after he unsuccessfully attempted to set fire to the building, and the conviction was affirmed on appeal. Both the District Court and the Court of Appeals rejected his contention that the building was not commercial or business property, and therefore was not capable of being the subject of an offense under § 844(i).

Held: Section 844(i) applies to petitioner's apartment building. The language of the statute expresses an intent by Congress to exercise its full power under the Commerce Clause, and the legislative history indicates that Congress at least intended to protect all "business property." The rental of real estate is unquestionably an activity that affects commerce for purposes of the statute, and the congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class, such as the local rental of an apartment unit. Pp. 859–862.

738 F. 2d 825, affirmed.

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

Julius Lucius Echeles argued the cause for petitioner. With him on the briefs was *Frederick F. Cohn.*

Christopher J. Wright argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Wallace,* and *Thomas E. Booth.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether 18 U. S. C. § 844(i) applies to a two-unit apartment building that is used as rental property.

Petitioner owns an apartment building located at 4530 South Union, Chicago, Illinois. He earned rental income from it and treated it as business property for tax purposes. In early 1983, he made an unsuccessful attempt to set fire to the building[1] and was consequently indicted for violating § 844(i). Following a bench trial, petitioner was convicted and sentenced to 10 years' imprisonment. The District Court[2] and the Court of Appeals[3] both rejected his contention that the building was not commercial or business property, and therefore was not capable of being the subject of an offense under § 844(i).

Section 844(i) uses broad language to define the offense. It provides:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both. . . ."

The reference to "any building . . . used . . . in any activity affecting interstate or foreign commerce" expresses an intent by Congress to exercise its full power under the Commerce Clause.[4]

---

[1] Petitioner hired Ralph Branch, a convicted felon, to start a fire in the building by using a natural gas line in the basement. Branch attempted to start a fire by lighting a potato-chip bag and a piece of wood, but was unsuccessful in torching the building. 1 Tr. 35–39. Petitioner asked Branch to make a second attempt; however, Branch reported the events to the Federal Bureau of Investigation and consented to tape-record a conversation with petitioner. After the conversation, petitioner was arrested. The fire was never set. *Id.*, at 41–50.

[2] 563 F. Supp. 1085 (ND Ill., ED 1983).

[3] 738 F. 2d 825 (CA7 1984).

[4] See *Scarborough* v. *United States*, 431 U. S. 563, 571 (1977), in which the Court stated:

"As we have previously observed, Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its

The legislative history indicates that Congress intended to exercise its full power to protect "business property."[5] Moreover, after considering whether the bill as originally introduced would cover bombings of police stations or churches,[6] the bill was revised to eliminate the words "for

---

full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.' *United States* v. *American Bldg. Maintenance Industries*, 422 U. S. 271, 280 (1975); see also *NLRB* v. *Reliance Fuel Corp.*, 371 U. S. 224, 226 (1963)."

[5] Section 844(i) was passed as part of Title XI of the Organized Crime Control Act of 1970. 84 Stat. 922, 952. The section originated because of the need "to curb the use, transportation, and possession of explosives." Hearings on H. R. 17154, H. R. 16699, H. R. 18573 and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 1 (1970) (hereinafter Hearings). After hearings before a House Subcommittee, Title XI emerged from two bills, H. R. 18573 and H. R. 16699, 91st Cong., 2d Sess., that Representative McCullough introduced in the House of Representatives and that were referred to the House Committee on the Judiciary. 116 Cong. Rec. 35198 (1970) (statement of Rep. McCullough). H. R. 16699 stated, in pertinent part:

"(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used *for business purposes* by a person engaged in commerce or in any activity affecting commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both. . . ." Hearings, at 30 (emphasis added).

During the hearings there were several discussions and statements on the reach of subsection (f) of H. R. 16699. Will R. Wilson, Assistant Attorney General, Criminal Division, Department of Justice, stated early in the hearings:

"[W]e have added a new provision (subsection (f)) covering malicious damage or destruction by means of an explosive of any property used for business purposes by a person engaged in commerce or in any activity affecting commerce. . . . Since the term 'affecting commerce' embraces 'the fullest jurisdictional breadth constitutionally permissible under the commerce clause,' *NLRB* v. *Reliance Fuel Corp.*, 371 U. S. 224, 226 (1963), subsection (f) would cover damage by explosives to substantially any business property." *Id.*, at 37.

[6] Shortly after Assistant Attorney General Wilson made the comment quoted in n. 5, *supra*, Representative Rodino of New Jersey engaged in the following colloquy with Wilson:

business purposes" from the description of covered property.[7] Even after that change, however, the final Report on the bill emphasized the "very broad" coverage of "substantially all business property."[8] In the floor debates on the final bill, although it was recognized that the coverage of the bill was extremely broad, the Committee Chairman, Representative Celler, expressed the opinion that "the mere bombing of a private home even under this bill would not be

---

"Mr. RODINO. That is the problem.

"Mr. Wilson, subsection (f) of section 837, as proposed by H. R. 16699, applies to structures used 'for business purposes.' I am a little bit in the dark. Would this section and these words cover the bombings of police stations? . . . Just what would new section 837(f) cover?

"Mr. WILSON. I don't believe it would cover either public buildings or private homes under normal use, but what this is designed for is the business office, where the business is interstate commerce, giving the Federal Government a basis for jurisdiction. It is to broaden the thing, to get at such things as the bombing of business offices in New York City, where the business is in interstate commerce.

"Mr. RODINO. Would it apply to the bombings of churches, synagogues, or religious edifices?

"Mr. WILSON. I don't think so." Hearings, at 56.

[7] See *id.*, at 300:

"The CHAIRMAN. The question is whether you want to broaden it to cover a private dwelling or a church or other property not used in business.

"Mr. WYLIE. As far as I am concerned we could leave out the words 'for business purposes,' and it would help the situation. . . ."

The phrase "for business purposes" was not included when the House Committee on the Judiciary amended S. 30 and those words were omitted from the statute as finally enacted.

[8] The Report stated in pertinent part:

"Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' *NLRB* v. *Reliance Fuel Corp.*, 371 U. S. 224, 226 (1963), this is a very broad provision covering substantially all business property." H. R. Rep. No. 91–1549, pp. 69–70 (1970).

covered because of the question whether the Congress would have the authority under the Constitution."[9] In sum, the legislative history suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home.

By its terms, however, the statute only applies to property that is "used" in an "activity" that affects commerce. The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and "the interstate movement of people,"[10] to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.[11]

Petitioner was renting his apartment building to tenants at the time he attempted to destroy it by fire. The property was therefore being used in an activity affecting commerce within the meaning of § 844(i).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

---

[9] See 116 Cong. Rec. 35359 (1970); see also *id.*, at 35198 ("[T]he committee extended the provision protecting interstate and foreign commerce from the malicious use of explosives to the full extent of our constitutional powers") (statement of Rep. McCullough); *id.*, at 37187 ("The reach of the law . . . is greatly extended by making it unlawful to damage or destroy property which is used in or affects interstate commerce. Nearly all types of property will now be protected by the Federal law") (statement of Rep. MacGregor).

[10] See *McLain* v. *Real Estate Board of New Orleans*, 444 U. S. 232, 245 (1980).

[11] See *Perez* v. *United States*, 402 U. S. 146, 153–154 (1971).

Reporter's Note

The next page is purposely numbered 1001. The numbers between 862 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 1 THROUGH APRIL 27, 1985

APRIL 1, 1985

Appeal Dismissed

No. 84–724. TEXAS A & M UNIVERSITY ET AL. *v.* GAY STUDENT SERVICES ET AL. Appeal from C. A. 5th Cir. Motion of appellants to disqualify counsel for appellees and to strike appellees' motion to dismiss or affirm denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 737 F. 2d 1317.

Certiorari Granted—Vacated and Remanded. (See also No. 84–436, *ante*, p. 148.)

No. 83–2034. UNITED STATES DEPARTMENT OF JUSTICE *v.* FALKOWSKI. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Chaney*, 470 U. S. 821 (1985). Reported below: 231 U. S. App. D. C. 226, 719 F. 2d 470.

No. 83–2035. UNITED STATES *v.* SCHMUCKER. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wayte* v. *United States*, 470 U. S. 598 (1985). Reported below: 721 F. 2d 1046.

No. 84–5035. SPIKES *v.* INDIANA. Sup. Ct. Ind. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hayes* v. *Florida*, 470 U. S. 811 (1985). Reported below: 460 N. E. 2d 954.

Vacated and Remanded After Certiorari Granted

No. 84–823. UNITED STATES *v.* DOE NO. 462. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Judgment vacated and case remanded with instructions to dismiss the cause as moot.

Miscellaneous Orders

No. D–453. IN RE DISBARMENT OF NOTHSTEIN. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D–467. IN RE DISBARMENT OF MCGLASSON. Disbarment entered. [For earlier order herein, see 469 U. S. 1083.]

No. 102, Orig. INDIANA *v.* UNITED STATES ET AL. Motion of plaintiff to expedite consideration of motion for leave to file bill of complaint denied.

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 469 U. S. 1016.] Case restored to calendar for reargument. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 84–679. BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1105.] Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 84–806. BUCKINGHAM CORP. *v.* ODOM CORP., DBA ARIZONA DISTRIBUTING CO. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–836. VASQUEZ, WARDEN *v.* HILLERY. C. A. 9th Cir. [Certiorari granted, 470 U. S. 1026.] Motion for appointment of counsel granted, and it is ordered that Clifford Earl Tedmon, Esquire, of Sacramento, Cal., be appointed to serve as counsel for respondent in this case.

No. 84–1231. STRICKLAND, WARDEN, ET AL. *v.* KING. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

Certiorari Granted

No. 84–1070. WITTERS *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND. Sup. Ct. Wash. Certiorari granted. Reported below: 102 Wash. 2d 624, 689 P. 2d 53.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 723 F. 2d 238.

No. 84–1181. NEW YORK *v.* CLASS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 63 N. Y. 2d 491, 472 N. E. 2d 1009.

No. 84–5786. MILLER *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 1456.

No. 84–6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 742 F. 2d 277.

Certiorari Denied. (See also No. 84–724, *supra.*)

No. 83–138. GOLD CROSS AMBULANCE CO., INC., ET AL. *v.* KANSAS CITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 1005.

No. 83–825. CENTRAL IOWA REFUSE SYSTEMS, INC. *v.* DES MOINES METROPOLITAN AREA SOLID WASTE AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 419.

No. 83–1959. EKLUND *v.* UNITED STATES; and MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1287 (first case); 733 F. 2d 1309 (second case).

No. 83–2098. SASWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 84–360. SCOTT ET AL. *v.* CITY OF SIOUX CITY, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1207.

No. 84–378. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1430.

No. 84–480. P. I. A. ASHEVILLE, INC., ET AL. *v.* NORTH CAROLINA EX REL. THORNBURG, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 274.

No. 84–643. ARKANSAS *v.* BAIRD ET AL. Ct. App. Ark. Certiorari denied. Reported below: 12 Ark. App. 71, 671 S. W. 2d 191.

No. 84–667. LYONS *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 430, 683 P. 2d 504.

No. 84–767. CARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 339.

No. 84–809. MCGUIRE *v.* UNITED STATES; and
No. 84–1107. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1197.

No. 84–832. HYBUD EQUIPMENT CORP. ET AL. *v.* CITY OF AKRON, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 949.

No. 84–982. CHAPMAN *v.* THOMAS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 743 F. 2d 1056.

No. 84–1003. SAILORS' UNION OF THE PACIFIC, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* SECRETARY OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 1426.

No. 84–1252. GUERIN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 458 So. 2d 286.

No. 84–1253. GEORGE ET UX. *v.* LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE. Ct. App. Ky. Certiorari denied.

No. 84–1267. MICHIGAN *v.* CARLTON. Ct. App. Mich. Certiorari denied.

No. 84–1268. KFC NATIONAL MANAGEMENT CO. *v.* BROWN. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1276. GRACE *v.* BILLS AUTO REPAIR & TOWING. C. A. 8th Cir. Certiorari denied.

No. 84–1277. DUNCAN, DBA TV NEWS CLIPS *v.* PACIFIC & SOUTHERN CO., INC., DBA WXIA–TV. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1490.

No. 84–1295. PATTON *v.* THOMSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84–1297. MONTGOMERY CITY-COUNTY PERSONNEL BOARD ET AL. *v.* WILLIAMS. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 586.

No. 84–1298. QUANSAH *v.* BISCO INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84–1302. SHELL OIL CO. *v.* PINEY WOODS COUNTRY LIFE SCHOOL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 225.

No. 84–1311. BONIN *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 435.

No. 84–1381. FICALORA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 85.

No. 84–1383. BRYN MAR, LTD., ET AL. *v.* CARLTON BROWNE & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84–1396. KRAMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–1408. RENNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–5857. CUMMISKEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 278.

No. 84–5938. WALLACE *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84–5958. HARVEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–5968. BREWER *v.* CITY OF CLAYHATCHEE. Sup. Ct. Ala. Certiorari denied. Reported below: 459 So. 2d 1015.

No. 84–6151. ZEISLER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 558, 465 N. E. 2d 1373.

No. 84–6160. ANTONELLI *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–6165. HARROD *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 84–6194. ANTONELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1159, 481 N. E. 2d 360.

No. 84–6195. JONES *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6198. FLORES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84–6199. ABDI *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1500.

No. 84–6210. MEALER *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 741 F. 2d 1451.

No. 84–6211. HOLSEY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–6212. HOPGOOD *v.* HOPGOOD. Sup. Ct. Ga. Certiorari denied.

No. 84–6213. GUERRERO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84–6226. MORET *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 84–6233. HOOK *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6235. IN RE BAILEY. C. A. 8th Cir. Certiorari denied.

No. 84–6236. SMITH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 84–6238. TYSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 283 S. C. 375, 323 S. E. 2d 770.

No. 84–6293. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–6299. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6308. CALDWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 341.

No. 84–6336. GAGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6338. LIGON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6341. GREEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 83–1896. MOBIL OIL CORP. *v.* BLANTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 1207.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit affirmed a jury verdict that petitioner had attempted to monopolize in violation of § 2 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 2, and was therefore liable to respondents for treble damages. 721 F. 2d 1207 (1983). Ordinarily, a finding of attempted monopolization depends on a showing that there was a dangerous probability that the defendant would succeed in monopolizing a relevant market. See *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 271–275 (CA2 1979), cert. denied, 444 U. S. 1093 (1980). In this case, the jury found that the relevant submarket that petitioner had attempted to monopolize consisted of sales of "Mobil-branded and non-Mobil-branded oil, lubricants, and [tires, batteries, accessories and specialties] to Mobil dealers."

On appeal, petitioner contended that, as a matter of law, sales to Mobil dealers only could not constitute a relevant submarket. The Court of Appeals found it unnecessary to address this contention, for it concluded that the finding of attempted monopolization could be sustained without reference to the effects of petitioner's conduct in any relevant market. The court relied in part on the Ninth Circuit's earlier ruling in *Lessig* v. *Tidewater Oil Co.*, 327

F. 2d 459, cert. denied, 377 U. S. 993 (1964), in which the court had held that the relevant market was not an issue in an attempted monopoly case. In subsequent cases, the Ninth Circuit had refined the holding of *Lessig* to allow avoidance of the issue of effects in a relevant market only in cases where the plaintiff had proved "either predatory conduct or a *per se* violation of § 1 [of the Sherman Act, 15 U. S. C. § 1]." *Gough* v. *Rossmoor Corp.*, 585 F. 2d 381, 390 (1978), cert. denied, 440 U. S. 936 (1979). Relying on the "*Lessig* doctrine" as modified in *Gough*, the court held that because respondents had proved that petitioner had engaged in practices that constitute *per se* violations of § 1 of the Sherman Act, the attempted monopolization verdict could be sustained without reference to the probability that petitioner's conduct would lead to monopolization of any relevant market.

Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 767 (1984).

Because the *Lessig* doctrine allows a violation of § 2 to be found on the basis of a *per se* violation of § 1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles. In addition, the doctrine, although accepted within the Ninth Circuit for over 20 years, has been explicitly rejected by a number of Courts of Appeals outside the Ninth Circuit. See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 117 (CA3 1980), cert. denied, 451 U. S. 911 (1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704, 711–712 (CA7 1979), cert. denied, 445 U. S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 276, and n. 69 (CA5 1978), cert. denied, 440 U. S. 939 (1979); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F. 2d 1019,

1030 (CA2 1976), cert. denied, 429 U. S. 1097 (1977); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296, 305 (CA10 1975), cert. denied, 425 U. S. 907 (1976); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (CA1 1974), cert. denied, 421 U. S. 1004 (1975); *Agrashell, Inc.* v. *Hammons Products Co.* 479 F. 2d 269, 287 (CA8), cert. denied, 414 U. S. 1022 (1973). The questionable validity of the doctrine on which the decision of the Ninth Circuit in this case rested and the longstanding conflict among the Circuits over the issue indicate that this case is one that this Court ought to resolve. I would therefore grant the petition for certiorari.

No. 83–6298. McDONALD *v.* MISSOURI. Sup. Ct. Mo.;

No. 84–6006. MASON *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir.;

No. 84–6036. GARRETT *v.* TEXAS. Ct. Crim. App. Tex.;

No. 84–6098. SESSION *v.* TEXAS. Ct. Crim. App. Tex.;

No. 84–6131. DEVIER *v.* GEORGIA. Sup. Ct. Ga.;

No. 84–6167. GROOVER *v.* FLORIDA. Sup. Ct. Fla.;

No. 84–6183. HUFFSTETLER *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 84–6186. FERRELL *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 84–6189. CHAFFEE *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 84–6223. DANIEL *v.* ALABAMA. Sup. Ct. Ala.;

No. 84–6230. TRUESDALE *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 84–6254. BANNISTER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 83–6298, 661 S. W. 2d 497; No. 84–6006, 748 F. 2d 852; No. 84–6036, 682 S. W. 2d 301; No. 84–6098, 676 S. W. 2d 364; No. 84–6131, 253 Ga. 604, 323 S. E. 2d 150; No. 84–6167, 458 So. 2d 226; No. 84–6183, 312 N. C. 92, 322 S. E. 2d 110; Nos. 84–6186 and 84–6189, 285 S. C. 21, 328 S. E. 2d 464; No. 84–6223, 459 So. 2d 948; No. 84–6230, 285 S. C. 13, 328 S. E. 2d 53; No. 84–6254, 680 S. W. 2d 141.

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. 84–1179. TAVONE *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 482 A. 2d 693.

No. 84–1262. FEDERATION INTERNATIONALE DE BASKETBALL AMATEUR *v.* BEHAGEN. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 731.

No. 84–1294. VILLAGES, INC. *v.* METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY. Ct. App. Ind. Motion of National Association of Homes for Children for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 464 N. E. 2d 367.

Rehearing Denied

No. 84–5307. THETFORD *v.* UNITED STATES, 469 U. S. 1218;
No. 84–5626. DUFOUR *v.* MISSISSIPPI, 469 U. S. 1230; and
No. 84–5945. WATKINS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 469 U. S. 1223. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 15, 1985

Dismissal Under Rule 53

No. 84–1387. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari dismissed under this Court's Rule 53.

Appeals Dismissed

No. 84–1093. WELCH ET AL. *v.* CLAIBORNE COUNTY BEER BOARD ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 678 S. W. 2d 52.

No. 84–1299. ARANGO *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 So. 2d 1037.

No. 84–1441. KAY *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 330 Pa. Super. 89, 478 A. 2d 1366.

No. 84–6425. WHITE *v.* MCGOFF, SUPERINTENDENT, FREMONT CORRECTIONAL FACILITY. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1329. CREA *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists., dismissed for want of substantial federal question.

No. 84–1346. HEINRICH *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Reported below: 104 Ill. 2d 137, 470 N. E. 2d 966.

No. 84–6256. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES, ET AL. Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction.

No. 84–1382. STERN ET AL. *v.* WEISS ET AL. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and give this case plenary consideration. Reported below: 312 N. C. 486, 322 S. E. 2d 771.

Certiorari Dismissed. (See No. 84–501, *ante*, p. 154.)

Miscellaneous Orders

No. — – ——. FURMAN *v.* COMMISSIONER OF INTERNAL REVENUE. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with Rule 33 denied. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–674 (84–6082). ATTWELL ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL., 470 U. S. 1008. Application to suspend the effect of the order denying certiorari pending action on a petition for rehearing, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–455. IN RE DISBARMENT OF PHILLIPS. Disbarment entered. [For earlier order herein, see 469 U. S. 914.]

No. D–472. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see 469 U. S. 1186.]

No. D–475. IN RE DISBARMENT OF PADELL. The order of this Court entered February 19, 1985 [469 U. S. 1203], suspending Bert Padell from further practice of law in this Court is vacated and the rule to show cause issued February 19, 1985, is discharged.

No. D–488. IN RE DISBARMENT OF ROUSE. It is ordered that Arthur J. Rouse, of West Nyack, 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. 100, Orig. WEBBER *v.* OKLAHOMA ET AL. Motion for leave to file bill of complaint denied.

No. 83–1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. C. A. 11th Cir. [Probable jurisdiction noted, 469 U. S. 1156.] Motion of the Solicitor General to permit Paul J. Larkin, Jr., Esquire, to present oral argument *pro hac vice* granted.

No. 84–310. IN RE SNYDER. C. A. 8th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of United States Court of Appeals for the Eighth Circuit to supplement the joint appendix granted.

No. 84–320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1032.] Motion of Sac and Fox Tribe of Indians of Oklahoma for leave to file a brief as *amicus curiae* out of time denied.

No. 84–518. JOHNSON ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.; and

No. 84–710. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of National League of Cities for leave to file a brief as *amicus curiae* granted.

No. 84–589. DOWLING *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of Recording Industry Association of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–648. SEDIMA, S. P. R. L. *v.* IMREX CO., INC., ET AL. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1157.] Motions of American Institute of Certified Public Accountants, Alliance of American Insurers et al., and Securities Industry Association for leave to file briefs as *amici curiae* granted.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motions of Interinsurance Exchange of the Automobile Club of Southern California and John Grado et al. for leave to file briefs as *amici curiae* granted.

No. 84–835. NEW JERSEY DEPARTMENT OF CORRECTIONS *v.* NASH; and

No. 84–776. CARCHMAN, MERCER COUNTY PROSECUTOR *v.* NASH. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1157.] Motion of respondent to permit John Burke III, Esquire, to present oral argument *pro hac vice* granted.

No. 84–861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 84–1023. UNITED STATES *v.* ROJAS-CONTRERAS. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1207.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–5909. ADAMS *v.* FULCOMER ET AL., 469 U. S. 1205. Motion of petitioner to reconsider the order denying leave to proceed *in forma pauperis* denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6317. IN RE ANTONELLI;

No. 84–6368. IN RE BROWN; and

No. 84–6429. IN RE ROSS. Petitions for writs of habeas corpus denied.

No. 84–6297. IN RE HELLWARTH. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 84–1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL. Appeal from C. A. 9th Cir. Motion of

National League of Cities et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. Reported below: 748 F. 2d 527.

No. 84–495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL. Appeal from C. A. 3d Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 737 F. 2d 283.

No. 84–248. PINO *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT'S CHILDREN'S COURT IN AND FOR THE COUNTY OF BERNALILLO. Appeal from Sup. Ct. N. M. Motion of Navajo Nation for leave to file a brief as *amicus curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 746 F. 2d 1152.

No. 84–1321. NIX, WARDEN *v.* WHITESIDE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 744 F. 2d 1323.

No. 84–1361. UNITED STATES *v.* LOUD HAWK ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 1184.

Certiorari Denied. (See also Nos. 84–1299, 84–1441, and 84–6425, *supra.*)

No. 82–1841. BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, HAWAII *v.* NAKATA ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 65 Haw. 531, 656 P. 2d 57.

No. 84–881. BAKER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 744 F. 2d 1438.

No. 84–930. CHEREK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1248.

No. 84–932. CED'S, INC., DBA PRODUCTS FOR POWER *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1092.

No. 84–943. ELVRUM ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 549.

No. 84–971. KAPNISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 1450.

No. 84–976. BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL–CIO, CLC, ET AL. *v.* CITY OF BELLEVUE. Sup. Ct. Wash. Certiorari denied. Reported below: 100 Wash. 2d 748, 675 P. 2d 592.

No. 84–1011. OLIPHANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84–1016. HARRINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–1017. UNIVERSITY OF PITTSBURGH ET AL. *v.* KRYNICKY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 94.

No. 84–1019. CARPENTER'S LOCAL UNION NO. 1478 ET AL. *v.* STEVENS. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1271.

No. 84–1020. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 426.

No. 84–1053. ECCLESIASTICAL ORDER OF THE ISM OF AM, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84–1086. PERKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 29.

No. 84–1135. COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 163.

No. 84–1151. ESTATE OF KREMM *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 743 F. 2d 1578.

No. 84–1157. NKC HOSPITALS, INC. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1100.

No. 84–1167. PINAR *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 899.

No. 84–1185. RAZATOS *v.* COLORADO SUPREME COURT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 746 F. 2d 1429.

No. 84–1231. STRICKLAND, WARDEN, ET AL. *v.* KING. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 1462.

No. 84–1238. ROOP *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 84–1263. RODMAN ET AL. *v.* HENSLEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 665.

No. 84–1275. STEWART *v.* DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84–1283. LUNA *v.* HOUSE OF SOFAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84–1284. UNITED STATES *v.* SQUILLACOTE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1208 and 747 F. 2d 432.

No. 84–1289. PORT TERMINAL RAILROAD ASSN. *v.* SIMS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 671 S. W. 2d 575.

No. 84–1290. BYRNE *v.* MASS TRANSIT ADMINISTRATION ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 501, 473 A. 2d 956.

No. 84–1296. PENNSYLVANIA DENTAL ASSN. ET AL. *v.* MEDICAL ASSOCIATION OF PENNSYLVANIA, DBA PENNSYLVANIA BLUE SHIELD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 248.

No. 84–1301. AMIS *v.* STEELE, LEE COUNTY TAX COLLECTOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84–1305. EPPERSON *v.* ESTATE OF EPPERSON. Sup. Ct. Ark. Certiorari denied. Reported below: 284 Ark. 35, 679 S. W. 2d 792.

No. 84–1308. BOSLEY, CLERK OF THE CIRCUIT COURT, CITY OF ST. LOUIS, ET AL. *v.* BARNES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 501.

No. 84–1309. STARNES ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 217.

No. 84–1314. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* HAMPTON ROADS SHIPPING ASSN. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1015.

No. 84–1322. NILL *v.* ESSEX GROUP, INC., ET AL. Ct. App. Ind. Certiorari denied. Reported below: 462 N. E. 2d 1334.

No. 84–1325. PONTERIO *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 374.

No. 84–1328. ULANE *v.* EASTERN AIR LINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1081.

No. 84–1330. GOULD *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1165.

No. 84–1336. KERN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 382.

No. 84–1338. RAMOS *v.* RAMOS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 391, 466 N. E. 2d 1016.

No. 84–1339. RASKE *v.* BOARD OF COMMISSIONERS OF THE FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–1349. BUSTO *v.* MARTIN MARIETTA. Ct. App. Colo. Certiorari denied. Reported below: 691 P. 2d 345.

No. 84–1356. KOHN BEVERAGE CO. *v.* TEAMSTERS' LOCAL NO. 348 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 2d 315.

No. 84–1371. FARWEST STEEL CORP. *v.* DeSANTIS ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 102 Wash. 2d 487, 687 P. 2d 207.

No. 84–1391. INDEPENDENT SCHOOL DISTRICT NO. 3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA *v.* HELMS. C. A. 10th Cir. Certiorari denied. Reported below: 750 F. 2d 820.

No. 84–1392. GEORGE ET AL. *v.* LIBERTY NATIONAL BANK & TRUST OF LOUISVILLE, FORMERLY DBA UNITED KENTUCKY BANK, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 50.

No. 84–1405. GHIBAUDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 108.

No. 84–1407. SCOTT *v.* BALDRIGE, SECRETARY OF COMMERCE. C. A. D. C. Cir. Certiorari denied. Reported below: 241 U. S. App. D. C. 174, 746 F. 2d 907.

No. 84–1424. CIRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 753 F. 2d 248.

No. 84–1434. MANGRUM *v.* CONTINENTAL CASUALTY CO. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84–1456. ERDLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1197.

No. 84–1474. BARTHOLOMEW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 644.

No. 84–1489. PHELPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5844. PRIMIANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84–5933. BOWRING *v.* BOOKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84–5979. BARNGROVER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–5997. McQUEEN *v.* PAROLE AND PROBATION COMMISSION. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 115.

No. 84–6034. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 84–6076. RABB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1320.

No. 84–6090. KANE *v.* FLORIDA STATE ATTORNEY GENERAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1477.

No. 84–6134. ALEXANDER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1007, 470 N. E. 2d 1071.

No. 84–6150. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1164, 481 N. E. 2d 363.

No. 84–6190. JUDD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 390.

No. 84–6231. DOE *v.* MICHIGAN DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. Mich. Certiorari denied.

No. 84–6240. SPEEDY *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 481.

No. 84–6241. LEE *v.* ALDERMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 379.

No. 84–6242. MIDWIFE *v.* EL PASO MATERNITY NURSING HOME ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84–6244. WARD *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 84–6245. KIMBALL *v.* LEWELLEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 66.

No. 84–6252. PHILLIPS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 447 So. 2d 1312.

No. 84–6257. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 128 Ill. App. 3d 706, 471 N. E. 2d 210.

No. 84–6258. LUCIEN *v.* MCGINNIS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–6262. BRAGG *v.* CAVE, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 84–6264. ASH *v.* SWANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–6265. BAKER ET AL. *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 461 So. 2d 26.

No. 84–6266. FINNEY *v.* ROTHGERBER, CHAIRMAN, KENTUCKY PAROLE BOARD, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 858.

No. 84–6267. LIBERTA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 152, 474 N. E. 2d 567.

No. 84–6269. HOWARD *v.* LANDRY. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 381.

No. 84–6274. O'CONNOR *v.* O'CONNOR. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 27.

No. 84–6276. SPOON ET AL. *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 691 P. 2d 253.

No. 84–6277. VOSSBRINCK *v.* VOSSBRINCK. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 229, 478 A. 2d 1011.

No. 84–6278. MCCALL *v.* TOVEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6279. NORMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 71 Ore. App. 389, 692 P. 2d 665.

No. 84–6280. ZARRILLI *v.* BRAUNSTEIN. C. A. 1st Cir. Certiorari denied.

No. 84–6288. SOCKWELL *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 979.

No. 84–6292. CHANCE *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6295. GIBBS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1462.

No. 84–6296. HOWARD *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 510.

No. 84–6304. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 99 N. J. 208, 491 A. 2d 704.

No. 84–6311. MITCHELL *v.* MEESE, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied.

No. 84–6313. YOCUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6314. CALVENTE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 1019.

No. 84–6319. GRAY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6324. INGRAHAM *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 156.

No. 84–6328. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 918.

No. 84–6331. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 84–6347. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6355. PRIDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–6362. MERRITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1226.

No. 84–6363. TOOKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 975.

No. 84–6376. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 247.

No. 84–6380. MARTIN *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS. Sup. Ct. Pa. Certiorari denied.

No. 84–6382. YATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 70.

No. 84–6383. ESQUIBEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6385. WISE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 33.

No. 84–6386. NEELY *v.* CENTRAL INTELLIGENCE AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 254, 744 F. 2d 878.

No. 84–6388. DINOIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 799, 481 N. Y. S. 2d 738.

No. 84–6389. HAYWOOD *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6392. LEWIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 1073.

No. 84–6402. MIRITI *v.* SCHADE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84–6419. HARVEY *v.* SMITH. C. A. 5th Cir. Certiorari denied.

