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UNITED STATES REPORTS

VOLUME 478

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

JUNE 30 THROUGH OCTOBER 3, 1986

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

ERRATA

466 U. S. 215, line 29: Insert "of" after "all".

471 U. S. 607: In lieu of lines 11–14, substitute "*John M. Morris III*, Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the briefs were *John Ashcroft*, former Attorney General, *William L. Webster*, Attorney General, and *David C. Mason*, Assistant Attorney General."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, CHIEF JUSTICE.[1]
WILLIAM H. REHNQUIST, CHIEF JUSTICE.[2]
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.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.[3]

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.
JOSEPH F. SPANIOL, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] CHIEF JUSTICE BURGER retired effective September 26, 1986.

[2] JUSTICE REHNQUIST was nominated by President Reagan on June 17, 1986, to be Chief Justice; the nomination was confirmed by the Senate on September 17, 1986; he was commissioned on September 25, 1986; and he took the oaths and his seat on September 26, 1986. See also *post*, p. VII.

[3] THE HONORABLE ANTONIN SCALIA, of Virginia, formerly a Judge of the United States Court of Appeals for the District of Columbia Circuit, was nominated by President Reagan on June 17, 1986, to be an Associate Justice; the nomination was confirmed by the Senate on September 17, 1986; he was commissioned on September 25, 1986; and he took the oaths and his seat on September 26, 1986. See also *post*, p. VII.

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.)

*For assignment orders of September 26, 1986, reassigning indicated Circuits, see *post*, pp. 1049–1050.

APPOINTMENT OF CHIEF JUSTICE REHNQUIST, APPOINTMENT OF JUSTICE SCALIA, AND RETIREMENT OF CHIEF JUSTICE BURGER

SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 26, 1986

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

THE CHIEF JUSTICE said:

Today's special sitting of the Court is held to receive the commissions of the newly appointed Chief Justice of the United States, William H. Rehnquist, and the newly appointed Associate Justice, Antonin Scalia.

This year, on the eve of the 200th anniversary of our Constitution, it is natural that we take a look back. Just one year ago in this Chamber, we took note that for a half century the Court has held its hearings and has conducted all of its judicial business in this magnificent building, designed by Cass Gilbert under the direction of Chief Justice Taft. Chief Justice Taft sought to underscore the separation of powers and the independence of the judiciary by having this building become, as it is today, a symbol of that Constitutional division of powers and the symbol of the supremacy of the rule of law.

As we know, Chief Justice Taft died before the Court first sat here. Chief Justice Hughes succeeded him and was the

first Chief Justice to preside over the Court on this bench. In the 50 years since then, three others have held the office following Chief Justice Hughes. Chief Justice Stone, Chief Justice Vinson and Chief Justice Warren.

In these past 50 years, the Court has dealt with changing conditions and a growing and complex society; more and more people seek to have more and more issues resolved by the courts.

Since the Court first sat on February 1, 1790, it has been called on to respond to new, different and changing questions. The Court's responses to those questions during the 196 years since the first sitting reflect, in a sense, the spirit of the common law from which our law derives. Changes in the Court do not alter the basic continuity of the spirit that activates the Court as an institution under the Constitution.

Many times each year the meaning of that great document is debated at this very lectern, and this confirms John Marshall's description of the Constitution as a living document whose meaning reasonable persons can and do disagree about while sharing common ideals. The history of this Court is one of continuity with change—change and continuity.

Seventeen years ago, on an occasion like this, Chief Justice Warren, my distinguished predecessor, expressed thoughts all Justices shared then, and I am sure we share today. He said this:

> "We do not always agree (and) it is not likely ever, with human nature as it is, for nine (Justices) always to agree . . . If that ever comes to pass," he said, "I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country."

I have no doubt whatever that Chief Justice Warren on that day, and all of us who heard him here on June 23, 1969, were thinking of those countries and the millions of people who are not allowed to dissent and where freedom does not, as our freedoms do, flow from "we the people."