No. 84–6436. DEVYVER, AKA WILSON *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–322. REMINICK ET AL. *v.* MALTZ ET AL. Ct. App. N. Y. Motion of Bankers Trust Co. for leave to intervene denied. Certiorari denied. Reported below: 62 N. Y. 2d 173, 464 N. E. 2d 974.

No. 84–600. COOPER *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 714.

JUSTICE WHITE, dissenting.

In December 1980, petitioner filed an administrative complaint with respondent, her employer, alleging that she had been denied

a position because of her sex. The Regional Postmaster General denied the complaint, notifying petitioner that she could appeal to the Equal Employment Opportunity Commission within 20 days, or file suit in federal district court within 30. See 42 U. S. C. § 2000e–16(c). Choosing the latter route, petitioner filed this suit on October 29, 1982, the day before the 30-day limit expired. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983, and did not serve the Postmaster General until February. The record does not indicate when or if the Postal Service, which was the named defendant, was served, but it was not within the 30-day period.

The District Court dismissed the complaint because it did not name the proper defendant, who was the Postmaster General. § 2000e–16(c). Petitioner sought to correct this defect and have the amendment relate back to the date of the initial complaint. See Fed. Rule Civ. Proc. 15(c).[1] The District Court denied the motion on the ground that the Postmaster General had not had notice of the suit within the 30-day period.

On appeal, a panel of the Ninth Circuit agreed that the Postmaster General was the only proper defendant and that the 30-day period was a flat—parenthetically, a jurisdictional—requirement. 740 F. 2d 714, 716 (1984). Therefore, petitioner's action was necessarily time-barred unless the amendment could relate back to the date of the original complaint. Observing that "[t]here is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision," *ibid.*, the court adopted a strict, literal reading and affirmed.

---

[1] That Rule provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

The case raises two important issues. The first is whether the 30-day limit of § 2000e–16(c) is jurisdictional or, like the equivalent limitation for suits against private employers, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), subject to waiver, estoppel, and equitable tolling. I have previously noted my dissent from the Court's refusal to address this issue, which has divided the Courts of Appeals. See *Stuckett* v. *United States Postal Service*, 469 U. S. 898 (1984) (WHITE, J., joined by REHNQUIST, J., dissenting from denial of certiorari). In light of the Court of Appeals' firm stance on the 30-day requirement and its view that petitioner's claim "must be barred" unless the amendment related back, I believe the issue is presented here. I continue to think it merits our attention.

The petition also challenges the Ninth Circuit's strict reading of Rule 15(c).[2] As that court observed, the Courts of Appeals have not taken a consistent approach to this provision. Some have rejected a literal construction of the requirement that the added party have had notice of institution of the action within "the period provided by law for commencing the action against him," allowing, for example, a reasonable time thereafter for service of process. See *Kirk* v. *Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); see also *Ringrose* v. *Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (Jones, J., concurring). The argument in favor of such a grace period for service of process is appealing when the statute of limitations is as short as 30 days. On the other hand, the Ninth Circuit is hardly alone in requiring that the added defendant have had notice strictly within the limitations period. See, *e. g.*, *Watson* v. *Uni-press, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984) (explicitly rejecting *Ingram*, *supra*); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F. 2d 68, 71–72 (CA8 1983); *Hughes* v. *United States*, 701 F. 2d 56, 58–59 (CA7 1982).

Relying on the implications of the Rule's second paragraph, respondent argues that except as provided therein, actual notice is

---

[2] The two questions presented are not unrelated. For example, were the 30-day period jurisdictional, the question would arise whether a district court would even have the power, notwithstanding the authorization of Rule 15(c), to add a new defendant after 30 days. See generally *Canavan* v. *Beneficial Finance Corp.*, 553 F. 2d 860, 864–865 (CA3 1977).

always required against a federal defendant. It points out that the cases with which the decision below conflicts did not involve federal defendants. This effort to separate federal from private defendants may or may not be legitimate, but neither the court below nor any other cited decision relied on the identity of the added defendant in denying relation back. Moreover, this argument goes more to the question of when the added defendant may be deemed to have had notice,[3] rather than the question, raised by petitioner, whether the period within which notice is required may be viewed flexibly.

In light of the conflicts in the lower courts on both issues raised by this petition, I would grant certiorari and set the case for oral argument.

No. 84–1013. BOUGH ET AL. *v.* RAMIREZ. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84–1180. PETROV *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 747 F. 2d 824.

No. 84–1224. EVANS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 468, 323 S. E. 2d 114.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, and I would vacate the judgment of the Supreme Court of Virginia insofar as it left

---

[3] In some cases, as where a complaint naming a corporation as the defendant is later amended to add the corporation's owner, *e. g.*, *Itel Capital Corp.* v. *Cups Coal Co.*, 707 F. 2d 1253, 1258 (CA11 1983), or parent corporation, *e. g.*, *Marks* v. *Prattco, Inc.*, 607 F. 2d 1153 (CA5 1979), the added party is deemed to have had notice in light of its identity of interests or close association with the original defendant. See generally *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102–103 (CA1 1979). Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.

undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari to decide the constitutional validity of the death sentence imposed here.

I

Petitioner Wilbert Lee Evans was convicted of capital murder in April 1981. At his sentencing hearing, the State urged the jury to recommend the death sentence based on Evans' "future dangerousness." To prove future dangerousness, the State relied principally upon the records of seven purported out-of-state convictions. The State's prosecutor later admitted that he knew, at the time he introduced the records into evidence, that two of them were false. App. to Pet. for Cert. 50a–52a. One of the seven "convictions," for assault on an officer with a deadly weapon, had been dismissed on appeal. Another, for engaging in an affray with a deadly weapon, had been vacated on appeal, and Evans had been reconvicted in a trial *de novo;* the conviction for one crime was, however, counted as two convictions.[1] After considering Evans' prior "history," the jury determined that there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, see Va. Code § 19.2–264.4C (1983), and it recommended the death penalty based solely upon its finding of future dangerousness. 228 Va. 468, 323 S. E. 2d 114 (1984). Evans was sentenced to death on June 1, 1981.

On October 16, 1981, while Evans' direct appeal was pending, the Supreme Court of Virginia ruled that, when a capital defendant's right to a fair and impartial jury is violated during the sentencing phase of trial, a death sentence must be commuted to life imprisonment. *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S. E. 2d 212 (1981). The court premised its decision on a construction of the then-existing death-penalty statute under which only the jury that finds a capital defendant guilty can fix his punishment. Because the original jury, tainted by the constitutional error, could not be reconvened to resentence the defendant, the

[1] In addition, several of the other convictions had been obtained when Evans was without the benefit of counsel. App. to Pet. for Cert. 3a–4a.

death sentence had to be reduced automatically to life imprisonment. *Id.*, at 660, 283 S. E. 2d, at 216.

This ruling was in effect when the Virginia Supreme Court considered Evans' direct appeal. Therefore, had that court known of the error in the sentencing hearing and vacated Evans' death sentence, he would very likely have received a life sentence.[2] But the State not only failed to confess its error, it listed all the purported convictions, including the erroneous ones, in its brief. App. to Pet. for Cert. 42a. In sustaining Evans' death sentence, the State Supreme Court relied, in part, on this inaccurate record. *Id.*, at 31a. When Evans petitioned this Court for a writ of certiorari, the State again relied on the misleading records of convictions in its brief in opposition. *Id.*, at 46a. Certiorari was denied. 455 U. S. 1038 (1982).

The State did not notify Evans that it would confess its error regarding the false evidence until March 28, 1983. App. to Pet. for Cert. 73a. *On that day*, the Virginia Governor signed into law a bill that amended the state death-penalty statute to allow for resentencing by a different jury after a death sentence was set aside, thus effectively overruling *Patterson*. See Va. Code § 19.2–264.3C (1983). The State subsequently confessed error to the trial judge on April 12, 1983. At a hearing to consider the propriety of resentencing Evans, the prosecutor at Evans' trial admitted that he knew the evidence that he introduced at the sentencing hearing was false. The judge then ordered a new sentencing hearing. A new jury recommended the death penalty, and petitioner was again sentenced to death.

II

In *Napue* v. *Illinois*, 360 U. S. 264 (1959), this Court reversed a conviction obtained through the use of false evidence that was known to be false by representatives of the State. Since *Napue*,

---

[2] In its brief in opposition, the State urges that the opinion of the Virginia Supreme Court implied that the court would not have applied the *Patterson* rule to Evans' sentence. A fair reading of the opinion below, however, indicates that the court was not rejecting Evans' contention that *Patterson* would have controlled his case had it not been legislatively overruled; rather, the court was rejecting Evans' *ex post facto* argument, which was based on the subsequent overruling of *Patterson*. See 228 Va. 468, 476–477, 323 S. E. 2d 114, 118–119 (1984).

this Court has adhered to the principle that a conviction obtained by the knowing use of false evidence is fundamentally unfair. See, *e. g.*, *United States* v. *Agurs*, 427 U. S. 97, 103 (1976); *Miller* v. *Pate*, 386 U. S. 1, 7 (1967). The rule of *Napue* is undoubtedly applicable to the sentencing phase of a capital trial. In this case, the prosecutor admitted that he knowingly introduced false evidence at Evans' sentencing hearing to demonstrate "future dangerousness." Evans was therefore deprived of the fundamental fairness due him under the Fourteenth Amendment.

To remedy this injury, the state court ordered a new sentencing hearing free from the taint of false evidence. This remedy, however, was inadequate to undo the harm suffered by Evans. For the State compounded its original misconduct by concealing the deception during both Evans' direct appeal and his petition for certiorari to this Court. Had the State honestly confessed the error, petitioner's sentence would almost certainly have been commuted to life imprisonment under the then-existing statute. Instead, the State did not confess error until nearly two years after the original death sentence had been imposed, by which time the death-penalty statute had been amended.

The court below ruled that, even assuming that the prosecutor's handling of the sentencing hearing involved serious prosecutorial misconduct, the State was not barred from seeking the death penalty a second time. In doing so, it relied on the holding in *United States* v. *Morrison*, 449 U. S. 361 (1981), that drastic remedies should not be used to redress "deliberate" and "egregious" violations of constitutional rights "absent demonstrable prejudice, or substantial threat thereof," to the defendant. *Id.*, at 365. The court concluded that Evans' resentencing hearing removed any prejudice. But the court considered only the prejudice suffered by Evans at the initial sentencing. It failed to account for the harm done to Evans afterwards, during his direct appeal. Had the State not continued to rely on the false evidence, very likely the death sentence would have been commuted to life imprisonment.

The State argues, nevertheless, that this Court cannot consider the harm done to Evans by its conduct during the appeal. It directs our attention to the finding by the trial judge that the State did not delay its confession of error until after the death-penalty statute was amended just to have a second chance to sentence

Evans to death. App. to Pet. for Cert. 20a. This argument misses the point. Regardless of its purpose in regard to the amendment, the State's continued, knowing use of false evidence during the direct appeal and petition for certiorari, and its failure to disclose this misconduct, constituted egregious conduct that seriously harmed Evans.[3]

III

To my mind, the only way to remedy the federal constitutional violation Evans has suffered would be for the Virginia courts to consider, *nunc pro tunc*, how *Patterson* would have applied to this case. I would grant the petition for certiorari to consider whether the court below was constitutionally obligated to make this inquiry. Accordingly, I dissent from the denial of certiorari.

No. 84–1341. DUQUESNE LIGHT CO. ET AL. *v.* STATE TAX DEPARTMENT OF WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: —— W. Va. ——, 327 S. E. 2d 683.

No. 84–1353. KARTELL ET AL. *v.* BLUE SHIELD OF MASSACHUSETTS, INC.; and

No. 84–1354. RODKEY ET AL. *v.* BLUE SHIELD OF MASSACHUSETTS, INC. C. A. 1st Cir. Motion of American Medical Association for leave to file a brief as *amicus curiae* granted. Motion of Ball Memorial Hospital, Inc., et al. for leave to file a brief as

---

[3] Further, whether the delay of nearly two years in confessing error was intentional or merely negligent has no bearing on the degree of prejudice suffered by Evans. "Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin." *Dickey* v. *Florida*, 398 U. S. 30, 51 (1970) (BRENNAN, J., concurring).

Nor does it matter whether the state attorney who appeared at the sentencing hearing, and who admitted that he knew the evidence on which the State relied was false, took part in preparing the State's briefs in the Virginia Supreme Court or in this Court. The prosecutor's office is an entity, not just a group of isolated individuals, and the prosecutor is responsible for assuring that relevant information is communicated among the lawyers in the office. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972); *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part).

amici curiae in No. 84–1353 granted. Certiorari denied. Reported below: 749 F. 2d 922.

No. 84–5339. WINGO *v.* LOUISIANA. Sup. Ct. La.;
No. 84–6073. NELSON *v.* LOUISIANA. Sup. Ct. La.;
No. 84–6224. WALDROP *v.* ALABAMA. Sup. Ct. Ala.;
No. 84–6250. MILTON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 84–6251. NUCKOLS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6285. AVERHART *v.* INDIANA. Sup. Ct. Ind.;
No. 84–6348. COPELAND *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–6442. WEEKS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 84–5339, 457 So. 2d 1159; No. 84–6073, 459 So. 2d 510; No. 84–6224, 459 So. 2d 959; No. 84–6250, 744 F. 2d 1091; No. 84–6251, 690 P. 2d 463; No. 84–6285, 470 N. E. 2d 666; No. 84–6348, 457 So. 2d 1012; No. 84–6442, 456 So. 2d 404.

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. 84–5819. BOYD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 311 N. C. 408, 319 S. E. 2d 189.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was sentenced to death after a hearing in which the judge prevented the jury from considering evidence that it might well have considered highly relevant to petitioner's motive at the time of his crime and to the relationship of his character and record to the offense he had committed. As a result, the jury was called on to decide whether death was the appropriate punishment but was deprived of the evidence petitioner offered in mitigation of his crime. The death sentence must thus be vacated, for it stands in glaring conflict with one of the most basic requirements of the Eighth Amendment—"'that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of

a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)).[1]

I

Petitioner Boyd was convicted of murdering his former girlfriend after unsuccessfully attempting a reconciliation. They had lived together for three years but had separated several months prior to the murder. On the day of the murder, Boyd met the victim at a local shopping mall. They sat and talked quietly for some time, sitting in the midst of a church-sponsored event run by the victim's father, a local pastor. Eventually, the victim's mother approached her daughter and said it was time to leave, but Boyd asked the daughter to stay and talk to him a little longer. After talking some more, the victim said she would leave. She was also reported to have said that if Boyd was going to kill her "he should hurry up and get it over with." Boyd took out a knife but also assured her that he would not hurt her. He then began to stab her rapidly and repeatedly until bystanders dragged the two apart. The victim died from the multiple stab wounds.

At his capital sentencing hearing, Boyd offered in mitigation expert testimony by a sociologist, Dr. Humphrey, who had interviewed Boyd and previously had done academic research into the behavioral dynamics of suicide and homicide. Most relevantly, Dr. Humphrey had coauthored a study of people who had murdered their relatives or intimates. The trial judge excluded the entirety of his testimony.

---

[1] I continue to adhere 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, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in this case because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Eutzy* v. *Florida*, *post*, p. 1045 (MARSHALL, J., dissenting from denial of certiorari); *Patterson* v. *South Carolina*, *post*, p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

Dr. Humphrey would have testified, based on his study and his personal interview with Boyd, that Boyd's crime and life history conformed to a common pattern that distinguishes those who kill intimates from those who kill others. According to the sociologist, those in the former group are more likely to have had lives characterized by repeated deep personal losses (such as deaths of loved ones or abandonment by parents) and strong feelings of self-destruction:

> "'The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are after all, killing something that is a part of them, very close to them, very important to their self. They are destroying them. So in the act of killing another person they are in fact destroying part of their self, a self-destructive act.'" 311 N. C. 408, 439, 319 S. E. 2d 189, 209 (1984) (Exum, J., dissenting) (quoting *voir dire* testimony of Dr. Humphrey).

In Dr. Humphrey's view, Boyd's life history conformed to the pattern he had found in his research; Boyd's life had involved repeated and intense personal losses that had generated strong self-destructive feelings in him.[2] Dr. Humphrey thus understood Boyd's crime "primarily [as] a depression caused self-destructive act, closely related to the impulse that leads to suicide, resulting from a life history of an inordinate number of losses beginning with the abandonment by the defendant's father and the death of his grandfather and culminating with the threatened loss of [the victim]." *Id.*, at 419, 319 S. E. 2d, at 197.

Boyd's counsel sought to introduce the expert's testimony to provide the jury with a perspective on Boyd's personal history, on his mental and emotional condition, and on how these factors may have led to the crime. In that sense, it was evidence of motive; but more broadly, the proposed testimony was an effort to "link

---

[2] Boyd's lawyers had introduced evidence that Boyd's father had been an alcoholic who abandoned his family when Boyd was a child, that his grandfather—whom he had come to view as a father—had then died, that he had a history of losing jobs and repeated imprisonment, and that his life since adolescence had been characterized by drug and alcohol abuse. When Dr. Humphrey interviewed Boyd, Boyd said that he had so feared the loss of his girlfriend that he had contemplated suicide shortly before the murder.

together all of the defendant's mitigating evidence into a unified whole which explained the apparent contradiction of killing the person the defendant loved the most." *Ibid.*[3]

On the prosecutor's motion, the trial court excluded Dr. Humphrey's explanation of why Boyd killed his former girlfriend, but the prosecutor nevertheless argued vigorously for an alternative explanation of Boyd's motive. According to the prosecutor, Boyd was selfish and mean; he killed the victim because if he could not have her he wanted to make sure that no one else could. *Id.*, at 436, 319 S. E. 2d, at 207 (Exum, J. dissenting). In the words of the dissenting opinion below, the State's theory was "a motive theory that is easy to sell in this kind of case. . . . Defendant's motive theory was different, less apparent to the average observer, and probably more difficult to sell. It was a theory which does not excuse the crime but which might have mitigated it in the eyes of the jury." *Ibid.* The legal question, obviously, is not which of these theories is more worthy of belief, but whether petitioner had a right to offer evidence in support of his theory. *Lockett* and *Eddings* leave no doubt as to the correct answer to that question; he had such a right.

With two justices in dissent, the State Supreme Court affirmed the sentence of death. In the court's view the proffered testimony only "placed [the] various 'stressful events' [of Boyd's life] in a context suggesting that defendant's act [of murder] was predictable." 311 N. C., at 423, 319 S. E. 2d, at 199. It had "merely constructed a profile of a murderer into which the defendant fits." *Ibid.* The court doubted that this information could have much weight in mitigation, especially because, in the court's view, some of the traumas in Boyd's life (*e. g.*, imprisonment) could not "extenuate or reduce the moral culpability of the killing." *Ibid.*

II

Lockett and *Eddings* have at their core an understanding that the factors that can rationally militate against the appropriateness of death are varied, subjective, and not subject to prior itemization. See also *McGautha* v. *California*, 402 U. S. 183, 204–208 (1971). Moreover, those cases clearly stand for the proposition that, within a broad range of relevance, the weight of any offered

[3] The proffered evidence would of course also have been quite relevant to such issues as future dangerousness and prospects of rehabilitation.

factor of mitigation is for the sentencer to determine. Here the sentencers were the jurors. Although evidence of various events in Boyd's personal history was admitted, expert evidence that might have been highly useful to the sentencer's attempt to understand Boyd's crime and its relation to those events of personal history was excluded. Expert knowledge of human motivation might well have been considered highly relevant in the eyes of the jurors, for it might have offered an alternative explanation for why Boyd killed. Without that evidence, the scattered personal history evidence might have had little apparent significance, but the expert evidence might well have provided a link between the personal history evidence and that "extenuat[ion] or reduc[tion of] the moral culpability of the killing" that might call for a sentence of less than death. The exclusion of the expert evidence thus violated *Lockett* and *Eddings*.

Behind the State Supreme Court decision stand certain premises concerning punishment. Most apparently, the court took the view that it would be highly questionable to mitigate punishment based on a criminal's conformity to a social psychology profile that traces the crime's origins to the traumas of the criminal's life and to the self-destructive impulses that those traumas may produce. But under the Constitution, the weight of mitigating factors is a judgment for the capital sentencer, and neither court nor legislature may usurp the sentencer's role. In a jury's eyes, the fact that a killer is moved by self-destructive tendencies might make a crime seem more generally tragic and less demanding of retribution, and it might make the criminal seem less clearly evil and more capable of rehabilitation. Moreover, the jury might become less concerned with the prospect of future dangerousness where a defendant's violence stemmed from intimacy and the likely alternative to death is that he spend his life in prison far from loved ones.[4]

---

[4] There is some ambiguity in the State Supreme Court's opinion as to whether the affirmance rested on a view that the proffered evidence was properly excludable as irrelevant or was simply of so little weight as to not be a basis for vacating the sentence in this case. Either basis would of course be improper. The former would clearly be contrary to the discussions of relevance in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and the latter would ignore those cases' determination that the sentencer be the judge of the proper weight to be given to mitigating

Although these possible uses of the proffered but excluded evidence show that it was of clear relevance within even the most traditional views of mitigation, its possible power with the jury is even clearer when we consider the inherent subjectivity of capital sentencing decisions. Put simply, viewing the defendant's behavior in terms of a pattern that has governed a far greater number of persons than the defendant alone might lead a jury to step beyond initial revulsion and attempt to understand the crime in more human terms. As one commentator has speculated, in many cases a jury's ability to take precisely that step might be what determines whether or not a defendant will be sentenced to die:

> "[It may be that] many jurors vote to execute when they are repelled by the defendant, because he presents the threatening image of gratuitous, disruptive violence that they cannot assimilate into any social or psychological categories they use in comprehending the world. Jurors can probably give mercy to even the most vicious killers if they can somehow understand what might cause this person to be a killer . . . . A juror votes to expel the defendant who presents an image of violence he or she cannot assimilate into any stabilizing categories, and who thereby threatens his or her sense of comfortable order in the world." Weisberg, Deregulating Death, 1983 S. Ct. Rev. 305, 391.

It was our recognition of the importance to a defendant of just this sort of subjective but intensely human analysis of mitigation that stood behind this Court in *Lockett* and *Eddings*. Relying on those cases, Boyd sought to place his crime within the jury's understanding. The state courts denied him the right to make that effort.

---

factors. Whatever might be the circumstances, if any, that might allow a court to speculate as to the possible harmlessness of an improper exclusion of a properly proffered mitigating factor, cf. *Eddings*, *supra*, at 119 (O'CONNOR, J., concurring); see also *Songer* v. *Wainwright*, 469 U. S. 1133, 1140, and n. 13 (1985) (BRENNAN, J., dissenting from denial of certiorari), the standard can certainly be no less than the constitutional harmless-error standard we have otherwise endorsed. The court below did not engage in any determination that there was error that could be found harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U. S. 18 (1967). Moreover, there is no reason to believe that any such determination could reasonably have been made in a case such as this.

III

We have broadly declared that the law cannot preclude a capital sentencer's consideration of "'*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings*, 455 U. S., at 110 (quoting *Lockett*, 438 U. S., at 604). Accordingly, a constitutional death sentence cannot result from a process wherein the State may portray a defendant's acts as so "inhuman," bizarre, and cruel as to be beyond the reach of human sympathy, but a defendant is legally precluded from offering in mitigation those "'diverse frailties of humankind'" an understanding of which might place the barbaric act within the realm of the tragic but nonetheless human. 455 U. S., at 112, n. 7 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)).

The *Lockett-Eddings* principle stems from the "'fundamental respect for humanity underlying the Eighth Amendment,'" *Eddings*, *supra*, at 112 (quoting *Woodson* v. *North Carolina*, *supra*, at 304), and rests on the requirement that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976). Without the *Lockett-Eddings* principle, the uniqueness of a person's life, including how that life may have led to the crime, may be casually ignored in determining whether that person should live or die. The Constitution cannot tolerate the execution of people "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, *supra*, at 304. This Court should not stand by and allow the *Lockett-Eddings* principle to erode. I would thus grant review, and I dissent from the denial of certiorari.

No. 84–5843. PATTERSON *v.* SOUTH CAROLINA; and

No. 84–5850. KOON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 84–5843, 285 S. C. 5, 327 S. E. 2d 650; No. 84–5850, 285 S. C. 1, 328 S. E. 2d 625.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In spite of this Court's repeated declarations that a capital "'sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character . . . that the

defendant proffers as a basis for a sentence less than death,'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)), the South Carolina Supreme Court has determined that evidence of a capital defendant's likely nondangerousness within a prison environment is legally irrelevant to the capital sentencer's choice between death or life in prison. In these cases, the petitioners were sentenced to death. They had offered such evidence in mitigation of death but were denied the opportunity of submitting the evidence to their sentencing juries.

The death sentences in these cases were imposed in glaring violation of two lines of this Court's capital sentencing jurisprudence. First, and most obviously, the sentences are contrary to the *Lockett-Eddings* line of authority, which makes unmistakably clear that it is for the sentencer to determine the weight to be given to proffered evidence of mitigation. Second, they are equally in conflict with those decisions of this Court that make equally clear that the question of a capital defendant's future dangerousness is a legitimate penological concern relevant to a capital sentencing hearing. See *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976).

While this latter group of cases affirmed the penological relevance of future dangerousness in contexts in which the State urged it as a factor in aggravation, the hitherto relevant factor of future dangerousness cannot become suddenly and cruelly "irrelevant" as a matter of law when a defendant wishes to assert its absence as a factor in mitigation. As was declared in a precursor to *Lockett* and *Eddings*, "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, *supra*, at 271. Rather than allow *Lockett* and *Eddings* to be eroded through such a cruelly inequitable view of relevance, I would grant these petitions.[1]

---

[1] I continue to adhere 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, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in these cases because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably

I

At the time of the sentencing hearings in question the South Carolina Supreme Court's view of the relevance of predictive evidence as to a defendant's future nondangerousness in a prison environment was clear:

> "The penalty phase of a capital murder case is concerned with the existence or nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. . . . In *Lockett* v. *Ohio*, . . . cited as controlling in *Eddings* v. *Oklahoma*, . . . the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *State* v. *Koon*, 278 S. C. 528, 536, 537, 298 S. E. 2d 769, 773–774 (1982) (hereinafter *Koon I*).[2]

At Koon's hearing below, his counsel sought to develop a number of avenues of mitigating evidence. First, he sought to call two prison officials to testify as to petitioner's excellent record in prison and his demonstrated ability to adapt to prison life. Record in No. 84–5850, pp. 922–927. Second, he sought to call psychiatric experts to testify as to Koon's mental condition. Those psychiatrists had examined him and were prepared to testify that he suffered from a severe mental disorder, and that partly as a result of that disorder he was extremely capable of

---

narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Boyd* v. *North Carolina*, *ante*, p. 1030 (MARSHALL, J., dissenting from denial of certiorari); *Eutzy* v. *Florida*, *post*, p. 1045 (MARSHALL, J., dissenting from denial of certiorari).

[2] This ruling by the South Carolina Supreme Court occurred in an appeal of an earlier sentencing of petitioner Koon. In both of these cases the capital defendants had previously been sentenced to death pursuant to proceedings that were later found by the South Carolina Supreme Court to violate state law. *State* v. *Patterson*, 278 S. C. 319, 295 S. E. 2d 264 (1982); *Koon I*. Both had thus been imprisoned for a substantial period at the time of their resentencing hearings.

adapting to prison life. They would have testified that, within the highly structured and regulated context of life in prison, Koon would be unlikely to present any problem of future dangerousness, and that, indeed, he might live a more productive life than he was capable of living outside of confinement. *Id.*, at 925–928. See also *id.*, at 1062–1066.[3]

The trial court, relying on *Koon I*, excluded all of the prison officers' testimony, and all psychiatric evidence of Koon's ability to adapt to prison life or of his likely future nondangerousness within the prison environment. Although Koon was allowed to

---

[3] At the sentencing hearing at issue in the instant case, Koon made a proffer that his psychiatric expert would testify to substantially the same effect as the expert had done in the hearing that resulted in *Koon I*, *supra*. The following testimony by Dr. Pattison, an expert psychiatric witness, was proffered in mitigation at that earlier hearing:

"Q: You have observed Paul in his prison environment—his jail environment. Do you have an opinion as to his ability to adapt to a long term institutional environment?

"A: Yes. Both from the records and from observing him in the jail and talking with him it is, I think, quite clear in my professional opinion that he adapts very well to an institutional environment. As a matter of fact, in my professional judgment, in an institutional environment he has performed at probably his highest levels of function during his adult life, in as much as that environment is supportive, protective and has a relatively low level of stress compared to life in the outside world. Therefore, in this case I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long term basis . . . .

"Q: Do you think Paul would be a violent person in an institutionalized environment?

"A: Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than with men. Therefore, I conclude that he would be a very good risk for good adjustment in an institution and a very low risk for assaultive or violent behavior in an institutional setting.

"Q: He could be, in your opinion, could he be a contributive [sic] member to a prison institution?

"A: Again, for the same reasons, I would say yes, in my professional opinion." Pet. for Cert. in No. 84–5850, pp. 6–7.

call a psychiatric witness to testify about his general psychiatric makeup, questions concerning adaptability or future nondangerousness were prohibited. The witness did briefly refer to petitioner's successful adaptation to prison life in responding to a question only tangentially related to that issue; petitioner's counsel was obviously unable to either develop this issue to any extent or to draw the jury's attention to it in his summation.

In *Patterson*, the facts are quite similar. Petitioner proffered evidence from prison authorities that he had an exemplary prison record during the period of almost three years since his earlier trial, and proffered evidence from a psychiatrist that individuals exhibiting a personality pattern similar to petitioner's "usually make a satisfactory adjustment to prison life" so that the likelihood of future violence by such persons "diminishes with the passing of time." Record in No. 84–5843, p. 1442. The trial court excluded all this evidence as irrelevant under the authority of *Koon I*. Thus, the sentencing jury was given no opportunity at all to consider either petitioner's behavior in prison or the issue of petitioner's likely future nondangerousness within a prison environment.

On appeal, both of these petitioners' death sentences were affirmed by the State Supreme Court on a slight variation of the *Koon I* rationale. 285 S. C. 5, 327 S. E. 2d 650 (1984); 285 S. C. 1, 328 S. E. 2d 625 (1984). Following *Koon I*, the court held that all predictive evidence of Patterson's future behavior in prison was simply irrelevant. It modified *Koon I* only to the extent that it held that the bare facts of Patterson's past prison record would now be considered admissible as general personal history. It read *Lockett* and *Eddings* as saying that a defendant's "character" was relevant mitigating evidence that can be shown through evidence of past behavior. It thus found that it had been error for the trial court to exclude the prison officers' testimony concerning Patterson's prior prison behavior. But since such behavior was relevant only to show a generally good character, the court held that it was merely cumulative of other general character evidence submitted by the petitioner.[4]

---

[4] The character evidence that the court found was cumulative to Patterson's evidence of his prison record was the testimony of a former employer that Patterson was a good and responsible worker and general testimony by Pat-

Similarly, in Koon's appeal below, the State Supreme Court held that the evidence of future nondangerousness was properly excluded. Prison officials' testimony as to Koon's prison record was relevant, but again, was properly excluded as cumulative since the psychiatrist had briefly, in an unresponsive answer, stated that petitioner had been doing quite well in prison.

In both of these cases, the capital defendants were limited to argue the most vague and general theories of mitigation. Their chosen theories were completely excluded from the jury's consideration. The State Supreme Court declared that it was irrelevant, as a matter of law, to argue that a death sentence might be inappropriate where a defendant could be relied on to lead an unthreatening life, and even a somewhat productive life, if kept in prison.[5]

II

The constitutionality of these sentences rests on the premise that a State can make irrelevant to the capital sentencing process, as a matter of law, the theory of future nondangerousness that was proffered in mitigation by petitioners. The State's reasoning was that the proffered factor does not "aris[e] out of the murder" nor "bear logical relevance to the crime." *Koon I*, 278 S. C., at 536, 298 S. E. 2d, at 774. Put another way, the State viewed the factor as irrelevant because its proof would not reduce the moral culpability of the defendant. But this Court has never limited the circumstances relevant to a capital sentencing determination to those going to moral culpability. Quite the contrary, this Court has repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns.

---

terson's relatives to the effect that he had been a good child and was still a "wonderful person" who had been led by bad influences to commit a murder that was out of character for him.

[5] The fact that in both of these cases the state court held that the proffered evidence of prior prison behavior was "cumulative" cannot save either of these decisions from review. In both cases, the theory of future nondangerousness was deemed irrelevant and the evidence and argument which would have been necessary to its proof were excluded. The determinations of "cumulativeness" whatever their merits, cf. *Chapman* v. *California*, 386 U. S. 18 (1967), were determinations that rested on the predicate federal determination that the only basis for the relevance of the evidence was to show general good character.

The most glaring is *Jurek* v. *Texas*, 428 U. S. 262 (1976), where this Court upheld a state law requiring capital sentencing juries to consider the issue of future dangerousness. The opinion announcing the judgment there declared:

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . *And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.* . . . The task that a [capital sentencing] jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.*" *Id.*, at 274–276 (emphasis added).

The Court has treated evidence of future dangerousness as relevant even where the evidence at issue seemed of much less predictive value than the evidence at issue here. In both the instant cases, the witnesses who were excluded had all had extensive contact with the defendants and were testifying only to the likely behavior of the defendants within the same environment as that in which they had made their observations. In contrast, in *Barefoot* v. *Estelle*, 463 U. S. 880 (1983), this Court approved of the relevance of expert psychiatric predictions of future dangerousness even where the expert witness was testifying based on hypotheticals without ever having examined the defendant. *Id.*, at 903–906. If that evidence was relevant to capital sentencing, how can the evidence at issue in the instant cases be deemed irrelevant? See also *California* v. *Ramos*, 463 U. S. 992 (1983).

III

Of course there are two differences between these earlier cases and the instant cases. First, relevance in the earlier cases was urged on the sentencers by prosecutors, who called for death sentences on the theory that the defendants at issue might be violent in the future. Here, evidence of the absence of future dangerous-

ness is offered as a reason for urging that the defendants not be sent to die. But this difference can hardly be a relevant one. A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment.

The second difference is that discussions of future dangerousness in our prior cases have emphasized the defendant's dangerousness to the society outside of jail, while here the emphasis was on the likely nondangerousness of the defendants' future behavior within jail. But although this might be viewed as an important distinction by a sentencer, it cannot be rationally viewed as a distinction that makes nondangerousness in prison irrelevant as a matter of law. If a jury can base a sentencing determination on predictions of the possible dangerousness of a defendant at the point far in the future when, after a long confinement, he might be paroled or pardoned, a jury cannot be precluded from considering the more immediate issue of his future dangerousness during that quite lengthy period when he will remain in jail. Similarly, it would be the ultimate cynicism to adopt a conclusive presumption that a sentencing jury would simply be wholly uninterested in the possible dangers that a killer who continues to be violent might present to other inmates—or conversely—that the jury would be wholly unimpressed by the fact that a different criminal might present no dangers to those inmates.

Ultimately, the evidence offered in mitigation here was premised on the proper notion that a jury might confront in a serious and humane way the question of what is actually to be gained and lost by a verdict of death. While in some cases the cry for moral retribution may sound clear to the jury, in others it may not. In the latter cases, it may be quite effective, as it would always be legitimate, to remind the jury that an execution may generate little social benefit and, indeed, may generate substantial social loss. A jury may come to see that a prisoner's life in prison has some substantial social worth. He may adapt to his environment, find some degree of community in it, and contribute in some way to that community. He may even come to live a life of greater meaning than that which he knew before his confinement. Should a sentencer believe that there is a chance that these may be the consequences of a rejection of a death sentence, these factors may

become powerful factors of mitigation. South Carolina's determination that they are simply irrelevant cannot stand.

No. 84–6123. ESTES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 84–6154. ALBANESE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 104 Ill. 2d 504, 473 N. E. 2d 1246.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Charles Albanese was convicted of murder and sentenced to death. On appeal to the Illinois Supreme Court, Albanese argued that the Illinois death penalty statute violated the Eighth and Fourteenth Amendments because of the broad, post-trial discretion granted each of Illinois' 102 State's Attorneys on whether to seek the death penalty following a conviction for a capital offense.

Under the Illinois statute, the decision whether to convene a death hearing rests solely in the hands of the individual Illinois State's Attorney. Ill. Rev. Stat., ch. 38, ¶9–1(d) (1983). As a result, the statute vests in each State's Attorney freewheeling discretion to select, among potential capital defendants, those who may be subject to the death penalty. It allows each of the 102 State's Attorneys to establish his own policy, or no policy at all, by which to exercise this discretion. The scheme thereby introduces into the penalty phase an element of completely unbridled discretion and invites wholly arbitrary decisionmaking. It does so at the phase of the proceeding at which clear statutory guideposts and carefully channeled discretion are absolutely necessary to preserve the constitutionality of a capital sentencing scheme. See *Zant* v. *Stephens*, 462 U. S. 862, 876–877 (1983); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion).

Even if I did not continue to believe that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant certiorari in this case. As I have said before, I believe that this aspect of the Illinois scheme poses a serious constitutional question that is worthy of this Court's consideration. See *Eddmonds* v. *Illinois*, 469 U. S. 894 (1984) (MARSHALL, J., dis-

senting from denial of certiorari). I therefore dissent from the Court's refusal to consider the merits of this case.

No. 84–6182. EUTZY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 458 So. 2d 755.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Although the State of Florida has adopted a system of capital sentencing that allows a trial judge to overturn a sentencing jury's finding as to the inappropriateness of death—and although this Court has upheld that system as constitutional, see *Spaziano* v. *Florida*, 468 U. S. 447 (1984)—that system nevertheless remains subject to the dictates of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). In Florida, as in other States, a capital defendant has a right to a sentencer who is free to consider and weigh, within the broadest bounds of relevance, "'*any* aspect of a defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.*, at 110 (quoting *Lockett*, *supra*, at 604) (emphasis added).

This principle must govern judges responsible for sentencing, *Eddings*, *supra*, just as it must govern juries. In Florida, it must govern both, for the state scheme purports to split sentencing authority between the two. Although the judge has the power to override, that power is limited, for the judge may not exercise plenary discretion as to the issue of mitigation. To the contrary, the State has repeatedly purported to limit the judicial override to those cases where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). Unfortunately, regardless of this supposed limit—a limit that the State cited to this Court when arguing for the constitutionality of its sentencing process, *Spaziano*, *supra*, at 465—the State has administered capital sentencing in a manner that allows the override to repeatedly denigrate the principle of *Lockett* and *Eddings*. See *e. g.*, *Heiney* v. *Florida*, 469 U. S. 920 (1984) (MARSHALL, J., dissenting from denial of certiorari).

In this case, the Florida Supreme Court took another step in the erosion of *Lockett* and *Eddings*, affirming a judge's sentence of death over a jury's finding for life on the ground that certain miti-

gating factors that likely stood behind the jury's finding were simply invalid as a matter of law, and the jury's verdict was therefore reversible within the *Tedder* rule. Under *Lockett* and *Eddings* that legal determination is simply wrong as a matter of federal law. It embodies a view of mitigation that is violative of the Eighth Amendment. To prevent this denigration of one of the most important aspects of our Eighth Amendment law, I would grant review in this case.[1]

I

The facts of this case are not complicated. Petitioner was found guilty of murdering a taxi driver. There were no witnesses, nor was there evidence of robbery; and petitioner's sister-in-law, who testified against petitioner at trial, may have played some uncertain role in the crime. The jury returned a verdict of life in prison, and the trial judge, finding that there were three aggravating circumstances but no mitigating circumstances, overrode that verdict and imposed a death sentence. The trial judge did not attempt to analyze the jury's thought process when he reversed it, nor did he make any *Tedder* finding. He simply expressed disagreement with the jury determination. His sentence was affirmed by the State Supreme Court. 458 So. 2d 755 (1984).

II

The State Supreme Court's analysis of the case began with a determination that at least one of the aggravating circumstances found by the trial judge was inapplicable to this case as a matter of law, but it nevertheless affirmed the death sentence because it agreed that there were no valid mitigating circumstances. It held that this situation satisfied the *Tedder* standard. However,

---

[1] I continue to adhere 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, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in this case because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See, *Boyd* v. *North Carolina*, *ante*, p. 1030 (MARSHALL, J., dissenting from denial of certiorari); *Patterson* v. *South Carolina*, *ante*, p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

petitioner's counsel had argued the presence of mitigating factors. Most prominently, counsel argued that petitioner's likely nondangerousness after incarceration should be considered a mitigating factor. Because petitioner was 43 years old at the time of his conviction, under Florida law he could not be paroled from a life sentence until he was at least 68. Petitioner's counsel argued that there was a very low probability that a 68-year-old, emerging from 25 years in prison, would constitute a substantial and continuing threat to the society.

The State Supreme Court simply ruled that such an argument of future nondangerousness was irrelevant as a matter of law.

> "[T]he crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young." 458 So. 2d, at 759 (citations omitted).

III

It may be that the argument proffered by petitioner would prove unpersuasive to a sentencing authority, but it is simply wrong to hold that it is legally irrelevant. In the State's view, legitimate mitigation is limited to the consideration of factors that would reduce the moral culpability of the defendant and thus the need for moral retribution. But this Court has never limited the circumstances relevant to a capital sentencing determination in such a way.

This Court has, in fact, repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns. See, *e. g.*, *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976). As the opinion announcing the judgment in *Jurek* declared:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . And any sentencing authority must pre-

dict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Id.*, at 275.

Of possibly even greater relevance to this case is *California* v. *Ramos*, *supra*, in which this Court held that the mere possibility that a capital defendant might be pardoned by the Governor at some undefined time after receiving a life sentence was a legitimate sentencing concern, because of the issue of future dangerousness. The existence of a provision for pardons is certainly no more relevant to a defendant's moral culpability than is his age, but that link never has been accepted by this Court as a test for relevance even as to aggravating circumstances. In contrast, the issue of future dangerousness repeatedly has been accepted as relevant to valid penological concerns. See *Patterson* v. *South Carolina*, *ante*, p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

Given that future dangerousness after a distant parole or pardon has been considered relevant to aggravation, it must certainly be considered relevant to mitigation. As I said in *Patterson:* "A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment." *Ante*, at 1043.[2] Indeed, whether or not a State chooses to allow evidence of future dangerousness in aggravation, *Lockett* and *Eddings* make clear that evidence of future nondangerousness simply cannot be prohibited as a consideration in mitigation.

IV

This Court, in *Lockett* and then more decisively in *Eddings*, held that *any* aspect of a case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is

---

[2] Although it might also be argued that looking to a defendant's advanced age at the time when he might possibly be released from prison would be unreliable evidence of future nondangerousness, this Court has been quite willing to find relevance in evidence of future dangerousness of a much more speculative nature. See, *e. g.*, *Barefoot* v. *Estelle*, 463 U. S. 880, 903–906 (1984). Given that speculative evidence of future dangerousness has been so willingly declared relevant for aggravation, it would simply be constitutionally intolerable to declare the evidence of nondangerousness here argued in mitigation to be irrelevant.

certainly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence on the basis that a life sentence, even with the possibility of parole, will sufficiently render a defendant nondangerous to the outside society until he is of an age where he likely will no longer present a significant threat of violence. Under federal law, a capital defendant has a right to a sentencer who may consider such a factor for mitigation. But under Florida law, a life sentence based on such a factor shall now be subject to override as irrational. The Florida courts cannot be allowed to use their override system to erode the rights protected by *Lockett* and *Eddings*. The fact that they are doing so is reason enough to grant review.

No. 84–6286 (A–667). GRAVES *v.* HESTER ET AL. C. A. 4th Cir. Application for injunction, addressed to JUSTICE STEVENS and referred to the Court, denied. Certiorari denied. Reported below: 751 F. 2d 379.

Rehearing Denied

No. 82–1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL., 469 U. S. 528;

No. 82–1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL., 469 U. S. 528; and

No. 83–1416. NATIONAL LABOR RELATIONS BOARD *v.* ACTION AUTOMOTIVE, INC., 469 U. S. 490. Petitions for rehearing denied.

No. 84–355. NEW YORK *v.* SMITH, 469 U. S. 1227;

No. 84–890. BROWN *v.* UNITED STATES, 470 U. S. 1004;

No. 84–896. IN RE ANDERSON, 469 U. S. 1206;

No. 84–897. TESCH, SHERIFF OF CASS COUNTY, NEBRASKA, ET AL. *v.* MCCURRY ET AL., 469 U. S. 1211;

No. 84–911. KOKER ET UX. *v.* SAGE ET AL., 469 U. S. 1201;

No. 84–937. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL., 469 U. S. 1201;

No. 84–952. GERZOF *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, 469 U. S. 1200;

No. 84–1031. COMMUNICATIONS SATELLITE CORP. *v.* FRANCHISE TAX BOARD, 469 U. S. 1201; and

No. 84–1034. FINCH ET AL. *v.* HUGHES AIRCRAFT CO., 469 U. S. 1215. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 84–1057. HUTCHERSON ET AL. *v.* BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA, ET AL., 470 U. S. 1004;

No. 84–1074. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 469 U. S. 1216;

No. 84–1095. FITZPATRICK *v.* DIMARTINO, JUDGE, SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY, ET AL., 470 U. S. 1005;

No. 84–1153. OTTO *v.* UNITED STATES, 469 U. S. 1217;

No. 84–5821. HOLMAN *v.* ILLINOIS, 469 U. S. 1220;

No. 84–5845. NOLAND *v.* NORTH CAROLINA, 469 U. S. 1230;

No. 84–5925. NUEY *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, 470 U. S. 1007;

No. 84–6020. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY, 470 U. S. 1007;

No. 84–6037. FAISON *v.* DAVIS, JUDGE, ET AL., 470 U. S. 1030;

No. 84–6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL., 470 U. S. 1030;

No. 84–6107. HOWELL *v.* MARYLAND, 470 U. S. 1056; and

No. 84–6169. LEVINE *v.* UNITED STATES, 470 U. S. 1031. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 22, 1985

Dismissal Under Rule 53

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Case dismissed under this Court's Rule 53. [For earlier order herein, see, *e. g.*, 459 U. S. 1096.]

Appeals Dismissed

No. 84–1281. WATSON MARINE SERVICES, INC. *v.* KLIEBERT EDUCATIONAL TRUST ET AL. Appeal from Ct. App. La., 5th Cir., dismissed for want of substantial federal question. Reported below: 454 So. 2d 855.

No. 84–1380. ALLNUTT *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 59 Md. App. 694, 478 A. 2d 321.

No. 84–1429. GILBERT *v.* UNIVERSITY OF TENNESSEE ET AL. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 82–1928. SWYKA ET AL. *v.* JOHNSON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wilson* v. *Garcia*, *ante*, p. 261. Reported below: 699 F. 2d 675.

No. 84–706. LARSON, SECRETARY, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, ET AL. *v.* FITZGERALD. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson* v. *Garcia*, *ante*, p. 261. Reported below: 741 F. 2d 32.

Miscellaneous Orders

No. A–753 (84–6506). BEWLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–470. IN RE DISBARMENT OF HAYES. Disbarment entered. [For earlier order herein, see 469 U. S. 1102.]

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Joint petition for an order with respect to fees and expenses of the Special Master granted, and it is ordered that the Honorable Wade H. McCree, Jr., be awarded the sum of $50,000 as compensation for his services as Special Master and that his disbursements of $2,246.74 be allowed. It is further ordered that the fees and disbursements be paid in equal parts by the State of California, the State of Texas, and William R. Lummis and First Interstate Bank of Nevada.

The order of this Court entered December 13, 1982 [459 U. S. 1083], is vacated.

This case having been dismissed on stipulation pursuant to Rule 53.1 of the Rules of this Court [*supra*, at 1050], it is further ordered that the Special Master is hereby discharged.

No. 84–262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. [Certiorari granted, 469 U. S. 879.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–310. IN RE SNYDER. C. A. 8th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of petitioner for leave to file a reply brief out of time granted.

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84–805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1207.] Motion of Thomas H. Jackson for leave to file a brief as *amicus curiae* granted.

No. 84–1198. TEXAS *v.* MCCULLOUGH. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellants to expedite and schedule oral argument during 1984 Term denied.

No. 84–6344. IN RE ELY. Petition for writ of mandamus denied.

Certiorari Granted

No. 84–1236. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK. C. A. 5th Cir. Certiorari granted. Reported below: 743 F. 2d 244.

No. 84–6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied

No. 83–2131. CITY OF OVERLAND PARK, KANSAS, ET AL. *v.* HAMILTON. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 2d 613.

No. 83–2140. MURRAY CITY ET AL. *v.* MISMASH. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 2d 1366.

No. 83–6676. GARCIA *v.* INGRAM. C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 691.

No. 83–7047. MCCLURE *v.* ESPARZA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 162.

No. 84–663. MINNIS *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 784.

No. 84–894. ILLINOIS *v.* FOGEL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1160, 481 N. E. 2d 361.

No. 84–1028. NEWS PUBLISHING CO., DBA ROME NEWS TRIBUNE *v.* DEBERRY. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 787, 321 S. E. 2d 112.

No. 84–1036. MATERIA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 197.

No. 84–1039. OLSON *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1061.

No. 84–1063. FOSTER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1491.

No. 84–1068. STUBBS, ADMINISTRATRIX OF THE ESTATE OF STUBBS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 58.

No. 84–1083. WEST, AS MOTHER AND ADMINISTRATRIX OF THE ESTATE OF WEST, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1317.

No. 84–1112. FLEET FINANCE, FKA SOUTHERN DISCOUNT *v.* MOYER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84–1116. LOUISIANA *v.* JACKSON. Sup. Ct. La. Certiorari denied. Reported below: 457 So. 2d 660.

No. 84–1216. ADKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 744.

No. 84–1317. ACKERMAN, SHERIFF OF BONNEVILLE COUNTY, ET AL. *v.* GILES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 614.

No. 84–1358. GREENFIELD ET AL. *v.* WOOD, TRUSTEE FOR TOWER 2450, INC. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–1359. LERMAN *v.* FLYNT DISTRIBUTING CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 123.

No. 84–1364. WILLIAMSON *v.* GILLMOR. Int. Ct. App. Haw. Certiorari denied.

No. 84–1370. AUSTIN, A MINOR, ET AL. *v.* BROWN LOCAL SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1161.

No. 84–1375. JETT *v.* JETT. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 449 So. 2d 557.

No. 84–1389. CITY OF BURBANK ET AL. *v.* CINEVISION CORP. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 560.

No. 84–1390. WILSON ET AL. *v.* POGO PRODUCING CO. C. A. 10th Cir. Certiorari denied.

No. 84–1394. MATCHETT *v.* CHICAGO BAR ASSN. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1004, 467 N. E. 2d 271.

No. 84–1395. LOTZ REALTY CO., INC., ET AL. *v.* ANTI-DEFAMATION LEAGUE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–1401. CARPENTER *v.* CITY OF PASCO, WASHINGTON. Super. Ct. Wash., Franklin County. Certiorari denied.

No. 84–1411. ARKANSAS-BEST FREIGHT SYSTEM, INC. *v.* BARRENTINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 750 F. 2d 47.

No. 84–1431. SMITH ET AL. *v.* SORENSEN, COMMISSIONER OF LABOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 427.

No. 84–1443. THOMPSON BUILDING MATERIALS INC. *v.* BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1396.

No. 84–1451. BAKER *v.* SEABOARD SYSTEM RAILROAD, INC. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–1460. ALL ALEXANDER L. KIELLAND LITIGANTS *v.* PHILLIPS PETROLEUM COMPANY NORWAY, INC. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84–1477. MOON *v.* SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 599.

No. 84–1511. SERVOTECH INTERNATIONAL ESTABLISHMENT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1280.

No. 84–1512. SOTERAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 585.

No. 84–1516. MARTINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 60.

No. 84–5714. ELLISON *v.* LANDON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 961.

No. 84–5827. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 122.

No. 84–5905. FITZPATRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84–6018. HARRISON *v.* MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6069. HINKLE *v.* MOSS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84–6086. COBB *v.* OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6298. LOCKETT *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6305. QUIROZ *v.* WAWRZASZEK, ADMINISTRATOR, ARIZONA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1375.

No. 84–6307. PERKINS *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84–6309. ALI *v.* FORD MOTOR CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 84–6312. MELDRUM *v.* CAMPBELL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–6318. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1167, 483 N. E. 2d 732.

No. 84–6320. DAY *v.* CARTWRIGHT ET AL. Sup. Ct. Tex. Certiorari denied.

No. 84–6321. PATTERSON *v.* CHARTER FINANCIAL GROUP, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1396.

No. 84–6322. PATTERSON, DBA SCREEN ADVERTISING FILM FUND *v.* BUENA VISTA DISTRIBUTION CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 602.

No. 84–6327. HYDE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 682 S. W. 2d 103.

No. 84–6335. BERGHAHN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 683 S. W. 2d 697.

No. 84–6337. FITZGERALD *v.* JORDAN, SUPERINTENDENT, COOK COUNTY JUVENILE DETENTION CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1120.

No. 84–6339. ALBERTON *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84–6340. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 880.

No. 84–6342. GUSTAFSON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 459, 359 N. W. 2d 920.

No. 84–6345. DOE *v.* BOARD OF BAR OVERSEERS OF MASSACHUSETTS ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 1001, 465 N. E. 2d 250.

No. 84–6365. GOCHNOUR *v.* MARSH, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1137.

No. 84–6374. FRAZIER *v.* LOPES, CONNECTICUT COMMISSIONER OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84–6378. MAXWELL *v.* BORDEN, INC. C. A. 2d Cir. Certiorari denied.

No. 84–6438. VALLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1085.

No. 84–6441. SLOAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 753 F. 2d 248.

No. 84–6443. PRIDE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6446. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 2d 1233.

No. 84–6456. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6457. LOPEZ *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 84–6463. WINTERHALDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–6361. MANZANARES *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 100 N. M. 621, 674 P. 2d 511.

No. 84–1009. BAILEY ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of the Appellate Court of Illinois, Second District. Reported below: 125 Ill. App. 3d 346, 465 N. E. 2d 979.

No. 84–1062. GEE *v.* BOYD, DISTRICT ENGINEER, NORFOLK DISTRICT OF THE CORPS OF ENGINEERS OF THE UNITED STATES DEPARTMENT OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

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

In 1982, the city of Norfolk sought permission from the Army Corps of Engineers to construct a 298-slip marina at the site of an abandoned ferry and near two existing marinas. The Corps issued an "environmental assessment"[1] concerning the project, which concluded that the socioeconomic benefits of the project outweighed its likely adverse impact on the aquatic ecosystem. The Corps further concluded that the project would not "significantly affect . . . the quality of the human environment," see 42 U. S. C. § 4332(2)(C), thereby making unnecessary the preparation of an environmental impact statement (EIS). On the same day, the Corps issued a permit to the city clearing the project.

Petitioner, a partner in a venture that owns property near the site of the proposed marina, subsequently filed suit, challenging, *inter alia*, the Corps' failure to prepare an EIS.[2] The District Court granted summary judgment to respondents and denied petitioner's cross-motion for summary judgment. On appeal, the Court of Appeals for the Fourth Circuit, like the District Court, employed an "arbitrary and capricious" standard in reviewing the agency's determination that the proposed marina would have no significant effect on the environment. *Gee* v. *Hudson*, 746 F. 2d 1471 (1984). See also *Webb* v. *Gorsuch*, 699 F. 2d 157, 160 (CA4 1983); *Providence Road Community Assn.* v. *EPA*, 683 F. 2d 80, 82 (CA4 1982). The court held that neither this finding, nor the agency's failure to consider the effect of possible future marinas on the environment, was arbitrary or capricious.

---

[1] An "environmental assessment" is a brief document that the Army Corps of Engineers prepares in order to determine whether a proposed action will have a significant effect on the human environment. If such an effect is anticipated, a more detailed "environmental impact statement" is required under 42 U. S. C. § 4332(2)(C). See App. to Pet. for Cert. 15a–16a, n. 1.

[2] Petitioner also contended that respondents failed to consider all reasonable alternatives and mitigation measures as required by 42 U. S. C. § 4332(2)(E), and that they had failed to verify certain financial data submitted by the applicant. These claims were rejected by the lower courts.

The decision below is the most recent in a long line of cases that have used divergent standards of review to assess an agency's failure to prepare an EIS. The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. See *Grazing Fields Farm* v. *Goldschmidt*, 626 F. 2d 1068, 1072 (CA1 1980); *Hanly* v. *Kleindienst*, 471 F. 2d 823, 828–829 (CA2 1972), cert. denied, 412 U. S. 908 (1973); *Nucleus of Chicago Homeowners Assn.* v. *Lynn*, 524 F. 2d 225, 229 (CA7 1975), cert. denied *sub nom. Nucleus of Chicago Homeowners Assn.* v. *Hill*, 424 U. S. 967 (1976). Four other Circuits have employed a "reasonableness" standard of review. See *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1973); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d 269, 271 (CA8), cert. denied, 449 U. S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture*, 681 F. 2d 1172, 1177–1178 (CA9 1982); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1248–1249 (CA10 1973).[3] The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, *Township of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F. 2d 732, 741–742 (1982), and the Sixth Circuit has similarly declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.*, 659 F. 2d 74, 75 (1981). The Court of Appeals for the District of Columbia Circuit has developed a four-part test to determine whether the agency action is arbitrary and capricious. *Sierra Club* v. *Peterson*, 230 U. S. App. D. C. 352, 717 F. 2d 1409 (1983).[4]

---

[3] The Eleventh Circuit has adopted as binding decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner* v. *City of Prichard*, 661 F. 2d 1206 (CA11 1981) (en banc). Therefore, the Eleventh Circuit would presumably employ a "reasonableness" standard in reviewing the failure to prepare an EIS statement.

Courts that have applied a "reasonableness" standard have generally placed an initial burden on the plaintiff of raising a "substantial environmental issue concerning the proposed project," after which the burden shifts to the agency to demonstrate the reasonableness of its negative determination. See *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d, at 271. See also *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture*, 681 F. 2d, at 1178; *Pokorny* v. *Costle*, 464 F. Supp. 1273, 1276 (Neb. 1979).

[4] The test used by the District of Columbia Circuit in scrutinizing an agency's finding of "no significant impact" is:

"(1) whether the agency took a 'hard look' at the problem;

This conflict is not merely semantic or academic. Certainly, there are individual cases in which application of one standard rather than the other makes no difference. But the lower courts that have wrestled with the question of what rule to adopt clearly have not viewed the issue as one that might be settled by the flip of a coin. Courts that have chosen the "reasonableness" standard have relied on the importance of "the basic jurisdiction-type conclusion involved,"[5] or on the "mandatory nature" of the statute's language.[6] In settling on this more stringent rule, the Court of Appeals for the Fifth Circuit expressed the concern that "[t]he spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect environment were too well shielded from impartial review." *Save Our Ten Acres*, *supra*, at 466. In contrast, courts adopting the "arbitrary and capricious" test have emphasized that the decision not to prepare an EIS is one committed to the agency's discretion,[7] and that application of a more deferential standard "permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."[8] The Court of Appeals did not state in this case that it would have reached the same result under a "reasonableness" standard,[9] and it is not for us to say what conclusions it might have drawn had it applied different considerations to these facts.

The lower courts have long been in disarray on what standard of review to apply to an agency's decision not to undertake an EIS. I would grant certiorari to end this confusion.

"(2) whether the agency identified the relevant areas of environmental concern;

"(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and

"(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." 230 U. S. App. D. C., at 356, 717 F. 2d, at 1413.

[5] *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1973).

[6] *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture*, *supra*, at 1177, n. 24; see also *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1249 (CA10 1973).

[7] *Providence Road Community Assn.* v. *EPA*, 683 F. 2d 80, 82 (CA4 1982).

[8] *Hanly* v. *Kleindienst*, 471 F. 2d 823, 829–830 (CA2 1972), cert. denied, 412 U. S. 908 (1973). See also *First National Bank of Chicago* v. *Richardson*, 484 F. 2d 1369, 1381 (CA7 1973).

[9] Cf. *Providence Road Community Assn.*, *supra*, at 82, n. 3.

No. 84–1239. YOUNG *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR dissent and would grant the petition for writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). Reported below: 748 F. 2d 194.

No. 84–1350. COHEN, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* BETSON ET AL. C. A. 3d Cir. Motion of respondents Betson and Woodward for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 749 F. 2d 1009.

No. 84–1357. UNITED STATES *v.* MORGAN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 743 F. 2d 1158.

No. 84–1386. MORRISSEY *v.* WILLIAM MORROW & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 84–1470. FRANCOIS *v.* RAYBESTOS-MANHATTAN, INC., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 749 F. 2d 37.

No. 84–5972. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 676 S. W. 2d 379.

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. 84–6145. REYES *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1045.

JUSTICE WHITE, dissenting.

Because the decision in this case conflicts with *Bolanos-Hernandez* v. *INS*, 749 F. 2d 1316 (CA9 1984), I would grant certiorari in this case.

Rehearing Denied

No. 83–1065. COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL., 470 U. S. 226. Petition for rehearing denied.

No. 83–1452. MARRESE ET AL. *v.* AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, 470 U. S. 373. Motion of petitioners for clarification denied. Petition for rehearing denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition.

No. 84–532. ROWLAND *v.* MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO, 470 U. S. 1009;

No. 84–5548. SMITH *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, 470 U. S. 1060;

No. 84–5811. GACY *v.* ILLINOIS, 470 U. S. 1037;

No. 84–6082. ATTWELL ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL., 470 U. S. 1008;

No. 84–6173. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE, 470 U. S. 1086;

No. 84–6273. MULLINS *v.* OHIO, 470 U. S. 1059; and

No. 84–6315. IN RE MCDONALD, 470 U. S. 1082. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 27, 1985

Dismissal Under Rule 53

No. 84–1409. DELTA AIR LINES, INC. *v.* JACOBSON. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 742 F. 2d 1202.

APRIL 29, 1985

Appeals Dismissed

No. 84–5795. CORNES *v.* KELLUM ET AL. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 125 Ill. App. 3d 512, 466 N. E. 2d 273.

No. 84–6381. SINGER *v.* BODLEY, JUDGE, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84–1015. GOODSON *v.* UNITED STATES. Ct. Mil. App. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *Illinois*, 469 U. S. 91 (1984). Reported below: 18 M. J. 243.

No. 84–1208. MURR *v.* TENNESSEE BOARD OF LAW EXAMINERS. Sup. Ct. Tenn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985).

*Miscellaneous Orders**

No. — – ——. AFFLERBACH ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file a petition for writ of certiorari in typewritten form not in compliance with the Rules of this Court denied.

No. — – ——. DAVIS ET AL. *v.* AMOCO OIL CO. ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–791. HOLDERMAN *v.* UNITED STATES (No. 84–1637); and HOLDERMAN *v.* UNITED STATES (No. 84–1638). C. A. 2d Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–473. IN RE DISBARMENT OF HUTCHINS. Disbarment entered. [For earlier order herein, see 469 U. S. 1202.]

No. D–474. IN RE DISBARMENT OF KOZEL. William Thomas Kozel, of Santa Maria, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 19, 1985 [469 U. S. 1202], is hereby discharged.