Today, I have the honor, and the great personal privilege as well, to welcome our friend and colleague of 15 years, JUS-

TICE WILLIAM H. REHNQUIST, as the 16th Chief Justice of the United States. I wish him and I know I speak for all of my colleagues, I wish him and our new colleague, Judge Scalia, good health, long life and Godspeed.

Now, I recognize the Attorney General of the United States.

The Attorney General said:

MR. CHIEF JUSTICE and may it please the Court. I have the commission which has been issued to the Honorable William H. Rehnquist as Chief Justice of the United States. The commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the commission and that it be made a part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you Mr. Attorney General. Mr. Clerk, will you please read the commission?

The Clerk then read the commission as follows:

RONALD REAGAN,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of William H. Rehnquist, of Virginia, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Chief Justice of the United States and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to have and to hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said William H. Rehnquist, during his good behavior.

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

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

[SEAL] RONALD REAGAN

By the President:

EDWIN MEESE, III,
Attorney General

THE CHIEF JUSTICE said:

Mr. Attorney General, your motion will be granted and the commission will be made part of the permanent records of this Court. Now you have another commission.

The Attorney General said:

CHIEF JUSTICE, I also have the commission which has been issued to the Honorable Antonin Scalia as an Associate Justice of this Court. The commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the commission and that it be made part of the permanent records of this Court.

The Clerk then read the commission as follows:

RONALD REAGAN,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Antonin Scalia, of Virginia, I have nominated, and, by and with the advice and

consent of the Senate, do appoint him as Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to have and to hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Antonin Scalia, during his good behavior.

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

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

[SEAL] RONALD REAGAN

By the President:

EDWIN MEESE, III,
Attorney General

THE CHIEF JUSTICE said:

Mr. Attorney General, your motion will be granted and this commission will likewise be made a part of the permanent records of the Court.

I now ask the Deputy Marshal of the Court to escort JUSTICE REHNQUIST to the center of the bench.

THE CHIEF JUSTICE said:

JUSTICE REHNQUIST, are you prepared to take the oath of office?

JUSTICE REHNQUIST said:

I am, CHIEF JUSTICE.

The oath of office was then administered by THE CHIEF JUSTICE in the following words:

I, William H. Rehnquist, do solemnly swear that I will administer justice without respect to persons, and do equal

right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as the Chief Justice of the United States according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States.

So help me God.

THE CHIEF JUSTICE said:

It is my privilege to present the new Chief Justice of the United States.

CHIEF JUSTICE REHNQUIST said:

I now ask the Chief Deputy Clerk to escort Judge Scalia to the center of the bench.

THE CHIEF JUSTICE said:

Judge Scalia, are you prepared to take the oath?

Judge Scalia said:

I am.

The oath of office was then administered by THE CHIEF JUSTICE in the following words:

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

So help me God.

THE CHIEF JUSTICE said:

JUSTICE SCALIA, on behalf of all the members of the Court and Chief Justice Burger, it is a pleasure to extend to you a very warm welcome as an Associate Justice of this Court and

to wish for you a very long life and a long and happy career in our common calling.

Adjourned to the time and place appointed by law.

It was ordered by the Court that the accompanying correspondence between members of the Court and Chief Justice Burger upon his retirement as Chief Justice of the United States be this day spread upon the minutes and that it also be printed in the reports of the Court.

SUPREME COURT OF THE UNITED STATES,

Washington, D. C., September 17, 1986.

Dear Chief:

Your decision to retire stirs in each of us a deep sense of loss that our association as colleagues on the Court must come to an end. Your zest for life and the extreme kindness and compassion you have always shown each of us has enriched our relationship beyond measure.

You have believed that it is wrong to live life without some deep abiding social commitment, and have devoted your entire professional life to pursuit of the elusive goals of freedom. The many noteworthy opinions you have authored covering the broad spectrum of issues that erupted in your seventeen years as Chief Justice constitute a major contribution to America's constitutional jurisprudence. The impact of these opinions will be lasting upon the problem areas fundamental in our constitutional democracy—the permutations and changing shapes of authority, justice, privacy, responsibility, participation, diversity, property and freedom.

It is with great reluctance that we reconcile ourselves to your retirement, and do so with our assurance of the great

regard and affection in which we hold you. Our hope for the future is that you enjoy the best of health and many opportunities to devote yourself to projects that you enjoy.

Sincerely,

William J. Brennan, Jr.
Byron R. White
Thurgood Marshall
Harry A. Blackmun
Lewis F. Powell, Jr.
William H. Rehnquist
John Paul Stevens
Sandra D. O'Connor

SUPREME COURT OF THE UNITED STATES,

Washington, D. C., September 18, 1986.

Dear Justices:

Your generous message concerning my retirement as Chief Justice so as to devote full time to the Commission on the Bicentennial of the United States Constitution gives me great satisfaction. To serve with you, and earlier with such splendid men as Hugo Black, Bill Douglas, John Harlan and Potter Stewart, has been a major satisfaction in my life. To leave this seat with such a warm message from you gives added satisfaction.

As the Court's burdens in these seventeen Terms have so greatly increased in volume and complexity, yours in the years ahead will continue to enlarge. I wish for each of you good health and the rewards of satisfaction due for the burdens you have carried and will carry in the service of our country and the great mandate set forth at Philadelphia 199 years ago.

Sincerely,

Warren E. Burger

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 84–1560. Argued February 26, 1986—Decided June 30, 1986

California filed a complaint against a nurse charging him with murdering 12 patients by administering massive doses of the heart drug lidocaine. The Magistrate granted the defendant's motion to exclude the public from the preliminary hearing on the complaint under a California statute that requires such proceedings to be open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial." At the conclusion of the 41-day preliminary hearing, the Magistrate refused petitioner's request that the transcript of the proceedings be released. Thereafter, the State, supported by petitioner and opposed by the defendant, moved unsuccessfully in the California Superior Court to have the transcript released. Petitioner then filed a peremptory writ of mandate with the California Court of Appeal. Meanwhile, the defendant waived his right to a jury trial, and the Superior Court released the transcript. After holding that the controversy was not moot, the Court of Appeal denied the writ. The California Supreme Court also denied the writ, holding that there is no general First Amendment right of access to preliminary hearings, and that under the California statute if the defendant establishes a "reasonable likelihood of substantial prejudice," the burden shifts to the prosecution or the media to show by a preponderance of the evidence that there is no such reasonable probability of prejudice.

Held:

1. Even though the Superior Court ultimately released the transcript in question, the case is not moot because the controversy is "capable of repetition, yet evading review." *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596; *Gannett Co.* v. *DePasquale*, 443 U. S. 368. Thus, this Court has jurisdiction. P. 6.

2. The qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as conducted in California. First, there has been a tradition of public accessibility to preliminary hearings of the type conducted in California. As opposed to grand jury proceedings, preliminary hearings conducted before neutral and detached magistrates have been open to the public. Second, public access to such preliminary hearings is essential to the proper functioning of the criminal justice system. This proper functioning is not made any less essential by the fact that a preliminary hearing cannot result in a conviction and the adjudication is before a magistrate without a jury. The absence of a jury makes the importance of public access even more significant. Pp. 6–13.

3. Since a qualified First Amendment right of access attaches to preliminary hearings as conducted in California, the proceedings cannot be closed unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co.* v. *Superior Court*, 464 U. S. 501, 510. If the interest asserted is the defendant's right to a fair trial, the preliminary hearing shall not be closed unless there is a "substantial probability" that that right will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect the right. Here, the "reasonable likelihood" test applied by the California Supreme Court placed a lesser burden on the defendant than the "substantial probability" test required by the First Amendment. Moreover, the court failed to consider whether alternatives short of closure would have protected the defendant's interests. Pp. 13–15.

37 Cal. 3d 773, 691 P. 2d 1026, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in Part II of which REHNQUIST, J., joined, *post*, p. 15.

James D. Ward argued the cause for petitioner. With him on the briefs was *Sharon J. Waters*.

Joyce Ellen Manulis Reikes argued the cause for respondent. With her on the brief were *Gerald J. Geerlings* and *Glenn Robert Salter*. *Ephriam Margolin* filed a brief for Diaz, real party in interest.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether petitioner has a First Amendment right of access to the transcript of a preliminary hearing growing out of a criminal prosecution.