No. D–490. IN RE DISBARMENT OF HOLTZMAN. It is ordered that Frank E. Holtzman, of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable

*For the Court's orders prescribing amendments to the Bankruptcy Rules, see *post*, p. 1149; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1155; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1169.

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of petitioners to supplement the record granted.

No. 84–1103. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. [Certiorari granted, 470 U. S. 1049.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Jack T. Lassiter, Esquire, of Little Rock, Ark., be appointed to serve as counsel for petitioner in this case.

No. 84–6158. FERRARA *v.* BECTON, DICKINSON & CO. ET AL., 470 U. S. 1049. Motion of petitioner for reconsideration of the order denying leave to proceed *in forma pauperis* denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6370. IN RE BEACHUM; and

No. 84–6375. IN RE ELY. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 83–1968. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. Appeal from D. C. E. D. N. C. Probable jurisdiction noted limited to Questions I and III presented by the statement as to jurisdiction. Reported below: 590 F. Supp. 345.

Certiorari Granted

No. 84–1144. UNITED STATES *v.* VON NEUMANN. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 657.

No. 84–1274. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* DIMENSION FINANCIAL CORP. ET AL. C. A. 10th Cir. Certiorari granted. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 1402.

Certiorari Denied. (See also No. 84–6381, *supra.*)

No. 84–1105. NEW MEXICO *v.* BAKER, SECRETARY OF THE TREASURY. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 1318.

No. 84–1108. WENTURINE *v.* PARFETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84–1109. BOTHKE *v.* RACCA. C. A. 9th Cir. Certiorari denied.

No. 84–1147. SIMMONS FASTENER CORP. *v.* ILLINOIS TOOL WORKS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 1573.

No. 84–1235. WATERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 1527.

No. 84–1249. NORRIS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 1116.

No. 84–1280. BOLDEN *v.* TARRANT COUNTY DEPARTMENT OF HUMAN RESOURCES. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 84–1367. GUERRA ET AL. *v.* GARCIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1159.

No. 84–1384. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* CARSON-TRUCKEE WATER CONSERVANCY DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 2d 523.

No. 84–1412. MCDONALD *v.* UNITED AIR LINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1081.

No. 84–1414. HABERMAN ET AL. *v.* CHEMICAL BANK ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 102 Wash. 2d 874, 691 P. 2d 524.

No. 84–1417. SAN JOSE UNIFIED SCHOOL DISTRICT ET AL. *v.* DIAZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 660.

No. 84–1421. PUDLO *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 337, 462 N. E. 2d 494.

No. 84–1422. B. R. MACKAY & SONS, INC. *v.* ATTORNEY GENERAL OF ILLINOIS. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 644.

No. 84–1428. TRECKER *v.* SCAG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1176.

No. 84–1433. BROWN *v.* PAULUS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84–1439. JOHNSON *v.* BRANFORD ZONING BOARD OF APPEALS ET AL. App. Ct. Conn. Certiorari denied. Reported below: 2 Conn. App. 24, 475 A. 2d 339.

No. 84–1445. MOORE ET AL. *v.* KENYATTA. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1179.

No. 84–1450. STEPPING STONES ASSOCIATES *v.* CITY OF WHITE PLAINS. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 690, 474 N. E. 2d 1196.

No. 84–1458. CHESLER ET AL. *v.* STADLER ASSOCIATES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–1492. BEERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 752 F. 2d 499.

No. 84–1510. SMITH *v.* ALYESKA PIPELINE SERVICE CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 668.

No. 84–1527. STONEHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–1533. JARAMILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1245.

No. 84–1536. CLARK *v.* WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–1590. JENSEN ET AL. *v.* GATES LEARJET CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1325.

No. 84–1595. RIGGINS *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 84–5854. OTALORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1382.

No. 84–5944. PEOPLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 934.

No. 84–5959. LAMBINUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 747 F. 2d 592.

No. 84–6054. DIXON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 458 So. 2d 272.

No. 84–6064. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 859.

No. 84–6122. WILKS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 93, 358 N. W. 2d 273.

No. 84–6135. PERKINS *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84–6161. STALLINGS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 667.

No. 84–6176. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 484 A. 2d 570.

No. 84–6349. BIRDEN *v.* GOUSHA. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 916.

No. 84–6354. TOOMEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 38 Wash. App. 831, 690 P. 2d 1175.

No. 84–6356. PALLETT *v.* HARP ET AL. C. A. 9th Cir. Certiorari denied.

No. 84–6357. MOORE *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 386.

No. 84–6358. STUMES *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 317.

No. 84–6359. RADFORD *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84–6361. ROBINSON *v.* IKARI ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 457 So. 2d 180.

No. 84–6366. HEATH *v.* NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES LOCAL R5–189 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 374.

No. 84–6369. ELY *v.* GLEN ELLYN POLICE DEPARTMENT. Sup. Ct. Ill. Certiorari denied.

No. 84–6371. CRIST *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 476.

No. 84–6373. HERNANDEZ *v.* DUNCAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6400. GLOVER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 284 S. C. 152, 326 S. E. 2d 150.

No. 84–6411. HEMBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 30.

No. 84–6428. JONES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1082.

No. 84–6431. PRIMBS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 159.

No. 84–6433. ANDREWS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 462 So. 2d 1249.

No. 84–6440. HARTER *v.* SHULTZ, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 17, 750 F. 2d 1093.

No. 84–6445. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–6450. GAZA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1197.

No. 84–6451. GEOGHEGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84–6454. DIZZLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–6460. GUSTUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–6466. PETRINO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 332 Pa. Super. 13, 480 A. 2d 1160.

No. 84–6468. DENISON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 241.

No. 84–6493. WILLIAMS *v.* GALDI. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84–550. INTERSTATE COMMERCE COMMISSION *v.* BRAE CORP. ET AL.; and

No. 84–867. CONSOLIDATED RAIL CORPORATION *v.* AHNAPEE & WESTERN RAILWAY CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 238 U. S. App. D. C. 352, 740 F. 2d 1023.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.*, Congress took a significant step away from the traditionally pervasive federal regulation of railroads. Displaying evident distrust of the regulatory model, the Act includes a 15-point National Rail Transportation Policy. § 10101a. Among the policies identified are "(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; [and] (2) to minimize the need for Federal regulatory control over the rail transportation system." *Ibid.* The Act also provides that the Interstate Commerce Commission (ICC) "shall exempt" persons or transactions from an otherwise applicable regulation if the regulation "is not necessary to carry out the transportation policy of section 10101a" and "either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." § 10505(a).

These cases arise out of an ICC rulemaking regarding the deregulation of boxcar traffic. *Exemption from Regulation—Boxcar Traffic*, 367 I. C. C. 423 (1983); *Alaska Railroad Certification*, 367 I. C. C. 745 (1983). The Commission granted far-reaching exemptions pursuant to § 10505(a). First, it eliminated ceilings on boxcar rates. Particularly in light of economic pressures caused by competition from the trucking industry, the Commission found that rail carriers lacked market power and that regulation of boxcar rates was not necessary to further the National Rail Transportation Policy. Second, it extended this exemption to "joint rates." A joint rate is the charge to a shipper for transportation over connected lines by more than one carrier. The revenues are divided among the carriers pursuant to joint rate agreements, which are regulated by 49 U. S. C. § 10705. The Commission concluded that elimination of joint rate regulation would not lead to the demise of joint rates, long haul routes, or cooperation between large and small carriers. Third, the Commission exempted negotiated agreements from its "car hire rules." Under the otherwise applicable rules, the owner of a boxcar could charge a per diem rental fee to the railroad with control over the boxcar for the entire time the car was on that railroad's tracks, even if it was empty and still. The Commission found that in practice these rules resulted in extreme inefficiency, higher operating costs, an incentive for excessive purchases of boxcars, and a lack of responsiveness to market conditions.

Respondents sought judicial review in the Court of Appeals for the District of Columbia Circuit. The court sustained the exemption of boxcar traffic from maximum rate regulation, but set aside the other two rulings. 238 U. S. App. D. C. 352, 740 F. 2d 1023 (1984). With regard to the joint rate exemption, it found that the Commission's consideration of the need for regulation and the possible adverse consequences of its elimination had been inadequate. Noting congressional concern about the possibility of large carriers squeezing profits from captive small carriers, it held the Commission's failure to consider the effect of joint rate exemption on the fair division of joint rate revenue among carriers had been arbitrary and capricious. Turning to the car hire issue, the Court of Appeals, echoing the position of dissenting ICC Chairman Taylor, held that the Commission's decision was, in reality, not an exemption but a new regulation. As such, it exceeded the Com-

mission's authority under § 10505. That section was part and parcel of the Act's emphasis on the reduction of regulatory burdens and Government oversight. The joint rate "exemption," rather than leaving the contours of the car hire relationships to the market, skewed the initial economic relationship in favor of the destination carrier. This reregulation could only be accomplished pursuant to normal rulemaking procedures.

Consolidated Rail Corp., which had initially sought the rulemaking, and the Commission itself now seek review in this Court. They are supported by a brief from the United States. Several aspects of the decision below are questionable. The court's concern with the fair division of revenues between carriers is not squarely based on the statutory language, which requires only that the regulation from which an exemption is granted be "not needed to protect *shippers* from the abuse of market power." § 10505(a)(2)(B) (emphasis added). There is also an arguable inconsistency between upholding the Commission with regard to maximum rate regulation generally and affirming its view of the surrounding circumstances supporting such a ruling, while refusing to do so as to joint rates. Finally, the court's distinction between reregulation and deregulation is hard to pin down—on its face, the Commission's ruling is certainly the latter.

More generally, the fact that the battle between the court and the agency has taken place on what may be considered the latter's turf casts doubt on the decision below. It is the Commission that should be evaluating the nature of the rail transportation market and the effect and necessity of regulation.

Finally, these cases present a significant clash between an independent federal agency and a Federal Court of Appeals. The subject matter is important not only to the numerous parties but also to the Nation as a whole. These cases seem to be one episode of a larger struggle. See *ICC* v. *Coal Exporters Assn. of United States, Inc.*, *post*, p. 1072. The court and the agency have rather divergent views of the mandate of the Staggers Act and the nature of the Commission's task thereunder. The proper implementation of that important legislation requires that these larger issues be settled.

I would grant these petitions and consolidate them for oral argument.

No. 84–884. INTERSTATE COMMERCE COMMISSION *v.* COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.; and

No. 84–885. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 240 U. S. App. D. C. 256, 745 F. 2d 76.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Like *ICC* v. *Brae Corp.* and *Consolidated Rail Corp.* v. *Ahnapee & W. R. Co.*, *ante*, p. 1069, these cases involve implementation of the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.* That Act begins with a 15-point National Rail Transportation Policy with a decidedly antiregulatory bent. § 10101a. It goes on to provide that the Interstate Commerce Commission (ICC) "shall exempt a person, class of persons, or a transaction or service" from any regulation that is not necessary to carry out the policies detailed in § 10101a or to "protect shippers from the abuse of market power." § 10505(a).

Pursuant to this provision, the ICC exempted the rail transportation of coal bound for export from all regulation under the Interstate Commerce Act. *Railroad Exemption—Export Coal*, 367 I. C. C. 570 (1983). In the view of the Commission, relief from regulation would lead to improved efficiency, stronger railroads, and greater pricing flexibility. The resulting benefits would promote a variety of goals set out in § 10101a. In addition, continued regulation was not needed to protect against abuse of market power by the railroads. They had an interest in the shippers' success, and the competitive international coal market would prevent them from raising prices so high that producers would not be competitive abroad. In addition, as experience had shown, the shippers formed a concentrated industry with bargaining power essentially equal to that of the railroads. The Commission also noted that antitrust remedies were available should the railroads abuse what market power they had, and that the railroads were unlikely to do so even if they could because the Commission would respond by revoking the exemption.

The Court of Appeals for the District of Columbia Circuit vacated and remanded. *Coal Exporters Assn. of United States*

v. *United States*, 240 U. S. App. D. C. 256, 745 F. 2d 76 (1984). It found that the Commission had overlooked a key element of National Transportation Policy: "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U. S. C. § 10101a(6). Reading this provision in tandem with § 10505's requirement that an exemption not subject shippers to "the abuse of market power," the court held that the Commission had too narrow an understanding of the latter phrase. As it read the Commission's opinion, there would be no abuse of market power as long as the shippers had some bargaining power, however minimal, and received some share of the economic rents, however slight. The court condemned this view as "wholly unreasonable," 240 U. S. App. D. C., at 275, 745 F. 2d, at 95, and indifferent to the Act's concern for protecting the revenues of shippers, *id.*, at 278, 745 F. 2d, at 98.

The railroads and the ICC, supported by the United States, petition for certiorari. They argue that the decision below effectively forecloses any use of the exemption provision. While this seems an overstatement, the opinion below does criticize the ICC for failing to quantify its conclusions with a precision that would appear unattainable. Moreover, the Court of Appeals involved itself in details of regulatory decisionmaking that might more properly be left to the agency. Precisely where hard bargaining leaves off and "abuse of market power" begins is the sort of issue best left to the agency's expertise, and the Court of Appeals' identification of abuse with any inequality is open to question.

More important, the decision below is set against the background of a fundamental clash between the Court of Appeals and the ICC concerning the deregulatory mandate of the Staggers Act. See *ICC* v. *Brae Corp.*, *ante*, p. 1069. The exemption provision is the key mechanism by which that mandate is to be effected, and the Commission has had some difficulty in getting its exemptions past the Court of Appeals. As I noted in dissenting from the Court's refusal to consider the *Brae* case, the effective implementation of the Staggers Act requires that the scope of the exemption requirement be settled.

I respectfully dissent.

No. 84–1067. DISTRICT OF COLUMBIA *v.* BROWN. C. A. D. C. Cir. Motion of respondent Brown, aka Yusaf Lateef Salahuddin,

for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 239 U. S. App. D. C. 345, 742 F. 2d 1498.

No. 84–1098. GENERAL MOTORS CORP. *v.* THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 239 U. S. App. D. C. 408, 742 F. 2d 1561.

No. 84–1209. CATLETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1102.

JUSTICE WHITE, dissenting.

Petitioners were convicted and fined for hunting doves in a "baited" field contrary to the Federal Migratory Bird Act, 16 U. S. C. § 703, and the regulations issued thereunder, despite their claim that they were unaware of the baiting and that they could not reasonably have been aware of it, since the remaining bait on the property was hidden from view at the time of the hunt.

The Court of Appeals affirmed, observing that petitioners "were apparently unaware of, and had not participated in, the baiting of the field." 747 F. 2d 1102, 1103 (CA6 1984). Nonetheless, the panel applied prior law of the Circuit to hold that scienter is not an element of the crime charged, and thus that petitioners could be convicted even if they could not have reasonably known that the field was baited.

The rule applied is that adopted by several Circuits, reading the regulation in question to impose strict liability on those who hunt over baited fields. See, *e. g.*, *United States* v. *Chandler*, 753 F. 2d 360, 363 (CA4 1985); *United States* v. *Brandt*, 717 F. 2d 955, 958–959 (CA6 1983); *United States* v. *Jarman*, 491 F. 2d 764, 766–767 (CA4 1974); *Rogers* v. *United States*, 367 F. 2d 998, 1001 (CA8 1966), cert. denied, 386 U. S. 943 (1967). Nevertheless, as the Court of Appeals below recognized, the rule applied here is contrary to the holding of a case from another Federal Circuit which requires proof of at least the minimum scienter, that hunters should have known of the baited condition. *United States* v. *Delahoussaye*, 573 F. 2d 910, 912 (CA5 1978).

There is a clear and recognized division between Circuits on the elements of a federal criminal offense. As the court explained in *Delahoussaye*, the regulation at issue here "is a national one, founded on a treaty, and [it] should not mean one thing in one state and another elsewhere." *Id.*, at 913. I would grant certiorari to resolve the split among the Courts of Appeals.

No. 84–1258. CHEMICAL BANK ET AL. *v.* PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, ET AL. Sup. Ct. Wash. Motions of Salomon Brothers, Inc., et al., American Bankers Association et al., Public Securities Association, American Association of Retired Persons, and National WPPSS 4 and 5 Bondholders' Committee for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 102 Wash. 2d 874, 691 P. 2d 524.

No. 84–1393. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, N. A. A. C. P., INC., ET AL.; and

No. 84–1430. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 749 F. 2d 102.

No. 84–1400. DONOVAN *v.* MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 84–1402. A. L. ADAMS CONSTRUCTION CO. *v.* GEORGIA POWER CO. C. A. 11th Cir. Motion of Georgia Branch, Associated General Contractors of America, 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: 733 F. 2d 853.

No. 84–1427. SIMON *v.* KROGER CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 1544.

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

Section 10(b) of the National Labor Relations Act limits the time for filing an unfair labor practice charge with the National

Labor Relations Board. It provides that "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." 29 U. S. C. § 160(b). The plain words require that a charge be both filed *and* served within six months of the challenged conduct, and such has long been the Board's interpretation. See, *e. g.*, *Old Colony Box Co.*, 81 N. L. R. B. 1025, 1027 (1949). Service may be accomplished merely by mailing a copy of the charge. See 29 CFR § 102.113(a) (1984).

In *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), we held that § 10(b) governs an employee's suit against his employer for breach of contract and his union for breach of its duty of fair representation. We did not discuss whether that section's requirement of service, as well as filing, within the 6-month period also applies in such a suit. That is the question raised in this petition.

The Kroger Co. (Kroger) discharged petitioner on February 18, 1982. Grievance procedures were unsuccessful, and on July 6, 1982, the union notified petitioner that it would not proceed to arbitration. The following January 3, just within the 6-month period, petitioner filed this § 301 action in Federal District Court. See 29 U. S. C. § 185. On January 12, after the 6-month period had run, he served a copy of the complaint on Kroger; and on January 25 he served the union. Applying *DelCostello*, and relying on the plain words of § 10(b), the District Court granted both defendants' motions for summary judgment on the ground that the action was time-barred. It also found that petitioner had not filed a timely response to Kroger's motion for summary judgment and that under a local rule he would be deemed not to oppose it.

The Court of Appeals for the Eleventh Circuit affirmed. 743 F. 2d 1544 (1984). Referring to the "intent, spirit, and plain language of section 10(b)," it held that a § 301 complaint must be both filed and served within the 6-month period. *Id.*, at 1546. It also found that the District Court had properly applied its local rule in treating Kroger's motion for summary judgment as unopposed.

The lower courts agree that a suit in federal court on a federal cause of action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, *e. g.*, *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 262, 737 F. 2d 1, 44 (1984); Fed. Rule Civ. Proc. 3; 2 J. Moore & J. Lucas, Moore's Federal Practice

¶ 3.07[4.–3–2] (1984). While the time for service of process is not open-ended, see Fed. Rules Civ. Proc. 4(a), 4(j), it need not occur within the limitations period. Ordinary federal practice thus conflicts with the specific terms of this borrowed statute of limitations. In light of this inconsistency, the brevity of the limitations period, and the fact that § 10(b) was not intended to apply to judicial proceedings, the result below is not obviously correct. In practical effect, the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service under the Federal Rules. Section 10(b) does not have a similar impact in administrative proceedings, in which service is accomplished merely by placing a copy of the charge in the mail. Compare Fed. Rule Civ. Proc. 4 with 29 CFR § 102.113(a) (1984).

This issue has come before the Eleventh Circuit more than once, see *Howard* v. *Lockheed-Georgia Co.*, 742 F. 2d 612 (1984), and it may be expected to recur. At least one District Court in another Circuit has reached the contrary conclusion. See *Williams* v. *E. I. du Pont de Nemours Co.*, 581 F. Supp. 791 (MD Tenn. 1983). A panel of the Sixth Circuit held that a complaint filed at the 5-month, 27-day mark was timely, without pausing to consider whether the defendants had been served within the subsequent 4 days. *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (1984).

This problem is a necessary corollary to the decision in *DelCostello*. It is worth settling quickly and dispositively. I would therefore grant the petition and set the case for oral argument.*

No. 84–1432. MARTIN *v.* CRAIN ET AL. Sup. Jud. Ct. Mass. Motion of Francis X. Bellotti, Attorney General of Massachusetts, for leave to intervene granted. Certiorari denied. Reported below: 393 Mass. 430, 472 N. E. 2d 231.

---

*The decision below also rests on petitioner's failure to respond to Kroger's motion for summary judgment. However, this ruling applies only to Kroger; the judgment in favor of the union rests solely on the statute of limitations holding. In any event, the presence of an alternative holding does not reduce the precedential effect of the § 10(b) holding or make it any less the authoritative judgment of the Court of Appeals. See *Richmond Co.* v. *United States*, 275 U. S. 331, 340 (1928); *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 160, 166 (1905).

No. 84–5814. DIGGS *v.* LYONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 741 F. 2d 577.

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

Petitioner sued respondent prison officials in Federal District Court under 42 U. S. C. § 1983, alleging the use of excessive force in preventing his escape from Holmesburg County Prison in Philadelphia and the denial of access to legal assistance. Respondents prevailed on both claims. At trial, the District Court permitted respondents' counsel to prove that petitioner had been convicted of murder, bank robbery, attempted prison escape, and criminal conspiracy within the 10 years preceding the date of trial. In so doing the trial judge relied on Rule 609(a) of the Federal Rules of Evidence, which provides that evidence of such felony convictions "shall be admitted" to attack the credibility "of a witness," if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[1] The trial judge interpreted the Rule to require the evidence to be admitted since the Rule's provision for assessing the prejudicial import of the evidence applied only in regard to the *defendant*, not to a plaintiff witness against whom such evidence was sought to be introduced. Moreover, under the trial judge's view, Rule 609(a) precluded any resort to the balancing test of Rule 403 of the Federal Rules of Evidence, which permits the exclusion of relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice."[2]

---

[1] Rule 609(a) provides:

"(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Rule 609(b) limits application of the Rule to convictions that are less than 10 years old.

[2] Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A divided panel of the Court of Appeals for the Third Circuit affirmed on appeal. 741 F. 2d 577 (1984). The Court of Appeals found the District Court's interpretation of Rule 609(a) to be strongly supported by the Rule's legislative history. Although acknowledging that congressional attention in enacting the Rule had been focused largely on criminal cases and on the defendants in those cases, the Court of Appeals concluded that its broad language was nevertheless applicable to a civil case such as the one before it. And, like the District Court, the Court of Appeals held that Rule 403 had no application where, as here, a more specific rule of admissibility applied. Admission of prior convictions to impeach a plaintiff witness in a civil case was therefore mandatory. The Court of Appeals recognized that this reading of the Rule "may in some cases produce unjust and even bizarre results," but suggested that the remedy lay with "those who have the authority to amend the rules, the Supreme Court and the Congress." *Id.*, at 582.[3]

As the Court of Appeals recognized, its reading of Rule 609(a) directly conflicts with the interpretation of two other Circuits. Both the Eighth Circuit and the Fifth Circuit have ruled that, assuming the applicability of Rule 609(a) to civil cases, it does not relieve courts of the duty to assess the prejudicial effect of evidence of prior convictions against a plaintiff witness under Rule 403. See *Czajka* v. *Hickman*, 703 F. 2d 317 (CA8 1983); *Shows* v. *M/V Red Eagle*, 695 F. 2d 114 (CA5 1983). This disagreement concerning the Rule's meaning now affects litigants in three large Circuits, and the issue will undoubtedly arise elsewhere before long. See *Furtado* v. *Bishop*, 604 F. 2d 80 (CA1 1979), cert. denied, 444 U. S. 1035 (1980) (finding it unnecessary to resolve the

---

[3] The District Court stated that it would have admitted the evidence of the prior convictions even if it had been given the discretion to exclude it under a balancing test. The Court of Appeals evidently viewed this statement as dictum. After squarely affirming the District Court's holding that "Rule 609(a) compelled the admission of evidence of [petitioner's] prior convictions and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness," the Court of Appeals noted that it therefore had "no need to consider the trial judge's suggestion that he would have admitted them in any event in the exercise of his discretion if he had been given such discretion." 741 F. 2d, at 581–582. In any event, that the District Judge would have reached the same result under a different test is no reason for this Court to decline to review this case. The Court of Appeals' interpretation of Rule 609(a) as precluding application of the Rule 403 balancing test is now the law in the Third Circuit, and future cases in that Circuit will be governed by it.

question). Given this square conflict regarding a fundamental evidentiary rule, and in light of the concededly "bizarre" results that may follow from the ruling below, I would grant certiorari to decide whether Rule 609(a) mandates the admission of evidence of prior convictions against a plaintiff witness in a civil case.

No. 84–6030. GLASS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 455 So. 2d 659.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

The petitioner Jimmy L. Glass has been condemned to death by electrocution—"that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead." La. Rev. Stat. Ann. § 15:569 (West 1981). Glass contends that "electrocution causes the gratuitous infliction of unnecessary pain and suffering and does not comport with evolving standards of human dignity," and that this method of officially sponsored execution therefore violates the Eighth and Fourteenth Amendments. Pet. for Cert. 27. The Supreme Court of Louisiana held that this claim must summarily be rejected pursuant to "clearly established principles of law" and observed that, in any event, the claim is wholly lacking in medical or scientific merit. 455 So. 2d 659, 660, 671 (1984).

I adhere 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) (BRENNAN, J., dissenting), and would therefore grant certiorari and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in *any* method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. *Furman* v. *Georgia*, 408 U. S. 238, 287–291 (1972).

Even if I thought otherwise, however, I would vote to grant certiorari. Glass' petition presents an important and unsettling

question that cuts to the very heart of the Eighth Amendment's Cruel and Unusual Punishments Clause[1]—a question that demands measured judicial consideration. Of the 42 officially sponsored executions carried out since the Court's decision in *Gregg* v. *Georgia*, *supra*, 31 have been by means of electrocution.[2] And since *Gregg*, an ever-increasing number of condemned prisoners have contended that electrocution is a cruel and barbaric method of extinguishing human life, both *per se* and as compared with other available means of execution. As in this case, such claims have uniformly and summarily been rejected,[3] typically on the strength of this Court's opinion in *In re Kemmler*, 136 U. S. 436 (1890), which authorized the State of New York to proceed with the first electrocution 95 years ago. *Kemmler*, however, was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience. I believe the time has come to measure electrocution against well-established contemporary Eighth Amendment principles.

---

[1] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.)

[2] See American Civil Liberties Union, Death-Row Census (Mar. 1, 1985). On the prevalence of electrocution, see also The Death Penalty in America 16 (H. Bedau ed., 3d ed., 1982) (hereinafter Bedau); Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 119, and n. 164 (1978).

[3] See, *e. g.*, *Sullivan* v. *Dugger*, 721 F. 2d 719, 720 (CA11 1983) (order); *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 616 (CA5 1978), cert. denied, 440 U. S. 976 (1979); *Dix* v. *Newsome*, 584 F. Supp. 1052, 1068 (ND Ga. 1984); *Mitchell* v. *Hopper*, 538 F. Supp. 77, 94 (SD Ga.), supp. op. *sub nom. Ross* v. *Hopper*, 538 F. Supp. 105 (1982), aff'd in part and vacated in part on other grounds *sub nom. Spencer* v. *Zant*, 715 F. 2d 1562 (CA11), and aff'd in part and rev'd in part on other grounds, 716 F. 2d 1528 (1983); *McCorquodale* v. *Balkcom*, 525 F. Supp. 408, 430–431 (ND Ga. 1981), aff'd in part and rev'd in part, 705 F. 2d 1553 (CA11), on rehearing, 721 F. 2d 1493 (1983), cert. denied, 466 U. S. 954 (1984); *Ruiz* v. *State*, 265 Ark. 875, 900–901, 582 S. W. 2d 915, 927–928 (1979), cert. denied, 454 U. S. 1093 (1981); *Booker* v. *State*, 397 So. 2d 910, 918 (Fla.), cert. denied, 454 U. S. 957 (1981); *Godfrey* v. *Francis*, 251 Ga. 652, 670, 308 S. E. 2d 806, 820, cert. denied, 466 U. S. 945 (1984); *State* v. *Shaw*, 273 S. C. 194, 206, 255 S. E. 2d 799, 804–805, cert. denied, 444 U. S. 957 (1979); *Martin* v. *Commonwealth*, 221 Va. 436, 439, 271 S. E. 2d 123, 125 (1980).

I

Electrocution as a means of killing criminals was first authorized by the New York Legislature in 1888, and resulted from a lengthy investigation to identify "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."[4] In *In re Kemmler*, *supra*, this Court rejected a constitutional attack on New York's statute by William Kemmler, who was scheduled to be the first person put to death by electrocution. The Court emphasized that, because the Eighth Amendment was not applicable to the States, "[t]he decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here." *Id.*, at 447.[5] In dicta, the Court also followed a "historical" interpretation of the Cruel and Unusual Punishments Clause as it governed executions carried out by the Federal Government, suggesting that the constitutionality of a particular means of execution should be determined by reference to contemporary norms at the time the Bill of Rights was adopted. See *id.*, at 446–447. In addition, the Court approvingly observed that the state court had concluded that "'it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as *certainly* to produce *instantaneous*, and, therefore, *painless*, death.'" *Id.*, at 443 (emphasis added).

State and federal courts recurrently cite to *Kemmler* as having conclusively resolved that electrocution is a constitutional method of extinguishing life, and accordingly that further factual and legal

---

[4] See Report of the Commission to Investigate and Report the Most Humane and Practical Method of Carrying Into Effect the Sentence of Death in Capital Cases 3 (transmitted to the Legislature of the State of New York, Jan. 17, 1888). See generally Bedau 15; L. Lawes, Life and Death in Sing Sing 183–186 (1928) (hereinafter Lawes); N. Teeters, Hang By The Neck 446 (1967) (hereinafter Teeters); Beichman, The First Electrocution, 35 Commentary 410, 411 (1963). Some contemporary observers described the so-called Electrical Execution Law as a means to ensure "euthanasia by electricity." *Id.*, at 411.

[5] The Court concluded that the challenged statute was reviewable only to determine whether its enactment "was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence." 136 U. S., at 449. See also *McElvaine* v. *Brush*, 142 U. S. 155, 158–159 (1891).

consideration of the issue is unnecessary. See n. 3, *supra*. But *Kemmler* clearly is antiquated authority. It is now well established that the Eighth Amendment applies to the States through the Fourteenth Amendment. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S., at 168 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Robinson* v. *California*, 370 U. S. 660 (1962). Moreover, the Court long ago rejected *Kemmler*'s "historical" interpretation of the Cruel and Unusual Punishments Clause, emphasizing instead that the prohibitions of the Clause are not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." *Weems* v. *United States*, 217 U. S. 349, 372 (1910). This is because "[t]ime works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.*, at 373. The Clause thus has an "expansive and vital character," *id.*, at 377, that "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion).[6] Accordingly, Eighth Amendment claims must be evaluated "in the light of contemporary human knowledge," *Robinson* v. *California*, *supra*, at 666, rather than in reliance on century-old factual premises that may no longer be accurate.

To be sure, legislative decisions concerning appropriate forms of punishment are entitled to considerable deference. But in common with all constitutional guarantees, "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg* v. *Georgia*, *supra*, at 174, n. 19 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *Weems* v. *United States*, *supra*, at 371–373.[7] "[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective

[6] See also *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (methods of punishment cannot trangress contemporary " 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' ").

[7] Were it otherwise, the Cruel and Unusual Punishments Clause would be rendered "little more than good advice," *Trop* v. *Dulles*, 356 U. S. 86, 104 (1958) (plurality opinion), and "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas," *Weems* v. *United States*, 217 U. S., at 373.

factors to the maximum possible extent." *Coker* v. *Georgia*, 433 U. S. 584, 592, 597 (1977) (plurality opinion). Thus it is firmly within the "historic process of constitutional adjudication" for courts to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out the death penalty is "barbaric" and unnecessary in light of currently available alternatives. *Furman* v. *Georgia*, 408 U. S., at 420, 430 (POWELL, J., dissenting).

What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punishment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Gregg* v. *Georgia*, *supra*, at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.). See also *Coker* v. *Georgia*, *supra*, at 592 (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.[8] Thus in explaining the obvious unconstitutionality of such ancient practices as disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." *In re Kemmler*, 136 U. S., at 447. It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace." *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879).[9]

---

[8] See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 392 (1972) (BURGER, C. J., dissenting) ("The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them").

[9] See also *id.*, at 279 (BRENNAN, J., concurring); *id.*, at 430 (POWELL, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 473–474 (1947) (Burton, J., dissenting) ("Taking human life by unnecessarily

The Eighth Amendment's protection of "the dignity of man," *Trop* v. *Dulles*, *supra*, at 100 (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, *e. g.*, Royal Commission on Capital Punishment, 1949–1953 Report ¶ 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. *Ibid.* These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, *e. g.*, *Wilkerson* v. *Utah*, *supra*, at 135.

In evaluating the constitutionality of a challenged method of capital punishment, courts must determine whether the factors discussed above—unnecessary pain, violence, and mutilation—are "*inherent* in the method of punishment." *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 464 (emphasis added). A single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional. Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 105 (1976). Thus in *Louisiana ex rel. Francis* v. *Resweber*, *supra*, the Court allowed a State to proceed with a second effort to electrocute a prisoner after a mechanical failure had interrupted the first attempt.[10] The Court emphasized that the initial failure had been an "unforeseeable accident," 329 U. S., at 464, and Justice Frankfurter's concurrence stressed that the failure had been an "innocent misadventure," *id.*, at 470.

A different case would be presented, however, if the Court were confronted with "a series of abortive attempts." *Id.*, at 471.

---

cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. . . . The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself").

[10] The issue in *Resweber* was whether repeated attempts to electrocute a person were unconstitutional, not whether electrocution was *per se* cruel and unusual punishment. The plurality obviously believed that electrocution in the abstract was not constitutionally forbidden, and even the dissent assumed that electrocution generally was so "instantaneous" and "painless" that it would not present constitutional difficulties. *Id.*, at 474 (Burton, J., dissenting).

This is because the Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain, violence, and mutilation.[11] If a method of execution does not satisfy these criteria—if it causes "torture or a lingering death" in a significant number of cases, *In re Kemmler*, 136 U. S., at 447—then unnecessary cruelty inheres in that method of execution and the method violates the Cruel and Unusual Punishments Clause.

II

Because contemporary courts have summarily rejected constitutional challenges to electrocution, the evidence respecting this method of killing people has not been tested through the adversarial truthfinding process. There is considerable empirical evidence and eyewitness testimony, however, which if correct would appear to demonstrate that electrocution violates every one of the principles set forth above.[12] This evidence suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the "mere extinguishment of life." *Ibid.*[13] Witnesses routinely report that, when the switch is

---

[11] We have emphasized in procedural contexts that the Eighth Amendment requires that all feasible measures be taken to minimize the risk of mistakes in administering capital punishment. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. 862, 884–885 (1983); *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). See also Royal Commission Report ¶ 729, at 255 (importance of determining "which method [of execution] is most likely to avoid mishaps").

[12] Details concerning the actual process of electrocution are not widely known, primarily because "executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of 'family newspaper' requirements of taste, sparing in detail." Hearings on H. R. 8414 et al. before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., 308 (1972) (hereinafter 1972 Hearings). See also *Furman* v. *Georgia*, *supra*, at 297 (BRENNAN, J., concurring); Camus, Reflections on the Guillotine, in Resistance, Rebellion, and Death 187 (1961) ("The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail").

[13] The technical aspects of electrocution, briefly stated, are that the authorities bind the condemned to a wooden chair with leather straps, affix electrodes to his shaven head and right leg, and partially cover his face with a mask. When the switch is thrown, an "initial voltage of 2,000 to 2,200 and amperage of 7 to 12" are sent "hurtling through the prisoner's body," and the voltage and amperage subsequently "are lowered and reapplied at various intervals" until the prisoner is dead. Lawes 170.

thrown, the condemned prisoner "cringes," "leaps," and "'fights the straps with amazing strength.'"[14] "The hands turn red, then white, and the cords of the neck stand out like steel bands."[15] The prisoner's limbs, fingers, toes, and face are severely contorted.[16] The force of the electrical current is so powerful[17] that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks."[18] The prisoner often defecates, urinates, and vomits blood and drool.[19]

"The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking."[20] Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively."[21] Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber.[22] This "smell of frying

---

[14] Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 20 (1968) (hereinafter 1968 Hearings) (statement of Clinton Duffy, former Warden of San Quentin); Lawes 170; 1972 Hearings, at 305. See also Teeters 448 ("'The figure in the chair gives one terrific lurch against the straps, every muscle contracting and straining. The face—all that can be seen from mouth to throat—turns crimson'") (quoting Dr. Amos Squire, Sing Sing prison).

[15] Lawes 170.

[16] C. Duff, A Handbook on Hanging 119–120 (1974) (hereinafter Duff).

[17] "The force of the death-dealing blow the condemned prisoner receives is more easily understood when it is realized that this amount of electricity, transferred into mechanical power, would be equivalent to 884,400 foot-pounds per minute, or enough electrical energy to light 800 lights in the average home." Lawes 189.

[18] 1968 Hearings, at 20 (statement of Clinton Duffy); see also Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime and Delinquency 121, 129 (1969). In addition, the force of the current is so strong that it sometimes literally ruptures the prisoner's heart. Duff 120.

[19] Tyler, Electrocution As a Spectator Sport, 2 Fact 47, 50–51 (Mar.-Apr. 1965); see also 1968 Hearings, at 20 (statement of Clinton Duffy).

[20] Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126; 1968 Hearings, at 20 (statement of Clinton Duffy). See also G. Bishop, Executions: The Legal Ways of Death 27 (1965).

[21] Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128; see also 1972 Hearings, at 305; Teeters 448.

[22] Tyler, 2 Fact, *supra* n. 19, at 50. One veteran observer once commented: "Only the greenhorns sit in the first row. We sit behind. The smell is too bad." *Id.*, at 49. See generally 1968 Hearings, at 20 (statement of Clinton Duffy); Bedau 16; Teeters 449; Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128.

human flesh in the immediate neighbourhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present."[23] In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand."[24] The body frequently is badly burned and disfigured.[25]

The violence of killing prisoners through electrical current is frequently explained away by the assumption that death in these circumstances is instantaneous and painless.[26] This assumption, however, in fact "is open to serious question" and is "a matter of sharp conflict of expert opinion."[27] Throughout the 20th century a number of distinguished electrical scientists and medical doctors have argued that the available evidence strongly suggests that electrocution causes unspeakable pain and suffering. Because "'[t]he current flows along a restricted path into the body, and destroys all the tissue confronted in this path . . . [i]n the meantime the vital organs may be preserved; and pain, too great for us to imagine, is induced. . . . For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.'"[28] L. G. V. Rota, a renowned French electrical scientist, concluded after extensive research that

> "[i]n every case of electrocution, . . . death inevitably supervenes but it may be very long, and above all, excruciatingly painful . . . . [T]he space of time before death supervenes varies according to the subject. Some have a greater physiological resistance than others. I do not believe that anyone killed by electrocution dies instantly, no matter how weak the

---

[23] Duff 119.

[24] Lawes 189; 1968 Hearings, at 20 (statement of Clinton Duffy). "[T]he electrodes making contact may reach a temperature high enough to melt copper (1,940 degrees Fahrenheit) and . . . the average body temperature will be in the neighbourhood of 140 degrees Fahrenheit . . . ." Lawes 188.

[25] Bedau 16; 1968 Hearings, at 20 (statement of Clinton Duffy).

[26] Lawes 188–189; Teeters 447–448.

[27] 1972 Hearings, at 305; Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1339 (1968). "No one knows whether electrocuted individuals retain consciousness until dead . . . ." 1972 Hearings, at 306. See also Bedau, General Introduction, in Capital Punishment 7, 17–18, 22–23 (J. McCafferty ed. 1972); G. Scott, The History of Capital Punishment 219 (1950).

[28] Teeters 447 (quoting Nicola Tesla).

> subject may be. In certain cases death will not have come about even though the point of contact of the electrode with the body shows distinct burns. Thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not. . . . This method of execution is a form of torture."[29]

Although it is an open question whether and to what extent an individual feels pain upon electrocution, there can be no serious dispute that in numerous cases death is far from instantaneous. Whether because of shoddy technology and poorly trained personnel, or because of the inherent differences in the "physiological resistance" of condemned prisoners to electrical current, see n. 29, *supra*, it is an inescapable fact that the 95-year history of electrocution in this country has been characterized by repeated failures swiftly to execute and the resulting need to send recurrent charges into condemned prisoners to ensure their deaths.[30] The very first electrocution required multiple attempts before death resulted,[31] and our cultural lore is filled with examples of at-

---

[29] Quoted in Duff 118–119. See also Lawes 187 ("[T]he resisting power of the human body is very high and it requires a voltage comparatively large or small, depending entirely upon the resistance and contacts, to force this amount of current through a circuit in which the body, with its contacts, constitutes the resistance").

[30] See Duff 122 ("Experience proves that human beings vary enormously in their powers of resistance to electrocution, which depends upon the strength of current and not upon voltage pressure: hence, *several shocks* may be required to produce what medical experts can reasonably define as death, which means that doctors have to stand by with stethoscopes at the ready to apply to the victim's chest when he or she has been given one or more doses of current") (emphasis in original).

[31] See generally Teeters 446–447; Beichman, 35 Commentary, *supra* n. 4, at 417–419. George Westinghouse, founder of Westinghouse Electric Company, "thought that the job could have been 'done better with an axe.'" Voices Against Death xxxii (P. Mackey ed. 1976) (hereinafter Voices Against Death). The New York Press asserted that "the age of burning at the stake is past; the age of burning at the wire will pass also." Beichman, *supra*, at 417. Another newspaper editorialized: "[I]t is not improbable that the first will prove the last . . . . Dr. E. A. Spitzka, the celebrated expert, who was present, unhesitatingly pronounced the experiment a failure and declared it his belief that the law should be repealed and no more experiments made with electricity as a means of execution." Teeters 446–447. A note in the Harvard Law Review from the time suggested that the judicial approval of electrocution

tempted electrocutions that had to be restaged when it was discovered that the condemned "tenaciously clung to life."[32] Attending physicians routinely acknowledge that electrocutions must often be repeated in order to ensure death.[33] It is difficult to

---

"might well be changed in the light of subsequent experiment." 4 Harv. L. Rev. 287 (1891).

[32] R. Elliott, Agent of Death 66 (1940) (hereinafter Elliott). See generally Bedau 15; Duff 121; J. Pritchard, A History of Capital Punishment 65 (1932); Teeters 448–449; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126; 1972 Hearings, at 305–306. Robert Elliott, Sing Sing's long-time electrocutioner, described in his memoirs a number of failed attempts to electrocute prisoners. See especially Elliott 57 ("Fred's heart, larger than that of any other person electrocuted up to that time, was still beating, and he was alive. There was only one thing to do: put him in the chair again, and pass current through his body until he was dead"); *id.*, at 66 (describing the execution of another condemned prisoner in which "six shocks [were] necessary before he was pronounced dead"); *id.*, at 147–148.

A noted instance of this phenomenon occurred when Ethel Rosenberg was electrocuted for treason: five consecutive attempts were required before she finally died. "After the *fourth* (shock) guards removed one of the two straps and the two doctors applied their stethoscopes. But they were not satisfied that she was dead. The executioner came to them from his switchboard in a small room 10 feet from the chair. 'Want another?' he asked. The doctors nodded. Guards replaced the straps and for the *fifth* time electricity was applied." Duff 122 (emphasis in original).

See also Howells, State Manslaughter, in Voices Against Death 152:

"It was not imagined that electricity could fail to kill instantly, much less that the criminal, who had become the State's peculiar care, could be so ineffectually tortured as to froth at the mouth, and strain at his bonds with writhings of agony which almost burst them, or give out the smell of his burning flesh so that the invited guest was often made sick at his stomach by the loathsome and atrocious fact. Yet all this has happened again and again in the execution of the death sentences since the consecration of the electric chair to the hallowed office of the axe, the noose, the screw. It has happened so often that I, at least, had become used to reading of it, and had tranquilly accepted it . . . . I generally managed to reconcile myself to the record of the frothing, and burning, and writhing, by learning further that the scientific gentleman, or the educated electrician, on the other side of the wall, had made it all right by discharging another thousand or two thousand volts into the body of his erring brother, and so putting him finally out of his misery."

[33] Dr. Amos Squires, for years the officiating doctor at electrocutions conducted at Sing Sing, observed that after "the current is cut off . . . the doctor with his stethoscope listens for heartbeats—*he listens to them grow fainter and fainter.* A brief interval passes. The switch is thrown again—and after contact is broken, again the doctor listens. *There is seldom any pulse this time.*" Teeters 448 (emphasis added). See also *id.*, at 449 ("[I]t often takes

imagine how such procedures constitute anything less than "death by installments"—"a form of torture [that] would rival that of burning at the stake." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 474, 476 (Burton, J., dissenting).[34]

This pattern of "death by installments" is by no means confined to bygone decades. Here is one eyewitness account of Alabama's electrocution of John Louis Evans on April 22, 1983:

> "At 8:30 p. m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of greyish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.
>
> "The electrode on the left leg was refastened. At 8:30 p. m. *[sic]* Mr. Evans was administered a second thirty sec-

---

several shocks of high voltage to finally convince the attending physician—who often must rely on the executioner himself to give the nod—that the victim is actually dead").

[34] Louisiana's execution of Willie Francis remains the most notorious example of the botched manner in which so many electrocutions have been conducted. See generally L. Berkson, The Concept of Cruel and Unusual Punishment 26–29 (1975); B. Prettyman, Death and the Supreme Court 90–128 (1961). Sheriff Harold Resweber described the first attempted electrocution as follows:

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath *[sic].*'" 329 U. S., at 480, n. 2 (Burton, J., dissenting).

Another witness gave this account of the aborted attempt:

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath *[sic].*' Then they took the hood from his eyes and unstrapped him. . . . This boy really got a shock when they turned that machine on." *Ibid.*

ond jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive.

"At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request for clemency was denied.

"At 8:40 p. m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes."[35]

Similarly, this was the scene at Georgia's electrocution of Alpha Otis Stephens just last December 12th:

"The first charge of electricity administered today to Alpha Otis Stephens in Georgia's electric chair failed to kill him, and he struggled to breathe for eight minutes before a second charge carried out his death sentence for murdering a man who interrupted a burglary.

. . . . . .

". . . A few seconds after a mask was placed over his head, the first charge was applied, causing his body to snap forward and his fists to clench.

"His body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths.

"At 12:26 A. M., two doctors examined him and said he was alive. A second two-minute charge was administered at 12:28 A. M."[36]

Stephens "'was just not a conductor' of electricity, a Georgia prison official said."[37]

---

[35] Affidavit of Russell F. Canan (June 22, 1983), attached to Pet. for Cert.

[36] N. Y. Times, Dec. 13, 1984, p. A18, cols. 1–4.

[37] N. Y. Times, Dec. 17, 1984, p. A22, col. 1.

Thus there is considerable evidence suggesting—at the very least—that death by electrocution causes far more than the "mere extinguishment of life." *In re Kemmler*, 136 U. S., at 447. This evidence, if correct, would raise a substantial question whether electrocution violates the Eighth Amendment in several respects. First, electrocution appears to inflict "unnecessary and wanton . . . pain" and cruelty, and to cause "torture or a lingering death" in at least a significant number of cases. *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.); *In re Kemmler*, *supra*, at 447. Second, the physical violence and mutilation that accompany this method of execution would seem to violate the basic "dignity of man." *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion). Finally, even if electrocution does not invariably produce pain and indignities, the apparent century-long pattern of "abortive attempts" and lingering deaths suggests that this method of execution carries an unconstitutionally high risk of causing such atrocities. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 471 (Frankfurter, J., concurring); see also n. 11, *supra*. These features of electrocution seem so "inherent in [this] method of punishment" as to render it *per se* cruel and unusual and therefore forbidden by the Eighth Amendment. *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 464.

Moreover, commentators and medical experts have urged that other currently available means of execution—particularly some forms of lethal gas and fast-acting barbituates—accomplish the purpose of extinguishing life in a surer, swifter, less violent, and more humane manner.[38] Several state legislatures have abandoned electrocution in favor of lethal injection for these very reasons; one of the architects of this change has emphasized that it resulted precisely from the recognition that the electric chair is "a barbaric torture device" and electrocution a "gruesome ritual."[39] Other States have rejected electrocution in favor of the use of lethal gas.[40]

For me, arguments about the "humanity" and "dignity" of *any* method of officially sponsored executions are a constitutional

---

[38] See Bedau 18; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 110–113; see also Royal Commission Report ¶¶ 735–749, at 256–261.

[39] Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126–127, n. 228 (quoting Texas Rep. Ben Grant).

[40] *Id.*, at 127.

contradiction in terms. See *supra*, at 1080. Moreover, there is significant evidence that executions by lethal gas—at least as administered in the gas chamber[41]—and barbituates—at least as administered through lethal injections[42]—carry their own risks of pain, indignity, and prolonged suffering. But having concluded that the death penalty in the abstract is consistent with the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion), courts cannot now avoid the Eighth Amendment's proscription of "the unnecessary and wanton infliction of pain" in carrying out that penalty simply by relying on 19th-century precedents that appear to have rested on inaccurate factual assumptions and that no longer embody the meaning of the Amendment. *Gregg* v. *Georgia*, *supra*, at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.). For the reasons set forth above, there is an evermore urgent question whether electrocution in fact is a "humane" method for extinguishing human life or is, instead, nothing less than the contemporary technological equivalent of burning people at the stake.

No. 84–6302. ROSCOE *v.* ARIZONA. Sup. Ct. Ariz.;

No. 84–6306. CAMPBELL *v.* WASHINGTON. Sup. Ct. Wash.; and

No. 84–6364. VEREEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 84–6302, 145 Ariz. 212, 700 P. 2d 1312; No. 84–6306, 103 Wash. 2d 1, 691 P. 2d 929; No. 84–6364, 312 N. C. 499, 324 S. E. 2d 250.

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.

---

[41] See, *e. g.*, 1968 Hearings, at 21; 1972 Hearings, at 306–307; Teeters 451–455; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 127–128.

[42] See, *e. g.*, *Chaney* v. *Heckler*, 231 U. S. App. D. C. 136, 139–140, 718 F. 2d 1174, 1177–1178 (1983), rev'd, 470 U. S. 821 (1985); Royal Commission Report ¶¶ 737–749, at 257–261; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 128–129.

Rehearing Denied

No. 83–6493. IRVING *v.* MISSISSIPPI, 470 U. S. 1059;

No. 84–1251. OHIO *v.* LUCK, 470 U. S. 1084;

No. 84–6092. BERKSON *v.* DEL MONTE CORP. ET AL., 470 U. S. 1056; and

No. 84–6144. DAY *v.* AMOCO CHEMICALS CORP., 470 U. S. 1086. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

MAY 1, 1985

Dismissal Under Rule 53

No. 84–999. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 745 F. 2d 68.

MAY 13, 1985

Appeals Dismissed

No. 84–1145. LANTON *v.* ALABAMA. Appeal from Ct. Crim. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 456 So. 2d 873.

No. 84–1478. BLAIR *v.* BOULGER. Appeal from Sup. Ct. N. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 358 N. W. 2d 522.

No. 84–1583. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1637. HOLDERMAN *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1638. HOLDERMAN *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 755 F. 2d 915.

No. 84–6401. VALWAY ET UX. *v.* KEARNS ET AL. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1476. DEPERTE ET AL. *v.* TRIBUNE CO. ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 458 So. 2d 1075.

Certiorari Granted—Vacated and Remanded

No. 84–6410. TUGGLE *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). Reported below: 228 Va. 493, 323 S. E. 2d 539.

Certiorari Granted—Vacated in Part and Remanded. (See No. 84–1440, *ante*, p. 459.)

Certiorari Granted—Reversed. (See No. 84–1165, *ante*, p. 453.)

Vacated and Remanded After Certiorari Granted

No. 84–5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1003.] Judgment vacated and case remanded for further proceedings in light of the assertions set forth in petitioner's motion to vacate filed April 26, 1985, and the response filed thereto.

Miscellaneous Orders

No. — – ——. KELLER, ADMINISTRATRIX OF THE ESTATE OF KELLER *v.* AMERICAN OPTICAL CO. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. D–294. IN RE DISBARMENT OF WOLFF. Disbarment entered. [For earlier order herein, see 459 U. S. 939.]

No. D–462. IN RE DISBARMENT OF COLLIER. Disbarment entered. [For earlier order herein, see 469 U. S. 1030.]

No. D–480. IN RE DISBARMENT OF BLACK. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–489. IN RE DISBARMENT OF MCGARRY. It is ordered that James P. McGarry, of Flushing, 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–491. IN RE DISBARMENT OF PECORARO. It is ordered that Maria Catherine Pecoraro, of West Chester, Pa., 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–492. IN RE DISBARMENT OF SURGENT. It is ordered that John W. Surgent, of Lake Ariel, 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. 83–1944. JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING. C. A. 8th Cir. [Certiorari granted, 469 U. S. 815.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. [Certiorari granted, 469 U. S. 879.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84–805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1207.] Motion of respondents for divided argument granted.

No. 84–1321. NIX, WARDEN *v.* WHITESIDE. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1014.] Motion for appointment of counsel granted, and it is ordered that Patrick Reilly Grady, Esquire, of Cedar Rapids, Iowa, be appointed to serve as counsel for respondent in this case.

No. 84–1426. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* MCCRAY. C. A. 2d Cir. Motion of respondent to expedite further consideration of the petition for writ of certiorari and to consolidate with No. 84–6263, *Batson* v. *Kentucky* [certiorari

granted, *ante*, p. 1052], denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would grant this motion.

No. 84–1447. SALCER ET AL. *v.* ENVICON EQUITIES CORP. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–6051. ALLEN *v.* GEORGIA, 470 U. S. 1059. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 84–6423. IN RE BERNSTEIN; and

No. 84–6496. IN RE HUNTER. Petitions for writs of mandamus denied.

Certiorari Granted

No. 84–1493. NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.; and

No. 84–1509. SEATTLE-FIRST NATIONAL BANK *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 752 F. 2d 356.

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 743 F. 2d 648.

No. 84–1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 329.

No. 84–1485. MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 753 F. 2d 178.

No. 84–6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari

granted limited to Question 1 presented by the petition. Reported below: 753 F. 2d 342.

Certiorari Denied. (See also Nos. 84–1145, 84–1478, 84–1583, 84–1637, 84–1638, and 84–6401, *supra.*)

No. 83–2132. LUCKY STORES, INC. *v.* GARIBALDI. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1367.

No. 84–756. MOORE *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 311.

No. 84–821. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY *v.* LASSO. C. A. 10th Cir. Certiorari denied. Reported below: 741 F. 2d 1241.

No. 84–996. JACOBS, EXECUTRIX OF THE ESTATE OF JACOBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84–1101. BRAINARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 320.

No. 84–1104. PRZYBYLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 828.

No. 84–1136. BURROUGHS ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 1525.

No. 84–1142. EXXON CORP. *v.* DEPARTMENT OF ENERGY ET AL.; and

No. 84–1316. TEXACO INC. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 752 F. 2d 650.

No. 84–1143. O'BROCTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 263.

No. 84–1171. JENRETTE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 193, 744 F. 2d 817.

No. 84–1173. UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN *v.* SEARS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 749 F. 2d 1451.

No. 84–1177. STERLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 521.

No. 84–1210. SPRADLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84–1260. YAMANIS *v.* UNITED STATES;
No. 84–1261. YAMANIS *v.* UNITED STATES; and
No. 84–6104. CALISE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1508.

No. 84–1306. BAKER *v.* BAKER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 483 A. 2d 733.

No. 84–1345. TOWN PUMP, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 65.

No. 84–1348. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1303.

No. 84–1369. MANHATTAN COFFEE CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 688. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 621.

No. 84–1416. SUMCO MANUFACTURING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1189.

No. 84–1420. CHICAGO INVESTMENT CORP. *v.* AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 750 F. 2d 577.

No. 84–1446. TACA INTERNATIONAL AIRLINES, S.A. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 965.

No. 84–1448. LENNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 737.

No. 84–1452. WISCONSIN'S ENVIRONMENTAL DECADE, INC., ET AL. *v.* STATE BAR OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 407.

No. 84–1453. KMA, INC. *v.* CITY OF NEWPORT NEWS. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 365, 323 S. E. 2d 78.

No. 84–1455. BEDAT ET AL. *v.* MCLEAN TRUCKING CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1457. CAPITAL TELEPHONE CO., INC., ET AL. *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 1154.

No. 84–1461. PROVIDENCE BUILDERS, INC., ET AL. *v.* ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP ET AL. Pa. Commw. Ct. Certiorari denied.

No. 84–1462. JAMES *v.* HUNTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84–1464. RONWIN ET AL. *v.* SUPREME COURT OF IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 84–1467. PALMER ET UX. *v.* TUCKER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 38.

No. 84–1468. DESEYN *v.* MUSKINGUM WATERSHED CONSERVANCY DISTRICT. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84–1469. BERRY *v.* BAILEY. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 670.

No. 84–1472. LYONS *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 84–1473. HOFFMAN *v.* HENDERSON. Ct. App. Minn. Certiorari denied. Reported below: 355 N. W. 2d 322.

No. 84–1483. YUGOEXPORT, INC., ET AL. *v.* THAI AIRWAYS INTERNATIONAL, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1373.

No. 84–1486. KERRIGAN ET UX. *v.* LUCE, FORWARD, HAMILTON & SCRIPPS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1082.

No. 84–1487. WASHINGTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 462 So. 2d 763.

No. 84–1494. BRISTER ET AL. *v.* PARISH OF JEFFERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1019.

No. 84–1496. HAMPTON ROADS SHIPPING ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1015.

No. 84–1497. RICELAND FOODS, INC. *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO–CLC, LOCAL 2381, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 749 F. 2d 1260.

No. 84–1498. GOOD HOPE CHEMICAL CORPORATION CREDITORS' COMMITTEE *v.* KOERVER & LERSCH. C. A. 1st Cir. Certiorari denied. Reported below: 747 F. 2d 806.

No. 84–1501. JOHN E. GREEN PLUMBING & HEATING CO., INC. *v.* TURNER CONSTRUCTION CO. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 965.

No. 84–1505. CHAMBERS *v.* HENDERSON, JUDGE OF THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA. Dist. Ct. Oklahoma County, Okla. Certiorari denied.

No. 84–1507. CARDER *v.* VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 84–1514. GEORGIA *v.* FELKER. Ct. App. Ga. Certiorari denied. Reported below: 172 Ga. App. 492, 323 S. E. 2d 817.

No. 84–1523. DUFFY *v.* CITY OF LONG BEACH. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–1547. ALPHA PORTLAND INDUSTRIES, INC., ET AL. *v.* ANDERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 1293.

No. 84–1562. SEGRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84–1570. JOHNSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 664.

No. 84–1574. ADCOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 346.

No. 84–1575. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84–1585. COSMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–1588. DUGGER *v.* DELTA AIRLINES. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 16, 325 S. E. 2d 394.

No. 84–1594. GENSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–1596. BIBBERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 581.

No. 84–1610. SMITH *v.* FCX, INC. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1378.

No. 84–1628. WILLIAMS *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 67.

No. 84–1632. SUTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 755 F. 2d 523.

No. 84–5343. HUX *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 737.

No. 84–5484. JARRELL *v.* BALKCOM, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1242.

No. 84–5547. SALDANA *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 685 P. 2d 20.

No. 84–5797. HERRERA *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 102 N. M. 254, 694 P. 2d 510.

No. 84–5950. RHEA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 41.

No. 84–5954. SAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–5963. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–5993. ATNIP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84–6059. THOMPSON *v.* REIVITZ, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 397.

No. 84–6074. GREGORY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 732.

No. 84–6079. OWENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 84–6080. VENTURA *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1488.

No. 84–6099. SCHMITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 249.

No. 84–6127. THOMPSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 731.

No. 84–6132. GRANDISON *v.* MOORE ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6146. PRESTON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 99.

No. 84–6205. PIERROT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1156.

No. 84–6246. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 33.

No. 84–6259. LATIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1464.

No. 84–6271. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1458.

No. 84–6290. VAN ORDEN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 469 N. E. 2d 1153.

No. 84–6310. LOVE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 468 N. E. 2d 519.

No. 84–6352. SEGURA *v.* UNITED STATES; and
No. 84–6360. REYNOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6353. SMITH *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 386.

No. 84–6367. SELLARS *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 769.

No. 84–6372. HAAS *v.* NICHOLS ET AL. Ct. App. Ariz. Certiorari denied.

No. 84–6379. ORANGE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–6390. COQUILLIAN *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84–6391. FOSSO ET AL. *v.* CABINET FOR HUMAN RESOURCES OF KENTUCKY ET AL. Sup. Ct. Ky. Certiorari denied.

No. 84–6393. FRANKENBERRY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 84–6394. BROWN *v.* SCHWEITZER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6397. DRUMHELLER *v.* BOOKER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1070.

No. 84–6403. SMITH ET UX. *v.* CITIZENS HOME SAVINGS CO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84–6404. SPEIGEL *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 84–6405. SMITH ET UX. *v.* CITIZENS HOME SAVINGS CO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84–6415. STEWART *v.* CABANA, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 84–6418. MCKINNIS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 469 So. 2d 727.

No. 84–6420. CONNOR *v.* HAUGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84–6421. ABBOTT *v.* MELSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6424. KIMBALL *v.* MAHLER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–6426. ELY *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 345, 753 F. 2d 163.

No. 84–6435. MAGEE *v.* CAMPOY, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 84–6439. FORRESTER *v.* BRANDT. C. A. 2d Cir. Certiorari denied.

No. 84–6448. WOODS *v.* LUMBER CENTER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 66.

No. 84–6455. FREEZE *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–6459. HUBER *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 361 N. W. 2d 236.

No. 84–6461. SWANN *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 84–6462. PERKINS *v.* RICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84–6467. DAVIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6472. BUHAJLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84–6476. WEBSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84–6479. SLOAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 84–6481. LIBERTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6483. DEVELASCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84–6488. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6494. MURPHY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84–6499. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6511. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 2d 1259.

No. 84–6518. PARSONS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 472 N. E. 2d 915.

No. 84–6519. PEPPER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 84–6523. LORICK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1295.

No. 84–6539. WALKER *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6549. MCELVEEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6565. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 84–6570. BLYTHER *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 24, 748 F. 2d 714.

No. 84–1190. WELLS *v.* ROCKEFELLER ET AL. C. A. 3d Cir. Motion of respondents for award of damages denied. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 728 F. 2d 209.

No. 84–1207. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. *v.* DOBY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 741 F. 2d 76.

No. 84–1223. DAVIS, WARDEN *v.* STOKES. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 746 F. 2d 1479.

No. 84–1234. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HALL. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 733 F. 2d 766.

No. 84–1410. IRVING, DIRECTOR, JUVENILE DIVISION, ILLINOIS DEPARTMENT OF CORRECTIONS *v.* CLAY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 749 F. 2d 427.

No. 84–1540. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON *v.* DILLON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 751 F. 2d 895.

No. 84–1278. YAMASAKI, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION *v.* STOP H–3 ASSN. ET AL. C. A. 9th Cir. Motion of Committee for H–3 et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 740 F. 2d 1442.