I

On December 23, 1981, the State of California filed a complaint in the Riverside County Municipal Court, charging Robert Diaz with 12 counts of murder and seeking the death penalty. The complaint alleged that Diaz, a nurse, murdered 12 patients by administering massive doses of the heart drug lidocaine. The preliminary hearing on the complaint commenced on July 6, 1982. Diaz moved to exclude the public from the proceedings under Cal. Penal Code Ann. §868 (West 1985), which requires such proceedings to be

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin* and *Steve White*, Chief Assistant Attorneys General, and *Marian M. Johnston*, Deputy Attorney General; for the American Civil Liberties Union et al. by *Robert S. Warren*, *Rex S. Heinke*, and *Charles S. Sims;* for the American Newspaper Publishers Association et al. by *Bruce W. Sanford*, *Lee Levine*, *W. Terry Maguire*, *Richard M. Schmidt, Jr.*, *George A. Vradenburg III*, *Lawrence Gunnels*, *Mark L. Tuft*, *Robert D. Sack*, *Alice Neff Lucan*, *E. Susan Garsh*, *Harvey L. Lipton*, *Norton L. Armour*, *Robert J. Brinkmann*, *Lois J. Schiffer*, *Samuel E. Klein*, *Nancy H. Hendry*, *Jane E. Kirtley*, *Alexander Wellford*, *P. Cameron De Vore*, and *Carol D. Melamed;* and for Copley Press, Inc., et al. by *Harold W. Fuson, Jr.*, *Judith R. Epstein*, *Edward J. McIntyre*, *William A. Niese*, *Donald L. Zachary*, *Mark L. Tuft*, *Lawrence Gunnels*, *Robert N. Landes*, *Kenneth M. Vittor*, and *Jonathan Kotler*.

Grover C. Trask II, pro se, filed a brief for the District Attorney, County of Riverside, as *amicus curiae*.

open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial."[1] The Magistrate granted the unopposed motion, finding that closure was necessary because the case had attracted national publicity and "only one side may get reported in the media." App. 22a.

The preliminary hearing continued for 41 days. Most of the testimony and the evidence presented by the State was medical and scientific; the remainder consisted of testimony by personnel who worked with Diaz on the shifts when the 12 patients died. Diaz did not introduce any evidence, but his counsel subjected most of the witnesses to vigorous cross-examination. Diaz was held to answer on all charges. At the conclusion of the hearing, petitioner Press-Enterprise

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[1] Section 868, as amended in 1982, provides in full:

"The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the witness is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 687 of the Penal Code."

Before 1982, the statute gave the defendant the unqualified right to close the proceedings. After the California Supreme Court rejected a First Amendment attack on the old statute in *San Jose Mercury-News* v. *Superior Court*, 30 Cal. 3d 498, 638 P. 2d 655 (1982), the California Legislature amended the statute to include the present requirement that the hearing be closed only upon a finding by the magistrate that closure is "necessary in order to protect the defendant's right to a fair and impartial trial."

Company asked that the transcript of the proceedings be released. The Magistrate refused and sealed the record.

On January 21, 1983, the State moved in Superior Court to have the transcript of the preliminary hearing released to the public; petitioner later joined in support of the motion. Diaz opposed the motion, contending that release of the transcript would result in prejudicial pretrial publicity. The Superior Court found that the information in the transcript was "as factual as it could be," and that the facts were neither "inflammatory" nor "exciting," but that there was, nonetheless, "a reasonable likelihood that release of all or any part of the transcripts might prejudice defendant's right to a fair and impartial trial." *Id.*, at 60a, 61a.

Petitioner then filed a peremptory writ of mandate with the Court of Appeal. That court originally denied the writ but, after being so ordered by the California Supreme Court, set the matter for a hearing. Meanwhile, Diaz waived his right to a jury trial and the Superior Court released the transcript. After holding that the controversy was not moot, the Court of Appeal denied the writ of mandate.