No. 84–1291. PARK AVENUE INVESTMENT & DEVELOPMENT, INC., ET AL. *v.* BARKHEIMER ET AL. Dist. Ct. App. Fla., 4th Dist. Motion of respondents for attorneys' fees and costs denied. Certiorari denied. Reported below: 462 So. 2d 1125.

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

I agree that we should deny the petition for a writ of certiorari, but I would also grant respondents' motion for costs and fees. This petition is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim, and on this record I believe that the purpose of the petition is to delay collection of a debt. This use of the Court's processes should subject the attorney who filed the petition to the sanction of Rule 49.2 of this Court.[1]

Park Avenue Investment & Development, Inc., was formed to develop and convert oceanfront buildings into time-share resorts. Petitioners solicited the respondents to invest in Park Avenue under a profit-sharing plan. Park Avenue later defaulted on its obligations under the profit-sharing plan. It then executed a series of promissory notes to the respondents for the deficiencies due under the plan, but defaulted on the notes as well. Respondents initiated five separate lawsuits to collect on the promissory notes. On September 17, 1981, the parties entered into a stipulation for the settlement of the lawsuits. The stipulation set out

[1] Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

the amounts petitioners owed to respondents and established a timetable for repayment. When Park Avenue failed to make any of the payments under the stipulation, respondents attempted to foreclose on their debts, but petitioners prevented them from doing so.

Respondents then filed suit in state court. In response to a motion for summary judgment filed by respondents, petitioners moved to set aside the stipulation on the ground that it was usurious and unenforceable under Florida's criminal usury statute, Fla. Stat. § 687.071(7) (1983). The trial court denied petitioners' motion to set aside the stipulation, granted respondents' motion for summary judgment, and, a few weeks later, entered judgment for respondents. The court based its decisions on *Gunn Plumbing, Inc.* v. *Dania Bank*, 252 So. 2d 1 (Fla. 1971), in which the Florida Supreme Court held that "usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute." *Id.*, at 4. The trial court held that the parties' stipulation constituted a waiver of whatever usury defense petitioners may have had to the promissory notes.

Petitioners appealed to the District Court of Appeal. That court affirmed in a *per curiam* order, simply citing *Gunn Plumbing*, *supra*, and *Sherman* v. *Field Clinic*, 74 Ill. App. 3d 21, 392 N. E. 2d 154 (1979). Petitioners then filed a petition for a writ of certiorari in the Florida Supreme Court and at the same time attempted to take a direct appeal to that court, invoking its appellate jurisdiction on the obviously meritless ground that the District Court of Appeal had held § 687.071(7) invalid as applied. See generally Fla. Const., Art. V, § 3(b)(1). The State Supreme Court denied certiorari and dismissed the appeal. Petitioners then filed a motion for reinstatement of the appeal. The Florida Supreme Court denied this motion.

Petitioners next filed their petition for a writ of certiorari in this Court, asserting that the state courts' failure to apply § 687.071(7) infringed their rights under the Equal Protection Clause of the Fourteenth Amendment. Petitioners' equal protection "argument" is raised here for the first time. In reviewing judgments of state courts, of course, we do not consider constitutional arguments that were not properly presented in the state courts.

Moreover, the claim is patently frivolous. Besides the wholly conclusory assertion that the decisions of the state courts have violated petitioners' right to equal protection, the arguments

contained in the petition concern only matters of state law, principally that the trial and appellate courts erred in applying *Gunn Plumbing*, *supra*. Although there are colorable arguments that *Gunn Plumbing* is distinguishable from petitioners' case, there is nothing in *Gunn Plumbing* or in the facts of this case to indicate that the application of *Gunn Plumbing* here was arbitrary or even surprising. There is no allegation that *Gunn Plumbing* has not been applied in similar cases.[2] Hence there is no basis whatsoever for petitioners' assertion that they have been denied equal protection. Indeed, it seems clear to me that this petition is but the latest step in a series of actions designed solely to delay respondents' foreclosure on their loans. Such an abuse of the judicial process should not be tolerated. See *Talamini* v. *Allstate Insurance Co.*, 470 U. S. 1067, 1071 (1985) (STEVENS, J., concurring) ("[I]f it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.").

Respondents have moved for an award of costs and fees for their expenses in responding to this frivolous petition. I would grant the motion to the extent of awarding respondents $5,000 against Hal P. Dekle, Esq., petitioners' counsel, pursuant to this Court's Rule 49.2.

No. 84–1313. BURLINGTON NORTHERN RAILROAD CO. *v.* COSBY ET AL. C. A. 8th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 741 F. 2d 1077.

No. 84–1438. NATIONAL BUSINESS SYSTEMS, INC., ET AL. *v.* AM INTERNATIONAL, INC., ET AL. C. A. 7th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 743 F. 2d 1227.

No. 84–1471. BEECH AIRCRAFT CORP. *v.* ELSWORTH ET AL. Sup. Ct. Cal. Motion of Boeing Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 37 Cal. 3d 540, 691 P. 2d 630.

---

[2] Nor could any such allegation be made; *Gunn Plumbing* has been followed consistently. See, *e. g.*, *Munilla* v. *Perez-Cobo*, 335 So. 2d 584 (Fla. App. 1976), cert. denied, 344 So. 2d 325 (Fla. 1977). See also *Morgan Walton Properties, Inc.* v. *International City Bank & Trust Co.*, 404 So. 2d 1059, 1062 (Fla. 1981).

No. 84–1488. BALDWIN-UNITED CORP. ET AL. *v.* EUBANKS, INSURANCE COMMISSIONER FOR ARKANSAS. Sup. Ct. Ark. Motion of the parties to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 283 Ark. 385, 678 S. W. 2d 754.

No. 84–6033. BROGDON *v.* LOUISIANA. Sup. Ct. La.;

No. 84–6284. FAIRCHILD *v.* ARKANSAS. Sup. Ct. Ark.;

No. 84–6326. HALL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 84–6408. SINGLETON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 84–6413. STANO *v.* FLORIDA. Sup. Ct. Fla.;

No. 84–6486. WASHINGTON *v.* VIRGINIA. Sup. Ct. Va.;

No. 84–6490. DUTTON *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 84–6526. CARRIGER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 84–6033, 457 So. 2d 616; No. 84–6284, 284 Ark. 289, 681 S. W. 2d 380; No. 84–6326, 733 F. 2d 766; No. 84–6408, 284 S. C. 388, 326 S. E. 2d 153; No. 84–6413, 460 So. 2d 890; No. 84–6486, 228 Va. 535, 323 S. E. 2d 577; No. 84–6526, 143 Ariz. 142, 692 P. 2d 991.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–2022. GRIBBLE *v.* BUCKNER, JUDGE, GENERAL SESSIONS COURT OF RUTHERFORD COUNTY, TENNESSEE, ET AL., 469 U. S. 930;

No. 84–667. LYONS *v.* WARDEN, NEVADA STATE PRISON, *ante*, p. 1004;

No. 84–5968. BREWER *v.* CITY OF CLAYHATCHEE, *ante*, p. 1005;

No. 84–6190. JUDD *v.* UNITED STATES ET AL., *ante*, p. 1019; and

No. 84–6212. HOPGOOD *v.* HOPGOOD, *ante*, p. 1006. Petitions for rehearing denied.

No. 83–6663. FUGATE *v.* NEW MEXICO, 470 U. S. 904;

No. 84–16. CORY ET AL. *v.* WESTERN OIL & GAS ASSN. ET AL., *ante*, p. 81;

No. 84–249. SPENCER ET UX. *v.* SOUTH CAROLINA TAX COMMISSION ET AL., *ante*, p. 82;

No. 84–559. PERALTA SHIPPING CORP. *v.* SMITH & JOHNSON (SHIPPING) CORP., 470 U. S. 1031;

No. 84–690. UNITED STATES *v.* GAGNON ET AL., 470 U. S. 522;

No. 84–833. BEAN DREDGING CORP. *v.* ALABAMA, 469 U. S. 1200;

No. 84–841. KASHETTA *v.* KASHETTA, 469 U. S. 1191;

No. 84–939. JAPAN AIR LINES CO., LTD. *v.* ABRAMSON, 470 U. S. 1059;

No. 84–5059. RAMIREZ *v.* INDIANA, *ante*, p. 147;

No. 84–5507. LAVONTE *v.* WALTER ET AL., 469 U. S. 1219;

No. 84–5736. WHITE *v.* MARYLAND, 470 U. S. 1062;

No. 84–5770. STULL *v.* UNITED STATES, 470 U. S. 1062;

No. 84–5870. FINNEY *v.* GEORGIA, 470 U. S. 1088;

No. 84–6055. HANSON *v.* RUTHERFORD ET AL., 470 U. S. 1055;

No. 84–6147. MCNEAIR *v.* SUBURBAN HOSPITAL ASSN., INC., 470 U. S. 1086;

No. 84–6192. BERTULFO *v.* OFFICE OF PERSONNEL MANAGEMENT, 470 U. S. 1057;

No. 84–6227. MANKO *v.* UNITED STATES, 470 U. S. 1046;

No. 84–6243. BETKA *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 470 U. S. 1087; and

No. 84–6323. FABIAN *v.* RYAN, 470 U. S. 1087. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

MAY 14, 1985

Miscellaneous Order

No. A–859. DE LA ROSA *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, May 15, 1985, presented to JUSTICE WHITE, and by him referred to the Court, 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 the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

MAY 17, 1985

Dismissal Under Rule 53

No. 84–1266. G. HEILEMAN BREWING CO., INC., ET AL. *v.* FOLDING CARTON ADMINISTRATION COMMITTEE ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 744 F. 2d 1252.

MAY 20, 1985

Appeals Dismissed

No. 84–1454. MISSISSIPPI POWER & LIGHT CO. *v.* CONERLY ET AL. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. JUSTICE BLACKMUN would dismiss for want of jurisdiction. Reported below: 460 So. 2d 107.

No. 84–1605. JACK H. BROWN & CO. INC. *v.* NORTHWEST SIGN CO. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 680 S. W. 2d 808.

Certiorari Granted—Vacated and Remanded

No. 84–1398. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* RAMIREZ DE ARELLANO ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub. L. 98–473, 98 Stat. 1884, 1893–1894, and other events occurring since October 5, 1984. Reported below: 240 U. S. App. D. C. 363, 745 F. 2d 1500.

No. 84–1418. PASTRANA DE CARABALLO *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to remand the case to the United States District Court for the District of Puerto Rico with instructions to remand the case to the Secretary of Health and

Human Services for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984.

Miscellaneous Orders

No. D–471. IN RE DISBARMENT OF BRAULT. Disbarment entered. [For earlier order herein, see 469 U. S. 1154.]

No. D–479. IN RE DISBARMENT OF GOFFEN. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–481. IN RE DISBARMENT OF GOLD. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–493. IN RE DISBARMENT OF SURDUT. It is ordered that Raymond J. Surdut, of Providence, R. I., 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. 83–1944. JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING. C. A. 8th Cir. [Certiorari granted, 469 U. S. 815.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of Mexican American Legal Defense and Educational Fund for leave to file a brief as *amicus curiae* granted.

No. 84–1287. LIPHETE ET AL. *v.* STIERHEIM ET AL. Dist. Ct. App. Fla., 3d Dist.; and

No. 84–1545. MILLER-WOHL CO., INC. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA ET AL. Appeal from Sup. Ct. Mont. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Appeal from Sup. Ct. Cal. Motions of California Chamber of Commerce and Western Mobilehome Association for leave to file briefs as *amici curiae* granted.

No. 84–6598. KNOBLAUCH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 10, 1985, 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.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–6471. IN RE CARTER. Petition for writ of mandamus denied.

No. 84–1558. IN RE PAN AMERICAN WORLD AIRWAYS, INC., ET AL. Petition for writ of mandamus and prohibition denied.

Probable Jurisdiction Noted

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 750 F. 2d 608.

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted and case set for oral argument in tandem with No. 84–495, *Thornburgh* v. *American College of Obstetricians and Gynecologists* [probable jurisdiction postponed, *ante*, p. 1014]. Reported below: 749 F. 2d 452.

Certiorari Granted. (See No. 83–2097, *ante*, at 471.)

Certiorari Denied. (See also No. 84–1605, *supra*.)

No. 83–6887. QUIGLEY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 461, 462 N. E. 2d 92.

No. 84–995. MASSA *v.* UNITED STATES; and
No. 84–1265. SKINNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 629.

No. 84–1200. MEESE, ATTORNEY GENERAL, ET AL. *v.* SEGAR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 103, 738 F. 2d 1249.

No. 84–1257. GLOVER *v.* UNITED GROCERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1380.

No. 84–1344. SAGINAW MINING CO. *v.* GIBAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 748 F. 2d 1112.

No. 84–1351. AKOOTCHOOK ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1316.

No. 84–1365. PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 466.

No. 84–1366. BOARD OF EDUCATION OF THE CITY OF CHICAGO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1300.

No. 84–1378. RENARD *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 563, 467 N. E. 2d 1090.

No. 84–1490. NELSON *v.* PIEDMONT AVIATION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 2d 1234.

No. 84–1520. CAMEO CONVALESCENT CENTER, INC. *v.* WILLKOM. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 84–1532. NEVADA ET AL. *v.* OLIVER. C. A. 9th Cir. Certiorari denied.

No. 84–1535. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* GERLING GLOBAL GENERAL INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 919.

No. 84–1541. DEWBERRY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–1544. MILLER *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 359 N. W. 2d 620.

No. 84–1546. MCGINNIS, WARDEN, ET AL. *v.* ROBINSON. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1078.

No. 84–1548. AMIS *v.* STEELE, LEE COUNTY TAX COLLECTOR, ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 459 So. 2d 1045.

No. 84–1551. KATHERINE D., A MINOR, BY AND THROUGH HER NATURAL PARENTS AND LEGAL GUARDIANS, KEVIN D. ET UX. *v.* DEPARTMENT OF EDUCATION OF HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 809.

No. 84–1552. SODERBECK *v.* BURNETT COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 285.

No. 84–1556. DURHAM HOSIERY MILLS, INC., ET AL. *v.* WHITE. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84–1557. HOWKINS *v.* CALDWELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 731.

No. 84–1561. S/S LAKE ANJA ET AL. *v.* M. GOLODETZ EXPORT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 1103.

No. 84–1565. VAN WEELDE BROTHERS SHIPPING LTD. ET AL. *v.* I. N. C. A. S. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 958.

No. 84–1576. MICHIGAN *v.* EARLY. Ct. App. Mich. Certiorari denied.

No. 84–1579. PRESBYTERY OF ELIJAH PARISH LOVEJOY ET AL. *v.* JAEGGI ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 682 S. W. 2d 465.

No. 84–1603. KELTEE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84–5934. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1338.

No. 84–5941. SATTERFIELD *v.* UNITED STATES;
No. 84–6300. ALLISON *v.* UNITED STATES; and
No. 84–6434. WELDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 827.

No. 84–6128. PALACIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 66.

No. 84–6221. CLEVELAND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 84–6222. BOCOOK *v.* TATE. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84–6272. GLASSHOFER *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6283. BRITT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 1149.

No. 84–6437. SAVAGE *v.* CITY OF COLUMBUS. Sup. Ct. Ohio. Certiorari denied.

No. 84–6464. SMALL *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 52.

No. 84–6480. COOPER ET AL. *v.* SOCIETY NATIONAL BANK. Sup. Ct. Ohio. Certiorari denied.

No. 84–6482. ROYBAL *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 84–6484. OWENS *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–6489. ANDERSON *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK, ET AL. C. A. 1st Cir. Certiorari denied.

No. 84–6491. WILSON *v.* SEITER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1014.

No. 84–6492. PAPANDREA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 961.

No. 84–6497. WESER *v.* MASCHNER ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6524. HERRINGTON *v.* HEFLIN-HORTON INSURANCE AGENCY ET AL. Cir. Ct. W. Va., Monongalia County. Certiorari denied.

No. 84–6540. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–6553. HILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1160, 483 N. E. 2d 728.

No. 84–6566. GALA *v.* UNITED STATES DEPARTMENT OF DEFENSE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–6573. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 520.

No. 84–6574. PIQUETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84–6577. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 175.

No. 84–6588. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84–6593. TIMLICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 937.

No. 84–6597. GODINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6600. BROWN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 659.

No. 84–6663. ANDINO *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–953. FLORIDA *v.* ZAFRA. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 444 So. 2d 1064.

No. 84–1227. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 37 Cal. 3d 136, 689 P. 2d 430.

No. 84–1537. EDUCATIONAL BOOKS, INC. *v.* VIRGINIA. Cir. Ct. Fairfax County, Va. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the convictions.

No. 84–6453. GASKINS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 84–6498. LAWSON *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 84–6508. STEWART *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 84–6522. HARDWICK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84–6453, 284 S. C. 105, 326 S. E. 2d 132; No. 84–6498, 310 N. C. 632, 314 S. E. 2d 493; No. 84–6508, 104 Ill. 2d 463, 473 N. E. 2d 1227; No. 84–6522, 461 So. 2d 79.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–1896. MOBIL OIL CORP. *v.* BLANTON ET AL., *ante*, p. 1007;
No. 84–724. TEXAS A & M UNIVERSITY ET AL. *v.* GAY STUDENT SERVICES ET AL., *ante*, p. 1001;
No. 84–6186. FERRELL *v.* SOUTH CAROLINA, *ante*, p. 1009;
No. 84–6189. CHAFFEE *v.* SOUTH CAROLINA, *ante*, p. 1009;
No. 84–6230. TRUESDALE *v.* SOUTH CAROLINA, *ante*, p. 1009; and
No. 84–6380. MARTIN *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS, *ante*, p. 1022. Petitions for rehearing denied.

No. 83–1274. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL., 470 U. S. 869. Petitions of W. G. Ward, Jr., and American Educators Life Insurance Co. for rehearing denied.

No. 84–685. RUSH ET AL. *v.* UNITED STATES, 470 U. S. 1004. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

MAY 23, 1985

Dismissal Under Rule 53

No. 84–1127. IN RE ROBSON ET AL. Petition for writ of mandamus dismissed under this Court's Rule 53.

MAY 28, 1985

Appeal Dismissed. (See also No. 84–1538, *infra.*)

No. 84–1571. O'KEEFE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF O'KEEFE *v.* COUNTY OF HENNEPIN. Appeal from Ct. App. Minn. dismissed for want of substantial federal question. Reported below: 354 N. W. 2d 531.

Miscellaneous Orders

No. A–856 (84–6743). DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–903. FRANCOIS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, May 29, 1985, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, 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) (BRENNAN, J., dissenting), I would grant Francois' application for a stay of execution.

Even if I believed otherwise, however, I would grant the application. The Court's decision to send Francois to his death tomorrow morning is particularly disturbing because we have granted a writ of certiorari in a case raising the identical legal claim. *Cabana* v. *Bullock*, No. 84–1236, cert. granted, *ante*, p. 1052, poses the question whether a capital sentence may be carried out despite the fact that the sentencing jury was instructed on an imputed intent felony-murder theory of the type condemned in *Enmund* v. *Florida*, 458 U. S. 782 (1982).[1] Francois was sen-

[1] In *Enmund* we concluded that "the Eighth Amendment [does not] permi[t] imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U. S., at 797.

tenced to death based on his role in six murders committed in the course of a robbery. Four persons were arrested for the crime; two were triggermen, one accompanied the triggermen into the house, and the fourth stayed in a car outside. Francois claims that he argued at his trial, and has argued consistently since trial, that he was *not* the triggerman and did not realize that lethal force was likely to be used by his companions. In the rush to execution, we have not yet received the record in this case, and must assume that Francois accurately describes his defense.

It is undisputed that Francois' jury was instructed that "[a]ny person who knowingly aids [or] abets . . . the commission of [a felony] . . . is equally guilty of the crime of first degree murder with the one who actually performs the act," and that a killing in the course of a felony "is murder in the first degree *even though there is no premeditated design or intent to kill.*" Application for Stay 27 (emphasis added). Thus, even if the jury had believed Francois' defense that he did not specifically intend to kill, they could have returned their death sentence against him under these instructions, which concededly were faulty under *Enmund.*

The jury instructions used in *Cabana* v. *Bullock, supra,* are indistinguishable. The jury there was told that capital murder included any killing "when done with *or without any design to effect death,* by any person engaged in the commission of the crime of . . . robbery." *Bullock* v. *Lucas,* 743 F. 2d 244, 247 (CA5 1984) (emphasis added). Applying *Enmund, supra,* the Fifth Circuit concluded that although there had been some evidence introduced at trial that Bullock had intended the killing at issue, "the penalty of death may not stand in light of the jury instruction which would permit the imposition of the death penalty merely because Bullock participated in the robbery" without any intent to kill. 743 F. 2d, at 248. See *Stromberg* v. *California,* 283 U. S. 359 (1931); cf. *Francis* v. *Franklin, ante,* at 322–325; *Sandstrom* v. *Montana,* 442 U. S. 510, 526 (1979).

Until we have decided *Cabana* v. *Bullock, supra,* there can be no doubt that a death sentence imposed for a conviction based on such instructions is of doubtful validity, unless facts that would justify a finding of intent to kill under *Enmund* are undisputed. The Eleventh Circuit denied Francois' claim on this issue only today. We have no record before us on which to evaluate Francois' claim, nor has he ever had an opportunity fully to present his

claims to this Court.[2] The Eleventh Circuit has squarely and consistently rejected the Fifth Circuit's approach, see, *e. g.*, *Ross* v. *Kemp*, 756 F. 2d 1483, 1487–1488 (CA5 1985) (en banc), thereby creating a clear split of authority on the question presented. Accordingly, I would vote to stay Francois' execution until *Cabana* v. *Bullock* is decided, or, at the very least, until we can consider Francois' claim with the record of his trial before us.

I dissent.

No. D–478. IN RE DISBARMENT OF HAILEY. Disbarment entered. [For earlier order herein, see 470 U. S. 1047.]

No. D–487. IN RE DISBARMENT OF TABMAN. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. 102, Orig. INDIANA *v.* UNITED STATES ET AL. Motion to amend the proposed complaint granted. Motion for leave to file bill of complaint denied. [For earlier order herein, see *ante*, p. 1002.]

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of respondents for divided argument to permit American Jewish Congress to present oral argument as *amicus curiae* denied.

No. 84–1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84–1361. UNITED STATES *v.* LOUD HAWK ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1014.] Motions for appointment of counsel granted, and it is ordered that Kenneth Saul

---

[2] Francois' first state and federal habeas corpus petitions were filed in November 1982. After the Eleventh Circuit denied Francois relief on his first habeas petition, *Francois* v. *Wainwright*, 741 F. 2d 1275 (1984), his appellate counsel abandoned him and no petition for certiorari was filed. Because Florida did not recognize *Enmund* claims as cognizable on collateral review until 1984, the District Court rejected the State's claim that Francois' presentation of his intent claim in a second petition for habeas corpus constituted an abuse of the writ. *Francois* v. *Wainwright*, No. 85–1918, pp. 4–5 (SD Fla. May 23, 1985).

Stern, Esquire, of Milwaukie, Ore., be appointed to serve as counsel for respondents in this case.

No. 84–6649. IN RE MAGEE. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Appeal from Sup. Ct. Cal. Motions of California Association of Realtors and California Building Industry Association for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted limited to Question 1 presented by the statement as to jurisdiction. Appeal as to Question 2 presented by the statement as to jurisdiction is dismissed for want of a substantial federal question. Reported below: 37 Cal. 3d 644, 693 P. 2d 261.

Certiorari Granted

No. 84–1580. UNITED STATES *v.* INADI. C. A. 3d Cir. Certiorari granted. Reported below: 748 F. 2d 812.

No. 84–1586. MALLEY ET AL. *v.* BRIGGS ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 748 F. 2d 715.

No. 84–1531. MICHIGAN *v.* JACKSON; and
No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 421 Mich. 39, 365 N. W. 2d 56.

Certiorari Denied

No. 84–1141. HOLLAND ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 878.

No. 84–1319. DENSMORE *v.* CITY OF BOCA RATON, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84–1376. GRIM HOTEL CO. ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 966.

No. 84–1385. WRIGHT *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1481.

No. 84–1423. FEYERS ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 2d 1222.

No. 84–1435. ADKINSON *v.* ADKINSON. Cir. Ct. W. Va., Jefferson County. Certiorari denied.

No. 84–1475. HOLOCARD *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 84–1563. BLINDER, ROBINSON & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 748 F. 2d 1415.

No. 84–1569. AGUILAR ET UX. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 1089.

No. 84–1572. MARX *v.* CENTRAN CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1536.

No. 84–1573. DESAI *v.* TOMPKINS COUNTY TRUST CO. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1578. MOREL DE LETELIER ET AL. *v.* REPUBLIC OF CHILE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 790.

No. 84–1581. SEALY, INC., ET AL. *v.* OHIO-SEALY MATTRESS MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 441.

No. 84–1582. MARTIN ET AL. *v.* KILGORE FIRST BANCORP, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1024.

No. 84–1592. SMELSER *v.* KELLEY, JUDGE, DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 84–1598. HOLLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 253.

No. 84–1607. NORTH EAST INDEPENDENT SCHOOL DISTRICT ET AL. *v.* FINDEISEN. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 234.

No. 84–1627. DAVIDSON *v.* CALEDONIAN HOSPITAL. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84–1670. FG FLEUZEUGLEASING GMBH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1280.

No. 84–1688. OSPINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 448.

No. 84–1690. ENRIQUEZ *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 111.

No. 84–1696. HEANEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6102. JENSEN *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied.

No. 84–6196. JOOST *v.* UNITED STATES PAROLE COMMISSION. C. A. 10th Cir. Certiorari denied.

No. 84–6303. BALDONADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6329. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 291.

No. 84–6495. WILLIAMS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 84–6502. MING SHEN WONG *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–6503. PETERSON *v.* MELTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 84–6512. HARVEY *v.* ANDRIST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 569.

No. 84–6514. LEPISCOPO *v.* SHUMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6525. HERRINGTON *v.* TOMASKY ET AL. Cir. Ct. W. Va., Monongalia County. Certiorari denied.

No. 84–6533. RYDER *v.* MORRIS, SUPERINTENDENT, MOBERLY TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 327.

No. 84–6535. MAGEE *v.* DABDOUB ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6563. TINGHITELLA *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6568. HAYES *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84–6595. ROBINSON *v.* OLDHAM, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 84–6608. ACCIBAL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 664.

No. 84–6611. RUGGIERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 2d 927.

No. 84–6616. BEJJANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 84–6618. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 883.

No. 84–6630. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6637. TRIBBLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 884.

No. 84–6674. FABIAN *v.* CITY OF MIAMI ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–1506. AIRWORK SERVICE DIVISION *v.* DIRECTOR, DIVISION OF TAXATION OF NEW JERSEY. Sup. Ct. N. J. Motions of Consumer Bureau, Chamber of Commerce of the United States, and American Civil Liberties Union of New Jersey for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 97 N. J. 290, 478 A. 2d 729.

No. 84–1524. OLLMAN *v.* EVANS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 301, 750 F. 2d 970.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In March 1978, petitioner, then a professor of political science at New York University, was nominated by a departmental search

committee to head the Department of Government and Politics at the University of Maryland in College Park. The committee's recommendation proved to be highly controversial, largely because petitioner was an avowed Marxist. Petitioner's appointment was approved by the Provost of the University and the Chancellor of the College Park Campus, but was eventually overruled by the President of the University.

While this controversy was going on, respondents, nationally syndicated columnists, devoted one of their columns to it. In the course of the article, they made a number of statements about petitioner, including a description of his principal scholarly work as "a ponderous tome in adoration of the master," and then went on to say:

> "Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession, but is a pure and simple activist,' he said."

Petitioner sued respondents for libel in the United States District Court for the District of Columbia, and that court granted summary judgment for respondents. 479 F. Supp. 292 (1979). On appeal, the Court of Appeals for the District of Columbia Circuit sitting en banc affirmed the judgment by a vote of six to five, producing three separate opinions concurring in the affirmance, and four dissenting opinions. 242 U. S. App. D. C. 301, 750 F. 2d 970 (1984).

The Court of Appeals rested its decision entirely on the First Amendment to the United States Constitution, and held that this statement about petitioner—that he had no status within his profession—could simply not form the basis of an action for defamation in the light of that Amendment. There was no question as to whether petitioner could meet the requirement of "malice" under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), since the case had never been tried to a jury. The Court of Appeals majority relied upon a brief passage from our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340 (1974). I think that the result reached by the Court of Appeals in this case is nothing less than extraordinary. At the heart of the common law of defamation were a few areas of expression which even when spoken rather than written were regarded as so damaging as to be classified as "slander *per se*" and therefore not to require the proof of any special damages in order to allow recovery. One of these catego-

ries consists of statements which defame the plaintiff in connection with his business or occupation. See, *e. g.*, *November* v. *Time, Inc.*, 13 N. Y. 2d 175, 194 N. E. 2d 126 (1963); *Stevens* v. *Morse*, 185 Wis. 500, 201 N. W. 815 (1924).

Much of the extended treatment of this question in the Court of Appeals was devoted to the question of whether or not this statement was one of "fact" or of "opinion," the implication being that if the statement were one of "opinion" it could not be actionable under any circumstances. But for nationally syndicated columnists to quote an unnamed political scientist as saying that petitioner has "no status within the profession" is far more than the mere statements of opinion traditionally protected by qualified privilege under the common law of libel. Doctors who are disapproved of by other doctors may find solace in the fees paid by their patients; lawyers disapproved of by other lawyers may comfort themselves by the retainers paid by their clients. But the academic who is disapproved of by his peers has no such healthy recourse outside of the profession. There, if ever, the opinion of one's peers is virtually the sole component of one's professional reputation.

The statement from our opinion in *Gertz*, *supra*, relied upon by the majority in the Court of Appeals was this:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U. S., at 339–340.

At the time I joined the opinion in *Gertz*, *supra*, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem." Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1239 (1976).

The scholarly treatment of this subject by the various opinions in the Court of Appeals comprises 148 pages in the appendix to the petition for certiorari in this case. Obviously the passage from *Gertz* quoted above has led the majority of that court to the conclusion that respondents' article is not actionable as a matter of law. But if one draws back for a moment, and considers the passage in context and in the light both of the First Amendment and the history of common-law libel, see R. Sack, Libel, Slander and Related Problems 158 (1980), I find it impossible to disagree with Judge Wald's characterization:

> "[T]he columnists' statement that 'Ollman has no status within the profession, but is a pure and simple activist' is an assertion of fact for which its authors can be made to answer, consistent with the requirements of the [F]irst [A]mendment, in a suit for libel." 242 U. S. App. D. C., at 363, 750 F. 2d, at 1032.

I would grant the petition for certiorari in this case.

No. 84–1577. FORRO PRECISION, INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 745 F. 2d 1283.

No. 84–6156. COOPER *v.* UNITED STATES; and
No. 84–6249. WESLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 962.

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

Before 1982, 18 U. S. C. § 1503 (1976 ed.) prohibited influencing or intimidating "any witness, in any court of the United States," or any juror or court officer in the discharge of his or her duty. The section also contained a residual clause forbidding anyone to obstruct or attempt to obstruct the "due administration of justice." In 1982, Congress amended § 1503 to remove all references to witnesses. At the same time, it enacted the Victim and Witness Protection Act, 18 U. S. C. § 1512, addressed specifically to protecting witnesses, informants, and crime victims from harassment and intimidation. Congress did not, however, remove from § 1503 the residual "obstruction of justice" clause.

Petitioners in these cases were charged with violating both § 1503 and § 1512 by attempting to influence a witness to testify falsely. They argued that such conduct could no longer support a conviction under § 1503, because § 1512 was now the only statute covering witness tampering. The Court of Appeals for the Fifth Circuit rejected this contention and affirmed petitioners' convictions under § 1503, reasoning that certain kinds of witness tampering could still be reached under the provision's "obstruction of justice" clause. 748 F. 2d 962 (1984). The court observed that § 1512 did not proscribe "urging and advising" a witness to testify falsely, which was the conduct that was charged to have violated § 1503 in these cases. If urging a witness to commit perjury was not prohibited by § 1512, and if witnesses had been removed entirely from the scope of § 1503, the conduct with which petitioners were charged would violate neither section. The Court of Appeals saw no indication that in enacting § 1512 to broaden witness protection, Congress had intended to create such a gap.

In reaching this result, the Court of Appeals explicitly rejected the reasoning of *United States* v. *Hernandez*, 730 F. 2d 895 (CA2 1984). In that case, the Second Circuit vacated a conviction under § 1503 that was based on witness intimidation. Reviewing the language and legislative history of §§ 1503 and 1512, the court held that Congress "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.*, at 898. The argument that the residual clause of that statute still covered witness harassment, the court stated, "def[ied] common sense." *Id.*, at 899.

The Courts of Appeals of two large Circuits have thus arrived at contrary interpretations of an important criminal statute. I would grant certiorari in these cases to resolve the conflict.

No. 84–6181. COSPITO ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Motion of Arkansas Legal Services Support Center et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 742 F. 2d 72.

No. 84–6395. HERRERA *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84–6399. CERVI *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 84–6505. GAINES *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 84–6534. STEWART *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 84–6395, 682 S. W. 2d 313; No. 84–

6505, 105 Ill. 2d 79, 473 N. E. 2d 868; No. 84–6534, 105 Ill. 2d 22, 473 N. E. 2d 840.

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. 84–6507. CALVERT *v.* SHARP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 748 F. 2d 861.

Rehearing Denied

No. 84–6250. MILTON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 1030;

No. 84–6311. MITCHELL *v.* MEESE, ATTORNEY GENERAL, *ante*, p. 1021; and

No. 84–6340. DAY *v.* AMOCO CHEMICALS CORP., *ante*, p. 1056. Petitions for rehearing denied.

No. 84–5564. DANO *v.* SZOMBATHY, 469 U. S. 1219. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

JUNE 3, 1985

Appeals Dismissed

No. 84–1609. MURPHY ET AL. *v.* PENNSYLVANIA HUMAN RELATIONS COMMISSION ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 506 Pa. 549, 486 A. 2d 388.

No. 84–1763. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1764. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES. Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal

was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 454.

No. 84–6529. GAUNCE *v.* IDAHO. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. D–484. IN RE DISBARMENT OF WOLLRAB. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. D–485. IN RE DISBARMENT OF LOGAN. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. D–486. IN RE DISBARMENT OF DELK. Leonard Adolph Delk, of Long Beach, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 25, 1985 [470 U. S. 1081], is hereby discharged.

No. D–494. IN RE DISBARMENT OF EDWARDS. It is ordered that Robert Douglas Edwards, of Destin, 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–495. IN RE DISBARMENT OF DICKER. It is ordered that Leon Dicker, 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–496. IN RE DISBARMENT OF HYTER. It is ordered that Charles Kilburn Hyter, of Hutchinson, Kan., 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–497. IN RE DISBARMENT OF MOORE. It is ordered that Michael Maulsby Moore, of Everett, Wash., 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–498. IN RE DISBARMENT OF SLONE. It is ordered that Harold G. Slone, 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. 84–6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1098.] Motion for appointment of counsel granted, and it is ordered that J. Lloyd Snook III, Esquire, of Charlottesville, Va., be appointed to serve as counsel for petitioner in this case.

Probable Jurisdiction Postponed

No. 84–1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Appeal from Sup. Ct. Ala. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 470 So. 2d 1060.

Certiorari Granted

No. 84–782. SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC. C. A. 4th Cir. Certiorari granted. Reported below: 740 F. 2d 305.

No. 84–1513. CALIFORNIA *v.* CIRAOLO. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93.

No. 84–1602. ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 241 U. S. App. D. C. 246, 746 F. 2d 1563.

No. 84–1636. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* MATHEWS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 754 F. 2d 158.

No. 84–6470. DAVIDSON *v.* CANNON ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument in tandem with No. 84–5872, *Daniels* v. *Williams* [certiorari granted, 469 U. S. 1207]. Reported below: 752 F. 2d 817.

Certiorari Denied. (See also Nos. 84–1763, 84–1764, and 84–6529, *supra.*)

No. 84–627. CITY COUNCIL OF THE CITY OF CHICAGO *v.* KETCHUM ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 1398.

No. 84–708. AMERICAN HORSE SHOWS ASSN., INC. *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 408, 683 P. 2d 26.

No. 84–866. REED ET AL., CO-EXECUTORS OF THE ESTATE OF HANCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 481.

No. 84–1134. GOLDMAR, LTD., INC., ET AL. *v.* GREELEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 71.

No. 84–1140. MELIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 741 F. 2d 70.

No. 84–1250. MESSER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 236 Kan. ix, 688 P. 2d 744.

No. 84–1285. PALMER *v.* PALMER ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 674, 463 N. E. 2d 129.

No. 84–1320. RADFORD *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 386.

No. 84–1374. CAIN *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84–1397. NORTHWEST COMMERCIAL FISHERMEN'S FEDERAL RECOVERY ASSN. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 84–1415. MARTELON *v.* TEMPLE, DIRECTOR OF THE NATIONAL GUARD BUREAU, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 747 F. 2d 1348.

No. 84–1436. DUGAN & MEYERS CONSTRUCTION CO., INC., ET AL. *v.* WORTHINGTON PUMP CORP. (USA). C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1166.

No. 84–1442. CARSTENS ET AL. *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 393, 742 F. 2d 1546.

No. 84–1502. SHERIFF OF THE COUNTY OF NEWAYGO, MICHIGAN, ET AL. *v.* DEUR. Sup. Ct. Mich. Certiorari denied. Reported below: 420 Mich. 440, 362 N. W. 2d 698.

No. 84–1504. S. G. FRANTZ CO., INC. *v.* DIRECTOR, DIVISION OF TAXATION OF NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84–1568. QUAKER CITY GEAR WORKS, INC., ET AL. *v.* SKIL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1446.

No. 84–1589. BARNEY *v.* DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied.

No. 84–1597. MANN *v.* SPIEGEL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84–1599. BASS AVIATION, INC. *v.* HERNANDEZ, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERNANDEZ, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 453 So. 2d 447.

No. 84–1600. HAMEED ET AL. *v.* JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 154.

No. 84–1612. KIZER, DIRECTOR, DEPARTMENT OF HEALTH SERVICES, ET AL. *v.* JENESKI ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 163 Cal. App. 3d 18, 209 Cal. Rptr. 178.

No. 84–1614. CAMPBELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 1028, 467 N. E. 2d 1112.

No. 84–1615. BOROUGH OF DEMAREST ET AL. *v.* TOWNSHIP OF MAHWAH ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 98 N. J. 268, 486 A. 2d 818.

No. 84–1618. KOPCZYNSKI *v.* THE JACQUELINE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 555.

No. 84–1620. BOLAR PHARMACEUTICAL CO., INC. *v.* CIBA-GEIGY CORP. C. A. 3d Cir. Certiorari denied. Reported below: 747 F. 2d 844.

No. 84–1629. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS PENSION PLAN ET AL. *v.* SHAW. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1458.

No. 84–1631. LUCAS *v.* DANIEL INTERNATIONAL CORP. Sup. Ct. Mo. Certiorari denied. Reported below: 682 S. W. 2d 820.

No. 84–1651. FLORIDA *v.* MANEE. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 457 So. 2d 530.

No. 84–1694. SHARYLAND WATER SUPPLY CORP. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 397.

No. 84–1721. RAFTER *v.* ANGLO-IRANIAN OIL CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84–1735. WATERS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 334 Pa. Super. 513, 483 A. 2d 855.

No. 84–1742. CARBONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 477.

No. 84–1753. FEULING *v.* WOOD, DBA ALUMINUM ACCESSORIES, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 666.

No. 84–1762. CERASANI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 2d 927.

No. 84–6171. BENITEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1312.

No. 84–6387. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1568.

No. 84–6530. DUSAKTO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 464 So. 2d 534.

No. 84–6532. PICHON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 683 S. W. 2d 422.

No. 84–6538. SIMPSON-WOOD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 218 Neb. 889, 360 N. W. 2d 478.

No. 84–5642. PRINCE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 377.

No. 84–6543. WILSON *v.* WILEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 263.

No. 84–6545. DEMARCO *v.* A. ILLUM HANSEN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 146.

No. 84–6546. WILLIAMS *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 956.

No. 84–6547. SAYAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1086.

No. 84–6548. CLARK *v.* BRUCE, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1447.

No. 84–6550. BAYLIES ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 84–6552. AUSTIN *v.* BROWN, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 84–6554. GAMBRELL ET AL. *v.* MARTIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 257.

No. 84–6555. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84–6556. GRAVES *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 927.

No. 84–6557. HOWELL *v.* COLE, JUDGE, CIRCUIT COURT FOR CECIL COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 928.

No. 84–6559. STRAHAN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 438.

No. 84–6564. SARRON *v.* FRUMKES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84–6569. JOHNSON *v.* UNITED AUTOMOBILE WORKERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84–6581. KEEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6586. COLINO ESCOBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84–6599. COHODAS *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 917.

No. 84–6645. MCDANIEL *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 84–6648. CHEN *v.* UNITED STATES; and
No. 84–6650. CHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 817.

No. 84–6652. LEAMOUS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 795.

No. 84–6654. HUMPHREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1073.

No. 84–6656. LINDSLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6657. FAHNBULLEH *v.* UNITED STATES. C. A. 3th Cir. Certiorari denied. Reported below: 748 F. 2d 473.

No. 84–6664. FLOWERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–6670. NORMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 71 Ore. App. 389, 692 P. 2d 665.

No. 84–6680. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 376.

No. 84–6684. SALMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–6690. PIZARRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 756 F. 2d 579.

No. 84–6692. SEALS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 32.

No. 84–634. CHEVRON U. S. A., INC., ET AL. *v.* SHEFFIELD, GOVERNOR OF ALASKA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 483.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Reasonable Justices can certainly differ on whether certiorari should be granted in this case. JUSTICE WHITE, in dissent, has explained why he favors a grant of the petition for writ of certiorari. There is, of course, no reason why that dissent should identify the reasons supporting a denial of the petition. Matters such as the fact that apparently only one 26-year-old vessel may be affected by the Ninth Circuit's ruling,[1] that apparently no other State has enacted a deballasting prohibition similar to Alaska's, and that the Coast Guard retains the power to modify its regulations relating to deballasting lend support to the Court's discretionary determination that review in this Court is not necessary even if the Court of Appeals' decision is arguably incorrect. I add these few words only because of my concern that unanswered dissents from denial of certiorari sometimes lead the uninformed reader to conclude that the Court is not managing its discretionary docket in a responsible manner. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942, 945 (1978) (opinion of STEVENS, J., respecting the denial of the petition for writ of certiorari).[2]

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that the State of Alaska's Tanker Act, former Alaska Stat. Ann. § 46.03.750(e) (Supp. 1977), amended in 1980 and cur-

[1] Moreover, this vessel is able to comply with the Alaska statute at some ports because of the presence of onshore reception facilities, thus further highlighting the minimal effect of the Court of Appeals' ruling.

[2] As I noted in *Singleton:*

"Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference." 439 U. S., at 945.

rently Alaska Stat. Ann. §§ 46.03.750(a), (b) (1982), which restricts deballasting by oil tankers in Alaskan waters, was not pre-empted by regulations promulgated by the Coast Guard under Title II of the Ports and Waterways Safety Act of 1972 (PWSA).[1] *Chevron U. S. A., Inc.* v. *Hammond*, 726 F. 2d 483 (1984). I believe that in so holding, the court arguably "decided a federal question in a way in conflict with applicable decisions of this Court." This Court's Rule 17.1(c). Accordingly, I would grant certiorari to review the judgment of the Court of Appeals.

In *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978), we held that federal regulations governing oil tanker design and construction promulgated under Title II of the PWSA pre-empt more stringent state regulations covering the same subject matter. Our holding was based in large part on our conclusion that Title II was intended to authorize comprehensive standards "[t]o implement the twin goals of providing for vessel safety and protecting the marine environment." *Id.*, at 161. Under the statute, we observed, "the Secretary [of Transportation] must issue all design and construction regulations that he deems necessary for these ends, after considering the specified statutory standards." *Id.*, at 165. When a State has imposed a more stringent standard than the Secretary but the state and federal standards "ai[m] at precisely the same ends," we concluded, "[t]he Supremacy Clause dictates that the federal judgment . . . prevail over the contrary state judgment." *Ibid.*

As the court below pointed out, *Ray* dealt with federal standards for tanker design and construction, whereas this case involves standards governing tanker operations—specifically, standards governing the discharge of seawater loaded into cargo compartments and used as ballast.[2] The need for national uniformity in the area of standards for tanker operations, the court concluded, is not so great as the need for uniformity in standards governing

---

[1] 86 Stat. 424. Title II of the PWSA, as amended by the Port and Tanker Safety Act of 1978, Pub. L. 95–474, 92 Stat 1471, was, until 1983, codified at 46 U. S. C. § 391a. In 1983, the PWSA/PTSA was recodified at 46 U. S. C. §§ 3701–3718 (1982 ed., Supp. I).

[2] The federal standard prohibits discharge of such water within 50 miles of shore unless the water meets certain standards of cleanliness. 33 CFR §§ 157.03(a)(1), 157.29, 157.37(a)(1) (1982). The state standards forbid *any* discharge of water from a tanker's cargo tanks within Alaskan territorial waters, regardless of the cleanliness of the water.

tanker operation and design; for while a tanker can under some circumstances alter its operating practices to conform to the requirements of the State whose territorial waters it is traversing, it cannot alter its construction or design. Accordingly, the absence of uniform design and construction requirements may be a far more serious impediment to the tanker industry than a lack of uniformity with respect to operations.

Although this distinction is not insubstantial,[3] the similarities between this case and *Ray* strike me as greater than the lower court was willing to recognize. Like *Ray*, this case involves federal regulations promulgated under Title II of the PWSA. As in *Ray*, the Secretary was obliged by the Act to issue "all . . . regulations that he deems necessary" to meet the goal of protecting the marine environment. *Id.*, at 165; see 46 U. S. C. §§ 391a(1)(D), 391a(6)(A). And, as in *Ray*, the state statute at issue in this case aims at precisely the same goal as the federal regulation, and thus amounts to a rejection by the State of the federal judgment as to the level of protection necessary to achieve the common goal. Under these circumstances, I would have thought that there would be a strong presumption that our ruling in *Ray* was applicable here as well.

In rejecting the applicability of *Ray*, the Court of Appeals relied not only on its perception of a diminished need for uniformity in the area of standards governing tanker operations, but also on its belief that the Clean Water Act, 33 U. S. C. § 1251 *et seq.*, reflects congressional recognition of concurrent state and federal authority to protect the environment within the territorial waters of the States. The court placed primary emphasis on those provisions of the Act that establish the National Pollutant Discharge Elimination System (NPDES), 33 U. S. C. § 1342, under which minimum federal standards regulating the discharge of pollutants may be supplanted by more stringent state standards. These

---

[3] The distinction should probably not be overstated, however. Design specifications and operating procedures are in many respects inextricably linked, and this linkage is striking where ballasting—the subject of the regulations at issue in this case—is concerned. The design of a tanker may require it to use seawater as ballast in order to operate safely. Such a tanker may be unable to take on oil at a particular port if it may not deballast in waters adjacent to that port. Restrictions on deballasting thus may exclude certain tankers from certain ports fully as effectively as regulations prohibiting all tankers with particular design features.

provisions of the Clean Water Act, however, are of extremely limited relevance to the questions posed by this case, as federal regulations specifically exempt from the NPDES program discharges from vessels incident to their normal operation. 40 CFR § 122.3(a) (1984). The Clean Water Act thus sheds little or no light on the question whether protection of the marine environment against the threats posed specifically by oil tanker traffic is, under Title II of the PWSA, a matter in which federal regulation has displaced state control.

The apparent inconsistency of the decision below with our own decision in *Ray*, coupled with the lower court's reliance on statutory materials of questionable relevance to the case before it, leads me to conclude that this is a case in which we should exercise our discretionary jurisdiction. I therefore dissent from the denial of certiorari.

No. 84–1307. ODEND'HAL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Motion to substitute Harry R. Smith, Jr., as Personal Representative of Estate of Ivan V. Magal, deceased, as a party petitioner granted. Certiorari denied. Reported below: 748 F. 2d 908.

No. 84–1495. KEMP, WARDEN *v.* DAVIS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 752 F. 2d 1515.

No. 84–6449. ROSE *v.* FLORIDA. Sup. Ct. Fla.; and

No. 84–6639. NASH, AKA HENDERSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 84–6449, 461 So. 2d 84; No. 84–6639, 143 Ariz. 392, 694 P. 2d 222.

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. 84–6601. DAVIS *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 1515.

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.

JUSTICE WHITE, dissenting.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), we held that where intent is an element of the crime charged, a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. In *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), we granted certiorari to resolve the question whether the giving of such a burden-shifting instruction may ever be deemed harmless error. *Johnson*, however, left that question unanswered: a plurality took the position that *Sandstrom* error was virtually never harmless, while four Justices would have found such errors harmless if a reviewing court could say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption. 460 U. S., at 97, n. 5.[1] On two subsequent occasions, we have granted certiorari in cases raising the harmless-error question, but on both occasions we have not resolved it. *Engle* v. *Koehler*, 707 F. 2d 241 (CA6 1983), aff'd by an equally divided Court, 466 U. S. 1 (1984); *Francis* v. *Franklin*, *ante*, p. 307.

In the present case, the Court of Appeals for the Eleventh Circuit, sitting en banc, correctly held that the jury instructions given at petitioner's trial for first-degree murder unconstitutionally shifted the burden of proof on the issues of malice and intent. 752 F. 2d 1515 (1985). See *Francis* v. *Franklin*, *supra*.[2] Noting that this Court in *Johnson* had failed to adopt a rule that *Sandstrom* error was *per se* reversible, the majority held that the error

---

[1] JUSTICE STEVENS concurred in the disposition allowing the decision of the Connecticut Supreme Court to stand, but found that no federal question was presented.

[2] The judge instructed the jury that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted." The jury was further instructed that "while it is true that the law presumes malice when a homicide has been shown, yet that presumption of malice may be rebutted by the defendant." 752 F. 2d, at 1524, 1526, n. 1. In *Francis*, we held that a virtually identical instruction on intent violated the Due Process Clause under *Sandstrom*.

here was harmless because intent was not a contested issue at trial. Petitioner's main defense had been that he had nothing to do with the murder, not that he lacked intent, and the evidence was "overwhelming" that whoever had committed the murder had done so with intent and malice. 752 F. 2d, at 1521. Five judges dissented on this point, arguing that the error was not harmless because, "[e]xcept where it includes a direct admission of intent, no defense, in and of itself, can take the element of intent out of 'issue.'" *Id.*, at 1528.[3] The dissenters also observed that the plurality opinion in *Johnson* "cast serious doubt on whether the doctrine of harmless error can be applied to the shifting of a presumption which is so integral to the concept of a fair trial." 752 F. 2d, at 1527.

This is the fourth time that the Court has been presented with the opportunity to decide whether *Sandstrom* error may be harmless under any circumstances. Because resolution of this important and frequently recurring question is long overdue, I would grant certiorari in this case.[4]

Rehearing Denied

No. 84–1299. ARANGO *v.* FLORIDA, *ante*, p. 1010;

No. 84–1329. CREA *v.* NEW YORK, *ante*, p. 1011;

No. 84–5339. WINGO *v.* LOUISIANA, *ante*, p. 1030;

No. 84–6018. HARRISON *v.* MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1055;

No. 84–6262. BRAGG *v.* CAVE, JUDGE, *ante*, p. 1020;

No. 84–6320. DAY *v.* CARTWRIGHT ET AL., *ante*, p. 1056;

No. 84–6373. HERNANDEZ *v.* DUNCAN ET AL., *ante*, p. 1068; and

No. 84–6431. PRIMBS *v.* UNITED STATES, *ante*, p. 1068. Petitions for rehearing denied.

---

[3] The plurality opinion in *Johnson* suggested that *Sandstrom* error might be harmless if the defendant had "conceded the issue of intent," and noted that in presenting a defense such as alibi, a defendant might admit that the act alleged by the prosecution was intentional. 460 U. S., at 87. Although the petitioner in this case presented an alibi defense, the majority below noted that "there was no explicit concession of intent and malice." 752 F. 2d, at 1521.

[4] The respondent filed a separate petition for certiorari raising different and "uncertworthy" objections to the opinion below. *Kemp* v. *Davis*, No. 84–1495, cert. denied, *ante*, p. 1143.

No. 84–5801. AUSTIN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, WAUPUN, WISCONSIN, 470 U. S. 1055. Motion for leave to file petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6152. FRIEDMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 470 U. S. 1057. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

AMENDMENTS TO BANKRUPTCY RULES

The following amendments to the Bankruptcy Rules were prescribed by the Supreme Court of the United States on April 29, 1985, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1148. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of Bankruptcy Rules, see, *e. g.*, 461 U. S. 973.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1985

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Bankruptcy prescribed by the Court pursuant to Section 2075 of Title 28, United States Code.

Accompanying these amendments is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 29, 1985

ORDERED:

1. That the rules of procedure heretofore prescribed by the Court to govern proceedings in bankruptcy cases be, and they hereby are, amended by including therein the amendments to Rules 5002 and 5004 hereinafter set forth:

[See *infra*, p. 1151.]

2. That the aforementioned amendments to the Bankruptcy Rules shall take effect on August 1, 1985, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit these amendments to the Bankruptcy Rules to the Congress in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO BANKRUPTCY RULES 5002 AND 5004

Rule 5002. Restrictions on appointments.

(a) Appointment of relatives prohibited.—No individual may be appointed as a trustee or examiner or be employed as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if the individual is a relative of the bankruptcy judge making the appointment or approving the employment. Whenever under this subdivision an individual is ineligible for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof are also ineligible for appointment or employment.

(b) Judicial determination that appointment or employment is improper.—A bankruptcy judge may not appoint a person as a trustee or examiner or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to § 327 or § 1103 of the Code if that person is or has been so connected with such judge as to render the appointment or employment improper.

Rule 5004. Disqualification.

(a) Disqualification of judge.—A bankruptcy judge shall be governed by 28 U. S. C. § 455, and when disqualified from acting thereunder, shall disqualify himself from presiding over the adversary proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, shall disqualify himself from presiding over the case.

(b) Disqualification of judge from allowing compensation.—A judge shall disqualify himself from allowing compensation to a person who is a relative or with whom he is so connected as to render it improper for him to authorize such compensation.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 29, 1985, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1154. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, and 461 U. S. 1095.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1985

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure prescribed by the Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these amendments is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 29, 1985

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein a new Rule E(4)(f) to the Supplemental Rules for Certain Admiralty and Maritime Claims; amendments to Rules 6(a), 45(d)(2), 52(a), 71A(h) and 83; amendments to Supplemental Admiralty Rules B(1) and C(3); and amendments to Official Form 18–A, as hereinafter set forth:

[See *infra*, pp. 1157–1165.]

2. That the foregoing additions to and changes in the Federal Rules of Civil Procedure, the Supplemental Rules for Certain Admiralty and Maritime Claims, and the Official Form shall take effect on August 1, 1985, and shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing addition to and changes in the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Time.

(a) Computation.—In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

. . . . .

Rule 45. Subpoena.

. . . . .

(d) Subpoena for taking depositions; place of examination.

. . . . .

(2) A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within

100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.

. . . . .

Rule 52. Findings by the court.

(a) Effect.—In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

. . . . .

Rule 71A. Condemnation of property.

. . . . .

(h) Trial.—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the

court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

. . . . .

Rule 83. Rules by district courts.

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial

council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judge and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule B. Attachment and garnishment: special provisions.

(1) When available; complaint, affidavit, judicial authorization, and process.—With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

. . . . .

Rule C. Actions in rem: special provisions.

. . . . .

(3) Judicial authorization and process.—Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

. . . . .

Rule E. Actions in rem and quasi in rem: general provisions.

. . . . .

(4) Execution of process; marshal's return; custody of property; procedures for release.

. . . . .

(f) Procedure for release from arrest or attachment.—Whenever property is arrested or attached, any person

claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U. S. C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

. . . . .

APPENDIX OF FORMS

FORM 18–A

NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

UNITED STATES DISTRICT COURT FOR THE _____ DISTRICT OF _____

Plaintiff,	:	
	:	Notice and Acknowledgment
vs.	:	of Receipt of Summons
No. _____	:	and Complaint
Defendant.	:	

NOTICE

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

_____

Signature

_____

Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF
SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

_____

Signature

_____

Relationship to Entity/
Authority to Receive
Service of Process

_____

Date of Signature

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 29, 1985, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1168. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, and 461 U. S. 1117.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1985

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure prescribed by the Court pursuant to Sections 3771 and 3772 of Title 18, United States Code.

Accompanying these amendments is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 29, 1985

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein a new Rule 49(e) and amendments to Rules 6(e)(3)(A)(ii), 6(e)(3)(B) and (C), 11(c)(1), 12.1(f), 12.2(e), 35(b), 45(a) and 57, as hereinafter set forth:

[See *infra*, pp. 1171–1174.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1985, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending. The amendment to Rule 35(b) shall be effective until November 1, 1986, when Section 215(b) of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, approved October 12, 1984, 98 Stat. 2015, goes into effect.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing addition to and changes in the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The grand jury.

. . . . .

(e) Recording and disclosure of proceedings.

. . . . .

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

. . . . . .

Rule 11. Pleas.

. . . . . .

(c) Advice to defendant.—Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

. . . . . .

Rule 12.1. Notice of alibi.

. . . . . .

(f) Inadmissibility of withdrawn alibi.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

. . . . .

(e) Inadmissibility of withdrawn intention.—Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Rule 35. Correction or reduction of sentence.

. . . . .

(b) Reduction of sentence.—A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Rule 45. Time.

(a) Computation.—In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Birth-

day of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

. . . . .

Rule 49. Service and filing of papers.

. . . . .

(e) Filing of dangerous offender notice.—A filing with the court pursuant to 18 U. S. C. § 3575(a) or 21 U. S. C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate in the district, except that in a district having a single judge and no United States magistrate, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

Rule 57. Rules by district courts.

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1174 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION TO VACATE STAY

No. A–778. Decided April 24, 1985

An application to vacate the Court of Appeals' stay of all proceedings with respect to this case in the Federal District Court and in the Crow Tribal Court, pending resolution of the merits by this Court, is denied. It is not likely that four Members of this Court would wish to review the separate issue of whether the Court of Appeals had jurisdiction to issue the stay order, in addition to resolving the merits of the principal case, which has already been argued. Nor do the equities favor preserving the posture between the parties that applicants seek.

JUSTICE REHNQUIST, Circuit Justice.

The Court of Appeals for the Ninth Circuit has stayed all proceedings with respect to this case in the United States District Court and in the Crow Tribal Court pending resolution of the merits of the case by this Court. Applicants contend that the Court of Appeals was without jurisdiction to issue the stay, and request me to "dissolve" the stay issued by the Court of Appeals. The jurisdiction of the Court of Appeals to issue the stay order is indeed debatable, but I do not believe that four Members of the Court would wish to review that separate issue in addition to resolving the merits of the principal case argued on April 16th. Nor do I believe that the equities favor a stay to preserve the posture between the parties that applicants seek, given the present state of affairs in the District and Tribal Courts. Decision of the merits by this Court may ordinarily be expected before the summer recess around July 1st, and the stay issued

by the Court of Appeals will expire by its own terms upon the happening of that event. The application is therefore denied.

INDEX

ABANDONMENT OF MINING CLAIMS. See **Federal Land Policy and Management Act of 1976.**

ACCOMPLICES' CONFESSIONS. See **Constitutional Law,** I.

ADVERTISEMENT BY ATTORNEYS. See **Constitutional Law,** V.

ALABAMA. See **Constitutional Law,** IV.

ALIENS. See **Immigration and Nationality Act.**

ANNEXATIONS BY CITIES. See **Antitrust Acts,** 2.

ANTITRUST ACTS.

1. *Motor common carriers—Collective ratemaking—"State action" doctrine.*—Collective ratemaking activities, on members' behalf, of "rate bureaus" that were composed of motor common carriers operating in certain States, and that submitted joint rate proposals to such States' Public Service Commissions, were immune from federal antitrust liability under "state action" doctrine where such activities, although not compelled, were authorized by States' laws. Southern Motor Carriers Rate Conference, Inc. v. United States, p. 48.

2. *Sewage treatment service—City's refusal to service townships—"State action" exemption.*—Where (1) city refused to supply sewage treatment service to adjacent townships that were city's potential competitors in collection and transportation of sewage, (2) city supplied service to individual landowners in townships' areas if majority in area voted to have city annex their homes and to use its sewage collection and transportation services, and (3) Wisconsin statutes governing municipal provision of sewage services expressed a clear state policy to replace competition with regulation, city's anticompetitive activities were protected by "state action" exemption to federal antitrust laws. Hallie v. Eau Claire, p. 34.

APARTMENT BUILDINGS. See **Criminal Law,** 1.

ARBITRATION UNDER COLLECTIVE-BARGAINING AGREEMENTS. See **Labor Management Relations Act.**

ARRESTS. See **Civil Rights Act of 1871,** 2; **Constitutional Law,** VII, 1.

ARSON. See **Criminal Law,** 1.

ATTORNEY ADVERTISEMENTS. See **Constitutional Law, V.**

ATTORNEY-CLIENT PRIVILEGE. See **Bankruptcy Act.**

ATTORNEY'S FEES. See **Civil Rights Attorney's Fees Awards Act of 1976.**

BANKRUPTCY. See also **Bankruptcy Act.**

Amendments to Bankruptcy Rules, p. 1147.

BANKRUPTCY ACT.

Attorney-client privilege of bankrupt corporation—Waiver.—Under Act, trustee of a corporation in bankruptcy, not corporation's directors, has power to waive corporation's attorney-client privilege with respect to prebankruptcy communications. Commodity Futures Trading Comm'n v. Weintraub, p. 343.

BLOOD PLASMA COLLECTION. See **Public Health Service Act.**

BREATH-ANALYSIS TESTS. See **Public Health Service Act.**

BURDEN OF PROOF. See **Constitutional Law, III, 1.**

CENTRAL INTELLIGENCE AGENCY'S RECORDS. See **Freedom of Information Act.**

CITY SEWAGE SERVICES. See **Antitrust Acts, 2.**

CITY'S LIABILITY FOR POLICE MISCONDUCT. See **Civil Rights Act of 1871, 1.**

CIVIL RIGHTS ACT OF 1871. See also **Civil Rights Attorney's Fees Awards Act of 1976.**

1. *Police misconduct—City's liability.*—Where (1) respondent brought a federal-court suit under 42 U. S. C. § 1983 alleging that actions of petitioner city and one of its police officers, who shot and killed respondent's husband while investigating an alleged robbery, had deprived husband of certain constitutional rights, (2) jury was instructed that city was liable only if its "policy" had caused deprivation but that jury could infer that a single excessive use of force was attributable to inadequate training or supervision amounting to deliberate indifference or gross negligence on part of officials in charge, and (3) jury returned a verdict against city, judgment of Court of Appeals—which held that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability—was reversed; it was too late for respondent to argue that jury instruction issue was not preserved because city failed to prop-

CIVIL RIGHTS ACT OF 1871—Continued.
erly object at trial, since respondent first raised such question in her brief on merits in this Court. Oklahoma City v. Tuttle, p. 808.

2. *State statute of limitations—Characterizations of § 1983 action.*—All claims under 42 U. S. C. § 1983—including respondent's claim against state police officers arising from alleged unlawful arrest and beating of respondent—are to be characterized as personal injury actions for purposes of determining appropriate state statute of limitations to be applied. Wilson v. Garcia, p. 261.

3. *State statute of limitations—Characterization of § 1983 action.*—In respondent's action under 42 U. S. C. § 1983 alleging that petitioner School District discriminated against her on basis of sex in failing to promote her to an administrative position, Court of Appeals' judgment, holding that 6-year "residuary" provision of pertinent State's limitations scheme was applicable, was vacated, and case was remanded for further consideration in light of *Wilson* v. *Garcia*, p. 261. Springfield Township School Dist. v. Knoll, p. 288.

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

Administrative proceedings—Award of attorney's fees in civil rights action.—Where (1) after petitioner teacher was discharged by respondent Board of Education, he retained counsel to represent him in administrative proceedings, contending that his discharge was racially motivated and violated his constitutional rights, (2) after he was denied administrative relief, he filed suit in Federal District Court under 42 U. S. C. § 1983, and (3) a consent decree was entered, awarding him damages but reserving matter of an award of attorney's fees, he was not entitled to an award for counsel's services during administrative proceedings on theory that they were proceedings to enforce § 1983 within meaning of Act, or on theory that time spent by counsel in administrative proceedings was "reasonably expended" in preparation for court action. Webb v. Dyer County Bd. of Ed., p. 234.

COLLECTIVE-BARGAINING AGREEMENTS. See **Labor Management Relations Act; Pre-emption of State or Local Law by Federal Law.**

COMMERCE CLAUSE. See **Criminal Law**, 1.

COMMERCIAL SPEECH. See **Constitutional Law**, V.

COMMON CARRIERS' RATES. See **Antitrust Acts**, 1.

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970. See **Constitutional Law**, II.

CONFESSIONS. See **Constitutional Law**, I.

CONFRONTATION CLAUSE. See **Constitutional Law**, I.

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871, 1; Criminal Law, 1; Fair Labor Standards Act; Federal Land Policy and Management Act of 1976; Judgments; Public Health Service Act.**

I. Confrontation of Witnesses.

Accomplice's confession—Admission to rebut defendant's testimony.—Where (1) at respondent's state-court murder trial, which resulted in his conviction, State relied on his confession to Sheriff, (2) respondent testified that confession was coerced, claiming that Sheriff read from an accomplice's confession and directed respondent to say same thing, (3) in rebuttal, Sheriff denied that respondent was read accomplice's confession, such confession was admitted, and judge instructed jury that confession was not admitted to prove its truthfulness but for purpose of rebuttal only, and (4) Sheriff then testified as to differences between respondent's confession and accomplice's confession, respondent's rights under Confrontation Clause were not violated by introduction of accomplice's confession for rebuttal purposes. Tennessee v. Street, p. 409.

II. Double Jeopardy.

Continuing criminal enterprise—Earlier conviction of a predicate offense.—Where (1) petitioner was tried in Federal District Court in Florida on several drug counts, including a count for engaging in a continuing criminal enterprise (CCE) in violation of Comprehensive Drug Abuse Prevention and Control Act of 1970, (2) evidence underlying his prior federal-court conviction in Washington for a drug offense was introduced to prove one of three predicate offenses necessary for a CCE violation, (3) he was convicted on CCE count and other counts, and (4) prison sentence on CCE count was concurrent with prison terms on other counts but consecutive to prison term for Washington conviction, Double Jeopardy Clause did not bar either CCE prosecution or cumulative sentences. Garrett v. United States, p. 773.

III. Due Process.

1. *Jury instructions—Presumption of criminal intent.*—Where (1) in respondent's state-court trial resulting in a conviction of malice murder, his sole defense was that killing was accidental and he had no intent to kill, and (2) trial judge instructed jury that a person is presumed to intend natural and probable consequences of his acts, but presumption may be rebutted, instruction on intent, when read in context of jury charge as a whole, violated due process requirement that State prove every element of a criminal offense beyond a reasonable doubt, and error was not harmless. Francis v. Franklin, p. 307.

2. *Prison disciplinary hearing—Inmate's request to call witnesses—Reasons for denial.*—Due Process Clause does not require that state prison officials' reasons for denying an inmate's request to call witnesses appear in administrative record of a prison disciplinary hearing; but where

CONSTITUTIONAL LAW—Continued.
officials' reasons do not appear in administrative record, officials must present testimony as to their reasons in court if deprivation of a prisoner's "liberty" interest, such as that afforded by "good time" credits, is challenged because of refusal to call requested witnesses. Ponte v. Real, p. 491.

3. *Restaurant franchise—Breach of agreement—Diversity jurisdiction.*—Where (1) appellant, a Florida corporation conducting a franchise restaurant business, provided in governing contracts that franchise relationship was established in Florida and governed by Florida law and that all fees and notices were to be forwarded to appellant's Florida headquarters, which set policy and worked directly with franchisees in resolving problems, and (2) appellee Michigan resident and another Michigan resident were franchisees and refused to vacate restaurant premises in Michigan after appellant terminated franchise, Due Process Clause was not violated by Federal District Court's exercise of jurisdiction over franchisees pursuant to Florida's long-arm statute in appellant's diversity action for alleged breach of franchise obligations. Burger King Corp. v. Rudzewicz, p. 462.

4. *Revocation of probation—Incarceration.*—Due Process Clause does not generally require a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation; procedures required by due process were afforded even though state judge—who, after putting respondent on probation and suspending prison sentences when he pleaded guilty to controlled substances offenses, revoked probation and ordered execution of sentences when respondent was arrested for and charged with felony of leaving scene of an automobile accident—did not explain on record his consideration and rejection of alternatives to incarceration. Black v. Romano, p. 606.

IV. Equal Protection of the Laws.

Disenfranchisement of convicts—Alabama law.—Provision of Alabama Constitution disenfranchising persons convicted of certain felonies and misdemeanors, including any crime involving moral turpitude, violated Equal Protection Clause of Fourteenth Amendment, since evidence showed that purpose of provision to discriminate against blacks was "but for" motivation for adopting provision; Tenth Amendment cannot save legislation prohibited by Fourteenth Amendment. Hunter v. Underwood, p. 222.

V. Freedom of Speech.

Attorney advertisements—Commercial speech.—Public disciplinary reprimand of appellant attorney for violations of Ohio attorney advertising rules was sustainable to extent reprimand was based on his misleading newspaper advertisement concerning his terms of representation in drunken driving cases and on omission of information from his adver-

CONSTITUTIONAL LAW—Continued.
tisement regarding his contingent-fee arrangements for representation of women for injuries resulting from use of a particular contraceptive device; but reprimand violated First Amendment insofar as it was based on appellant's use of an illustration in latter advertisement and his offer of legal advice. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, p. 626.

VI. Right to Grand Jury Indictment.

Allegations—Proof.—Where multicount federal grand jury indictment charging respondent with mail fraud alleged that he defrauded his insurer in connection with a burglary both by consenting to burglary and by lying to insurer about value of his loss, but proof at trial concerned only latter allegation and he was convicted, his Fifth Amendment grand jury right was not violated since crime and elements thereof that sustained conviction were fully and clearly set out in indictment—it normally being immaterial that indictment alleges more crimes or other means of committing same crime. United States v. Miller, p. 130.

VII. Searches and Seizures.

1. *Arrests—Fleeing suspect—Deadly force.*—Tennessee statute authorizing use of "necessary" force in effecting arrest of a fleeing suspect is unconstitutional under Fourth Amendment's reasonableness requirement insofar as it authorizes use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent escape and officer has probable cause to believe that suspect poses a significant threat of death or serious physical injury to officer or others. Tennessee v. Garner, p. 1.

2. *Motor home—Warrantless search.*—Where (1) a law enforcement agent, who had information that respondent's mobile motor home was being used to exchange marihuana for sex, watched respondent approach a youth who accompanied him to vehicle, which was parked in a downtown lot, (2) agents kept vehicle under surveillance, and youth, upon being stopped after leaving vehicle, told them that he had received marihuana in return for allowing respondent sexual contacts, (3) when respondent stepped out of vehicle after youth, at agents' request, knocked on door, one agent, without a warrant or consent, entered vehicle and observed marihuana, (4) a subsequent search of vehicle at police station revealed additional marihuana, and (5) respondent was convicted of a drug offense in a state court after his motion to suppress evidence discovered in vehicle was denied, warrantless search of vehicle did not violate Fourth Amendment. California v. Carney, p. 386.

CONTINUING CRIMINAL ENTERPRISE. See **Constitutional Law**, II.

CONTRACEPTIVE DEVICES. See **Constitutional Law, V.**

COPYRIGHTS.

Infringement—"Fair use" doctrine.—Where (1) former President Ford contracted with petitioners to publish his memoirs and gave petitioners exclusive first serial right to license prepublication excerpts, (2) when memoirs were nearing completion, petitioners, as copyright holders, negotiated a licensing agreement with a third party for prepublication excerpting of a portion of manuscript, and (3) an unauthorized source provided unpublished memoirs manuscript to a magazine, which then published an article that included quotes of copyrighted expression taken from manuscript, article was not a "fair use" under § 107 of Copyright Act and constituted a copyright infringement. Harper & Row, Publishers, Inc. v. Nation Enterprises, p. 539.

CORPORATION'S ATTORNEY-CLIENT PRIVILEGE. See **Bankruptcy Act.**

COURTS OF APPEALS. See **Stays.**

CRIMINAL LAW. See also **Constitutional Law,** I; II; III, 1, 2, 4; VI; VII.

1. *Destruction of apartment building—Federal statute.*—Title 18 U. S. C. § 844(i), which makes it a crime to maliciously destroy or attempt to destroy by means of fire or an explosive "any building . . . used . . . in any activity affecting interstate or foreign commerce," applied to petitioner's two-unit apartment building from which he earned rental income. Russell v. United States, p. 858.

2. *Food stamp fraud—Defendant's knowledge.*—In a prosecution for violating 7 U. S. C. § 2024(b)(1), which relates to food stamp fraud and provides that "whoever knowingly . . . acquires . . . or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is guilty of a crime, Government must prove that defendant knew that his acquisition or possession of food stamps was in such an unauthorized manner. Liparota v. United States, p. 419.

3. *Plea bargaining—Government's obligations in recommending sentence.*—Court of Appeals erred in concluding that Government had breached its plea bargain by not explaining its reasons for its recommended sentence to District Court (which disregarded recommendation) or by failing to show enthusiastic support for leniency, since (1) even assuming that Government, in a particular case, could commit itself to such undertakings, it had not done so here, and (2) Federal Rule of Criminal Procedure 11(e) does not require that such undertakings be implied as a matter of law from Government's agreement to recommend a particular sentence. United States v. Benchimol, p. 453.

CUMULATIVE SENTENCES. See **Constitutional Law,** II.

DEADLY FORCE IN EFFECTING ARREST. See **Constitutional Law,** VII, 1.

DENIAL OF CERTIORARI AS HAVING PRECEDENTIAL EFFECT. See **Judgments.**

DEPORTATION OF ALIENS. See **Immigration and Nationality Act.**

DISABILITY CLAIMS OF EMPLOYEES. See **Labor Management Relations Act.**

DISCIPLINARY HEARINGS AS TO PRISONERS. See **Constitutional Law,** III, 2.

DISCLOSURE OF GOVERNMENT RECORDS. See **Freedom of Information Act.**

DISCRIMINATION BASED ON RACE. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law,** IV.

DISCRIMINATION BASED ON SEX. See **Civil Rights Act of 1871,** 3.

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1871,** 3; **Civil Rights Attorney's Fees Awards Act of 1976.**

DISENFRANCHISEMENT OF CONVICTS. See **Constitutional Law,** IV.

DISMISSAL OF APPEAL AS HAVING PRECEDENTIAL EFFECT. See **Judgments.**

DISTRICT COURTS. See **Constitutional Law,** III, 3; **Jurisdiction.**

DIVERSITY JURISDICTION. See **Constitutional Law,** III, 3.

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DRUNKEN DRIVING. See **Constitutional Law,** V.

DUE PROCESS. See **Constitutional Law,** III; **Federal Land Policy and Management Act of 1976.**

EDUCATION OF THE HANDICAPPED ACT.

"Individualized education program"—Parents' participation—Judicial review.—Act's grant of authority to a court reviewing an administrative determination concerning a handicapped child's proper placement under an "individualized education program" (IEP) developed with parents' participation, includes power to order school authorities to reimburse parents for their expenditures for private special education if court ultimately determines that such placement, rather than proposed IEP, is proper; a violation of Act's provision requiring that child remain in then-current placement during pendency of review proceedings by parents' changing

EDUCATION OF THE HANDICAPPED ACT—Continued.
child's placement does not constitute a waiver of parents' right to reimbursement for expenses of private placement. Burlington School Committee v. Massachusetts Dept. of Ed., p. 359.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974. See **Pre-emption of State or Local Law by Federal Law.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1871, 3; Civil Rights Attorney's Fees Awards Act of 1976; Fair Labor Standards Act; Labor Management Relations Act; Pre-emption of State or Local Law by Federal Law.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1871, 3; Civil Rights Attorney's Fees Awards Act of 1976.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law, IV.**

ESTABLISHMENT OF RELIGION CLAUSE. See **Fair Labor Standards Act.**

EVIDENCE. See **Constitutional Law, I.**

FAIR LABOR STANDARDS ACT.

Nonprofit religious organization—Applicability of Act.—Businesses of petitioner foundation—a nonprofit religious organization deriving income from commercial businesses staffed by rehabilitated drug addicts, derelicts, and criminals who received no cash salaries but were provided food, clothing, shelter, and other benefits—constituted an "enterprise," and foundation's workers were "employees," within meaning of Act; application of Act to foundation did not violate Religion Clauses of First Amendment. Tony & Susan Alamo Foundation v. Secretary of Labor, p. 290.

"FAIR USE" DOCTRINE. See **Copyrights.**

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976.

Mining claims—Filing requirements.—Under § 314(a) of Act, which provides that mining claims on federal lands must be recorded with Government and certain annual documents must be filed by claimant "prior to December 31," and § 314(c), which states that failure to comply with either filing requirement "shall be deemed conclusively to constitute an abandonment" of claim, annual filings must be made on or before December 30, and claims for which timely filings are not made are extinguished; § 314(c) does not effect an unconstitutional taking of private property or violate due process. United States v. Locke, p. 84.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Civil Rights Act of 1871,** 1.

Amendments to Rules, p. 1153.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Criminal Law,** 3.

Amendments to Rules, p. 1167.

FEDERAL-STATE RELATIONS. See **Antitrust Acts; Civil Rights Act of 1871,** 2, 3; **Constitutional Law,** III, 3; **Indian Mineral Leasing Act of 1938; Labor Management Relations Act; Pre-emption of State or Local Law by Federal Law; Public Health Service Act; Social Security Act.**

FIFTH AMENDMENT. See **Constitutional Law,** II; VI; **Federal Land Policy and Management Act of 1976.**

FIRST AMENDMENT. See **Constitutional Law,** V; **Fair Labor Standards Act; Judgments.**

FLORIDA. See **Constitutional Law,** III, 3.

FOOD AND DRUG ADMINISTRATION'S REGULATION OF BLOOD PLASMA COLLECTION. See **Public Health Service Act.**

FOOD STAMP FRAUD. See **Criminal Law,** 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III; IV; **Judgments.**

FOURTH AMENDMENT. See **Constitutional Law,** VII.

FRANCHISE AGREEMENTS. See **Constitutional Law,** III, 3.

FRAUD. See **Criminal Law,** 2; **Securities Regulation.**

FREEDOM OF INFORMATION ACT.

Exemption 3—CIA intelligence projects—Identities of researchers.— Under Exemption 3 of Act, which relates to matters specifically exempted by another statute, § 102(d)(3) of National Security Act of 1947, which provides that Central Intelligence Agency's Director shall protect "intelligence sources" and methods from unauthorized disclosure, qualifies as a withholding statute, and researchers engaged in CIA intelligence projects contracted out to universities and other institutions were protected "intelligence sources." CIA v. Sims, p. 159.

FREEDOM OF RELIGION. See **Fair Labor Standards Act.**

FREEDOM OF SPEECH. See **Constitutional Law,** V.

GAS LEASES. See **Indian Mineral Leasing Act of 1938.**

GEORGIA. See **Antitrust Acts,** 1.

GOVERNMENT EMPLOYEES. See **Civil Rights Act of 1871, 3; Civil Rights Attorney's Fees Awards Act of 1976.**

GOVERNMENT RECORDS. See **Freedom of Information Act.**

GRAND JURY. See **Constitutional Law,** VI.

HANDICAPPED CHILDREN'S EDUCATION. See **Education of the Handicapped Act.**

HEALTH INSURANCE. See **Pre-emption of State or Local Law by Federal Law.**

HEARINGS AS TO PRISONER DISCIPLINE. See **Constitutional Law,** III, 2.

ILLUSTRATIONS IN ADVERTISEMENTS. See **Constitutional Law,** V.

IMMIGRATION AND NATIONALITY ACT.

Suspension of deportation—Attorney General's discretion.—Under Act's provisions allowing Attorney General to suspend an alien's deportation if he has been present in United States for at least seven consecutive years, is of good moral character, and demonstrates that deportation would result in extreme hardship to him or his spouse or child, who is a United States citizen, and under regulations providing that suspension will be denied unless reopening of proceedings is sought on basis of circumstances arising subsequent to original deportation hearing, Attorney General's refusal to reopen proceedings as to respondents, husband and wife, was within his discretion where respondents had flagrantly violated immigration laws in entering country and only met 7-year residency requirement during pendency of their baseless appeals in proceedings. INS v. Rios-Pineda, p. 444.

INDIAN MINERAL LEASING ACT OF 1938. See also **Indians.**

Tribe's royalty interests—Validity of state tax.—Montana may not tax respondent Tribe's royalty interests from oil and gas leases of Indian lands issued to non-Indian lessees pursuant to Act, notwithstanding provision of 1924 federal statute authorizing such state taxation. Montana v. Blackfeet Tribe, p. 759.

INDIAN REORGANIZATION ACT OF 1934. See **Indians.**

INDIANS. See also **Indian Mineral Leasing Act of 1938; Jurisdiction; Stays.**

Tribal taxes—Leasehold interests in tribal lands.—Secretary of Interior's approval was not required to validate taxes imposed, under Navajo Tribe's ordinances, on value of leasehold interests in tribal lands and on receipts from sale of property produced or extracted, or from sale of services, within such lands. Kerr-McGee Corp. v. Navajo Tribe, p. 195.

INDICTMENTS. See **Constitutional Law,** VI.

INFRINGEMENT OF COPYRIGHT. See **Copyrights.**

INJUNCTIONS. See **Mootness.**

INSTITUTIONS FOR MENTAL DISEASES. See **Social Security Act.**

INSTRUCTIONS TO JURY. See **Civil Rights Act of 1871,** 1; **Constitutional Law,** I; III, 1.

INSURANCE. See **Pre-emption of State or Local Law by Federal Law.**

"INTELLIGENCE SOURCES" OF CENTRAL INTELLIGENCE AGENCY. See **Freedom of Information Act.**

INTENT IN CRIMINAL CASE. See **Constitutional Law,** III, 1.

INTERSTATE COMMERCE. See **Criminal Law,** 1.

JUDGMENTS.

Summary dismissal of appeals—Denial of certiorari—Precedential effect.—Court of Appeals erred in concluding that claim that Massachusetts Democratic Party's Charter, as enforced by a Massachusetts statute, violated First and Fourteenth Amendments was foreclosed by precedential effect of this Court's summary dismissal of appeals in an earlier case, since disposition of earlier case was for lack of appellate jurisdiction rather than for want of a substantial federal question where this Court has jurisdiction, and since denial of certiorari upon treating papers in earlier case as petitions for certiorari also lacked any precedential effect. Hopfmann v. Connolly, p. 459.

JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS AS TO HANDICAPPED CHILDREN'S EDUCATION. See **Education of the Handicapped Act.**

JURISDICTION. See also **Constitutional Law,** III, 3; **Stays.**

Federal District Court—Indian Tribal Court.—Where (1) respondent Crow Indian minor obtained a default judgment against petitioner State School District in a personal injury action in Crow Tribal Court arising from injury sustained by minor in an accident that occurred on state school land located within Crow Indian Reservation, (2) School District and its insurer then brought an action in Federal District Court under 28 U. S. C. § 1331 for injunctive relief, and (3) District Court held that Tribal Court lacked jurisdiction over a civil action against a non-Indian, § 1331 encompassed federal question whether Tribal Court had exceeded its jurisdiction, but exhaustion of Tribal Court remedies was required before District Court could entertain claim of lack of Tribal Court jurisdiction. National Farmers Union Ins. Cos. v. Crow Tribe, p. 845.

JURY INSTRUCTIONS. See **Civil Rights Act of 1871,** 1; **Constitutional Law,** I; III, 1.

LABOR MANAGEMENT RELATIONS ACT.

Employee's disability claim against employer and insurer—State-court tort action—Pre-emption.—Where (1) a collective-bargaining agreement incorporated a disability plan administered by an insurance company, and established a disability grievance procedure culminating in binding arbitration, (2) an employee disputed manner in which employer and insurer handled his disability claim, and (3) rather than utilizing grievance procedure, he brought a damages suit against employer and insurer in a Wisconsin court, alleging bad faith in handling claim in violation of state tort law, employee's claim should have been dismissed either for failure to make use of grievance procedure or as constituting a contract claim under a collective-bargaining agreement, pre-empted by § 301 of Act. Allis-Chalmers Corp. v. Lueck, p. 202.

LAWYER ADVERTISEMENTS. See **Constitutional Law,** V.

LEASEHOLD INTERESTS IN INDIAN LANDS. See **Indians.**

LESSER INCLUDED OFFENSES. See **Constitutional Law,** II.

LIMITATION OF ACTIONS. See **Civil Rights Act of 1871,** 2, 3.

MASSACHUSETTS. See **Judgments; Pre-emption of State or Local Law by Federal Law.**

MEDICAID. See **Social Security Act.**

MENTAL-HEALTH CARE. See **Pre-emption of State or Local Law by Federal Law; Social Security Act.**

MINERAL LEASES. See **Indian Mineral Leasing Act of 1938; Indians.**

MINIMUM-CONTACTS STANDARD. See **Constitutional Law,** III, 3.

MINING CLAIMS. See **Federal Land Policy and Management Act of 1976.**

MISSISSIPPI. See **Antitrust Acts,** 1.

MONTANA. See **Indian Mineral Leasing Act of 1938.**

MOOTNESS.

Preliminary injunction—Compliance with terms.—Where (1) students of California School for Blind filed Federal District Court suit against petitioner state officials, claiming that school's physical plant did not meet applicable seismic safety standards, (2) after trial, court issued a "preliminary injunction" requiring State to conduct additional tests of school grounds to aid in assessment of school's seismic safety, and (3) Court of Appeals

MOOTNESS—Continued.
affirmed issuance of injunction, noting that it was not finally deciding merits, issue ruled on by Court of Appeals was moot, since petitioners had thereafter complied with terms of injunction. Honig v. Students of California School for Blind, p. 148.

MOTOR COMMON CARRIERS' RATES. See **Antitrust Acts**, 1.

MOTOR VEHICLE SEARCHES. See **Constitutional Law**, VII, 2.

MUNICIPALITY'S LIABILITY FOR POLICE MISCONDUCT. See **Civil Rights Act of 1871**, 1.

MUNICIPALITY'S SEWAGE SERVICES. See **Antitrust Acts**, 2.

NATIONAL BLOOD POLICY. See **Public Health Service Act.**

NATIONAL LABOR RELATIONS ACT. See **Pre-emption of State or Local Law by Federal Law.**

NATIONAL SECURITY ACT OF 1947. See **Freedom of Information Act.**

NEWSPAPER ADVERTISEMENTS OF ATTORNEYS. See **Constitutional Law**, V.

NORTH CAROLINA. See **Antitrust Acts**, 1.

OIL LEASES. See **Indian Mineral Leasing Act of 1938.**

PARENTS' PARTICIPATION IN EDUCATION PROGRAM FOR HANDICAPPED CHILD. See **Education of the Handicapped Act.**

PLEA BARGAINING. See **Criminal Law**, 3.

POLICE MISCONDUCT. See **Civil Rights Act of 1871**, 1, 2.

POLITICAL PARTIES' CHARTERS. See **Judgments.**

PRECEDENTIAL EFFECT OF JUDGMENTS. See **Judgments.**

PRE-EMPTION OF STATE OR LOCAL LAW BY FEDERAL LAW. See also **Labor Management Relations Act; Public Health Service Act.**

Health insurance—Validity of state statute.—A Massachusetts statute requiring that certain minimum mental-health-care benefits be provided a Massachusetts resident insured under a general health insurance policy or an employee health-care plan that covered hospital and surgical expenses was not pre-empted by federal Employee Retirement Income Security Act of 1974 insofar as Massachusetts statute applied to policies purchased by employee health-care plans regulated by ERISA; nor was Massachusetts statute, as applied to policies purchased pursuant to collective-bargaining agreements regulated by National Labor Relations Act, pre-empted by NLRA. Metropolitan Life Ins. Co. v. Massachusetts, p. 724.

PRELIMINARY INJUNCTIONS. See **Mootness.**

PRESUMPTION OF CRIMINAL INTENT. See **Constitutional Law,** III, 1.

PRISON DISCIPLINARY HEARINGS. See **Constitutional Law,** III, 2.

PROBATION. See **Constitutional Law,** III, 4.

PUBLIC DISCLOSURE OF GOVERNMENT RECORDS. See **Freedom of Information Act.**

PUBLIC EDUCATION FOR HANDICAPPED CHILDREN. See **Education of the Handicapped Act.**

PUBLIC EMPLOYEES. See **Civil Rights Act of 1871,** 3; **Civil Rights Attorney's Fees Awards Act of 1976.**

PUBLIC HEALTH SERVICE ACT.

Blood plasma collection—Local regulations—Pre-emption.—County ordinances and regulations requiring that blood donors be tested for hepatitis, that they donate at only one blood plasma center, and that they be given a breath-analysis test for alcohol content before each donation were not pre-empted by federal regulations, promulgated under Act, establishing minimum standards for collection of blood plasma. Hillsborough County v. Automated Medical Laboratories, Inc., p. 707.

RACIAL DISCRIMINATION. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law,** IV.

RATES OF COMMON CARRIERS. See **Antitrust Acts,** 1.

REGISTRATION OF STOCK. See **Securities Regulation,** 2.

RELIGIOUS FREEDOM. See **Fair Labor Standards Act.**

RESTAURANT FRANCHISES. See **Constitutional Law,** III, 3.

REVOCATION OF PROBATION. See **Constitutional Law,** III, 4.

RIGHT TO CALL WITNESSES. See **Constitutional Law,** III, 2.

RIGHT TO GRAND JURY INDICTMENT. See **Constitutional Law,** VI.

"SALE OF BUSINESS" DOCTRINE. See **Securities Regulation.**

SCHOOLS. See **Mootness.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VII.

SECURITIES ACT OF 1933. See **Securities Regulation.**

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION.

1. *Stock as "security"—"Sale of business" doctrine.*—Where respondent purchased 50% of a company's stock from its president, who previously had owned all of stock, respondent agreed to participate in company's management, but his actions were subject to president's veto, and he subsequently challenged accuracy of representations made to him in connection with his purchase, stock purchased by respondent was a "security" within meaning of antifraud provisions of Securities Act of 1933 and Securities Exchange Act of 1934, and "sale of business" doctrine did not apply. Gould v. Ruefenacht, p. 701.

2. *Stock as "security"—"Sale of business" doctrine.*—Where respondents father and sons sold all of stock in family corporation, purchasers formed petitioner company to run business, father agreed to stay on as a consultant to help with business' operation, and petitioner company ultimately went into receivership, stock was a "security" within registration provisions of Securities Act of 1933 and antifraud provisions of Securities Exchange Act of 1934, and "sale of business" doctrine did not apply. Landreth Timber Co. v. Landreth, p. 681.

SEISMIC SAFETY STANDARDS. See **Mootness.**

SEWAGE SERVICES. See **Antitrust Acts,** 2.

SEX DISCRIMINATION. See **Civil Rights Act of 1871,** 3.

SHERMAN ACT. See **Antitrust Acts.**

SIXTH AMENDMENT. See **Constitutional Law,** I.

SOCIAL SECURITY ACT.

Medicaid—"Institution for mental diseases."—Under Act's Medicaid provisions and implementing regulations whereby services performed for patients of certain ages in an "institution for mental diseases" (IMD) are not covered for purposes of federal reimbursement payments to a State, an "intermediate care facility" that provides both covered and uncovered services may also be an IMD. Connecticut Dept. of Income Maintenance v. Heckler, p. 524.

"STATE ACTION" DOCTRINE. See **Antitrust Acts.**

STATE TAXES ON INDIAN MINERAL LEASES. See **Indian Mineral Leasing Act of 1938.**

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1871,** 2, 3.

STAYS.

Vacation of stay.—Application to vacate Court of Appeals' stay of all proceedings below in Federal District Court and in Crow Tribal Court, pending resolution of merits by this Court, is denied. National Farmers Union Ins. Cos. v. Crow Tribe (REHNQUIST, J., in chambers), p. 1301.

STOCK AS "SECURITY." See **Securities Regulation.**

SUPREMACY CLAUSE. See **Public Health Service Act.**

SUPREME COURT.

1. Amendments to Bankruptcy Rules, p. 1147.
2. Amendments to Federal Rules of Civil Procedure, p. 1153.
3. Amendments to Federal Rules of Criminal Procedure, p. 1167.

SUSPENSION OF ALIEN'S DEPORTATION. See **Immigration and Nationality Act.**

TAKING OF PRIVATE PROPERTY. See **Federal Land Policy and Management Act of 1976.**

TAXES. See **Indian Mineral Leasing Act of 1938; Indians.**

TENNESSEE. See **Antitrust Acts,** 1; **Constitutional Law,** VII, 1.

TENTH AMENDMENT. See **Constitutional Law,** IV.

TRIBAL COURTS. See **Jurisdiction; Stays.**

TRIBAL TAXES. See **Indians.**

TRUSTEES IN BANKRUPTCY. See **Bankruptcy Act.**

TYING AGREEMENTS. See **Antitrust Acts,** 2.

VEHICLE SEARCHES. See **Constitutional Law,** VII, 2.

VOTER QUALIFICATIONS. See **Constitutional Law,** IV.

WAGES AND HOURS. See **Fair Labor Standards Act.**

WAIVER OF CORPORATION'S ATTORNEY-CLIENT PRIVILEGE. See **Bankruptcy Act.**

WISCONSIN. See **Antitrust Acts,** 2; **Labor Management Relations Act.**

WORDS AND PHRASES.

1. *"Enterprise."* Fair Labor Standards Act, 29 U. S. C. § 203(r). Tony & Susan Alamo Foundation v. Secretary of Labor, p. 290.

2. *"Intelligence sources."* § 102(d)(3), National Security Act of 1947, 50 U. S. C. § 403(d)(3). CIA v. Sims, p. 159.

3. *"Law of any State which regulates insurance."* § 514(b)(2)(A), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(b)(2)(A). Metropolitan Life Ins. Co. v. Massachusetts, p. 724.

4. *"Security."* § 2(1), Securities Act of 1933, 15 U. S. C. § 77(b)(1); § 3(a)(10), Securities Exchange Act of 1934, 15 U. S. C. § 78c(a)(10). Landreth Timber Co. v. Landreth, p. 681; Gould v. Ruefenacht, p. 701.