The California Supreme Court thereafter denied petitioner's peremptory writ of mandate, holding that there is no general First Amendment right of access to preliminary hearings. 37 Cal. 3d 772, 691 P. 2d 1026 (1984). The court reasoned that the right of access to criminal proceedings recognized in *Press-Enterprise Co.* v. *Superior Court*, 464 U. S. 501 (1984) *(Press-Enterprise I)*, and *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596 (1982), extended only to actual criminal trials. 37 Cal. 3d, at 776, 691 P. 2d, at 1028. Furthermore, the reasons that had been asserted for closing the proceedings in *Press-Enterprise I* and *Globe*—the interests of witnesses and other third parties—were not the same as the right asserted in this case—the defendant's right to a fair and impartial trial by a jury uninfluenced by news accounts.

Having found no general First Amendment right of access, the court then considered the circumstances in which the clo-

sure would be proper under the California access statute, Cal. Penal Code Ann. § 868 (West 1985). Under the statute, the court reasoned, if the defendant establishes a "reasonable likelihood of substantial prejudice" the burden shifts to the prosecution or the media to show by a preponderance of the evidence that there is no such reasonable probability of prejudice. 37 Cal. 3d, at 782, 691 P. 2d, at 1032.

We granted certiorari. 474 U. S. 899 (1985). We reverse.

II

We must first consider whether we have jurisdiction under Article III, § 2, of the Constitution. In this Court, petitioner challenges the Superior Court's original refusal to release the transcript of the preliminary hearing. As noted above, the specific relief petitioner seeks has already been granted—the transcript of the preliminary hearing was released after Diaz waived his right to a jury trial. However, as in *Globe Newspaper, supra,* at 603, and *Gannett Co.* v. *DePasquale,* 443 U. S. 368, 377–378 (1979), this controversy is "'capable of repetition, yet evading review.'" It can reasonably be assumed that petitioner will be subjected to a similar closure order and, because criminal proceedings are typically of short duration, such an order will likely evade review. *Globe* and *Gannett,* therefore, require the conclusion that this case is not moot. Accordingly, we turn to the merits.

III

It is important to identify precisely what the California Supreme Court decided:

> "[W]e conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict." 37 Cal. 3d, at 781, 691 P. 2d, at 1032.

It is difficult to disagree in the abstract with that court's analysis balancing the defendant's right to a fair trial against the public right of access. It is also important to remember that these interests are not necessarily inconsistent. Plainly, the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers.

The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness. Only recently, in *Waller* v. *Georgia*, 467 U. S. 39 (1984), for example, we considered whether the defendant's Sixth Amendment right to an open trial prevented the closure of a suppression hearing over the defendant's objection. We noted that the First Amendment right of access would in most instances attach to such proceedings and that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.*, at 46. When the defendant objects to the closure of a suppression hearing, therefore, the hearing must be open unless the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced. *Id.*, at 47.

Here, unlike *Waller*, the right asserted is not the defendant's Sixth Amendment right to a public trial since the defendant requested a *closed* preliminary hearing. Instead, the right asserted here is that of the public under the First Amendment. See *Gannett, supra*, at 397 (POWELL, J., concurring). The California Supreme Court concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, but a preliminary hearing. However, the First Amendment question cannot be resolved solely on the label we give the event, *i. e.*, "trial" or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.

In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First, because a "'tradition of accessibility implies the favorable judgment of experience,'" *Globe Newspaper*, 457 U. S., at 605 (quoting *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 589 (1980) (BRENNAN, J., concurring in judgment)), we have considered whether the place and process have historically been open to the press and general public.

In *Press-Enterprise I*, for example, we observed that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." 464 U. S., at 505. In *Richmond Newspapers*, we reviewed some of the early history of England's open trials from the day when a trial was much like a "town meeting." In the days before the Norman Conquest, criminal cases were brought before "moots," a collection of the freemen in the community. The public trial, "one of the essential qualities of a court of justice" in England, was recognized early on in the Colonies. There were risks, of course, inherent in such a "town meeting" trial—the risk that it might become a gathering moved by emotions or passions growing from the nature of a crime; a "lynch mob" ambience is hardly conducive to calm, reasoned decision-making based on evidence. Plainly the modern trial with jurors open to interrogation for possible bias is a far cry from the "town meeting trial" of ancient English practice. Yet even our modern procedural protections have their origin in the ancient common-law principle which provided, not for closed proceedings, but rather for rules of conduct for those who attend trials. *Richmond Newspapers*, *supra*, at 567.

Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question. *Globe Newspaper*, *supra*, at 606. Although many governmental processes operate best under public scrutiny, it takes little

imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 218 (1979). Other proceedings plainly require public access. In *Press-Enterprise I*, we summarized the holdings of prior cases, noting that openness in criminal trials, including the selection of jurors, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." 464 U. S., at 501.

These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute. *Globe Newspaper Co.* v. *Superior Court, supra*, at 606. While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity.[2] In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access. In *Press-Enterprise I* we stated:

> "[T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can

[2] Similarly, the interests of those other than the accused may be implicated. The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding. See *Globe Newspaper Co.* v. *Superior Court*, 457 U. S., at 607–610.

determine whether the closure order was properly entered." 464 U. S., at 510.

IV

A

The considerations that led the Court to apply the First Amendment right of access to criminal trials in *Richmond Newspapers* and *Globe* and the selection of jurors in *Press-Enterprise I* lead us to conclude that the right of access applies to preliminary hearings as conducted in California.

First, there has been a tradition of accessibility to preliminary hearings of the type conducted in California. Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public. Long ago in the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable-cause hearing was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens. *United States* v. *Burr*, 25 F. Cas. 1 (No. 14,692) (CC Va. 1807). From *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.[3] As we noted in *Gannett*,

[3] The vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. See, *e. g.*, *Arkansas Television Co.* v. *Tedder*, 281 Ark. 152, 662 S. W. 2d 174 (1983); *Miami Herald Publishing Co.* v. *Lewis*, 426 So. 2d 1 (Fla. 1982); *R. W. Page Corp.* v. *Lumpkin*, 249 Ga. 576, 578–579, 292 S. E. 2d 815, 819 (1982); *Gannett Pacific Corp.* v. *Richardson*, 59 Haw. 224, 580 P. 2d 49, 56 (1978); *State ex rel. Post-Tribune Publishing Co.* v. *Porter Superior Court*, 274 Ind. 408, 412 N. E. 2d 748 (1980); *Ashland Publishing Co.* v. *Asbury*, 612 S. W. 2d 749, 752 (Ky. App. 1980); *Great Falls Tribune* v. *District Court*, 186 Mont. 433, 608 P. 2d 116 (1980); *Keene Publishing Corp.* v. *Cheshire County Superior Court*, 119 N. H. 710, 406 A. 2d 137 (1979); *State* v. *Williams*, 93 N. J. 39, 459 A. 2d 641 (1983); *Westchester Rockland Newspapers* v. *Leggett*, 48 N. Y. 2d 430, 439, 399 N. E. 2d 518, 523 (1979); *Minot Daily News* v. *Holum*, 380 N. W. 2d 347 (N. D. 1986);

several States following the original New York Field Code of Criminal Procedure published in 1850 have allowed preliminary hearings to be closed on the motion of the accused. 443 U. S., at 390–391. But even in these States the proceedings are presumptively open to the public and are closed only for cause shown.[4] Open preliminary hearings, therefore, have been accorded "'the favorable judgment of experience.'" *Globe*, 457 U. S., at 605.

The second question is whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning of the process. We have already determined in *Richmond*

State ex rel. Dayton Newspapers, Inc. v. *Phillips*, 46 Ohio St. 2d 457, 351 N. E. 2d 127 (1976); *Philadelphia Newspapers, Inc.* v. *Jerome*, 478 Pa. 484, 503, 387 A. 2d 425, 434 (1978); *Kearns-Tribune Corp.* v. *Lewis*, 685 P. 2d 515 (Utah 1984); *Herald Assn., Inc.* v. *Ellison*, 138 Vt. 529, 534, 419 A. 2d 323, 326 (1980); *Federated Publications, Inc.* v. *Kurtz*, 94 Wash. 2d 51, 615 P. 2d 440 (1980); *State ex rel. Herald Mail Co.* v. *Hamilton*, 165 W. Va. 103, 267 S. E. 2d 544 (1980); *Williams* v. *Stafford*, 589 P. 2d 322 (Wyo. 1979). Cf. *In re Midland Publishing*, 420 Mich. 148, 173, 362 N. W. 2d 580, 593 (1984) (proceedings leading to a person's indictment have not been open to the public).

Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply. See, *e. g.*, *Iowa Freedom of Information Council* v. *Wifvat*, 328 N. W. 2d 920 (Iowa 1983); *Minneapolis Star and Tribune Co.* v. *Kammeyer*, 341 N. W. 2d 550 (Minn. 1983); *Richmond Newspapers, Inc.* v. *Commonwealth*, 222 Va. 574, 281 S. E. 2d 915 (1981).

[4] See *State* v. *McKenna*, 78 Idaho 647, 309 P. 2d 206 (1957); *Davis* v. *Sheriff*, 93 Nev. 511, 569 P. 2d 402 (1977). Although Arizona, Iowa, Montana, North Dakota, Pennsylvania, and Utah have closure statutes based on the Field Code, see *Gannett*, 443 U. S., at 391, in each of these States the Supreme Court has found either a common-law or state constitutitional right of the public to attend pretrial proceedings. See *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P. 2d 594 (1966); *Iowa Freedom of Information Council* v. *Wifvat*, *supra*; *Great Falls Tribune* v. *District Court*, *supra*; *Minot Daily News* v. *Holum*, *supra*; *Commonwealth* v. *Hayes*, 489 Pa. 419, 414 A. 2d 318 (1980); *Kearns-Tribune Corp.* v. *Lewis*, *supra*.

Newspapers, *Globe*, and *Press-Enterprise I* that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion.

In California, to bring a felon to trial, the prosecutor has a choice of securing a grand jury indictment or a finding of probable cause following a preliminary hearing. Even when the accused has been indicted by a grand jury, however, he has an absolute right to an elaborate preliminary hearing before a neutral magistrate. *Hawkins* v. *Superior Court*, 22 Cal. 3d 584, 586 P. 2d 918 (1978). The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. Cal. Penal Code Ann. §§ 859–866 (West 1985), § 1538.5 (West Supp. 1986). If the magistrate determines that probable cause exists, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases.

It is true that unlike a criminal trial, the California preliminary hearing cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury. But these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding. See *Waller* v. *Georgia*, 467 U. S., at 46–47. As the California Supreme Court stated in *San Jose Mercury-News* v. *Municipal Court*, 30 Cal. 3d 498, 511, 638 P. 2d 655, 663 (1982), the preliminary hearing in many cases provides "the sole occasion for public observation of the criminal justice system." See also *Richmond Newspapers*, 448 U. S., at 572.

Similarly, the absence of a jury, long recognized as "an inestimable safeguard against the corrupt or overzealous pros-

ecutor and against the compliant, biased, or eccentric judge," *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968), makes the importance of public access to a preliminary hearing even more significant. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U. S., at 572.

Denying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the "community therapeutic value" of openness. *Id.*, at 570. Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions." *Press-Enterprise I*, 464 U. S., at 509. See also H. Weihofen, The Urge to Punish 130–131 (1956); T. Reik, The Compulsion to Confess (1959). In sum:

> "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, *supra*, at 508 (emphasis in original).

We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California.

B

Since a qualified First Amendment right of access attaches to preliminary hearings in California under Cal. Penal Code Ann. §858 *et seq.* (West 1985), the proceedings cannot be closed unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values

and is narrowly tailored to serve that interest." *Press-Enterprise I*, *supra*, at 510. See also *Globe Newspaper*, 457 U. S., at 606–607. If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. See *Press-Enterprise I*, *supra*; *Richmond Newspapers*, *supra*, at 581.

The California Supreme Court, interpreting its access statute, concluded that "the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice." 37 Cal. 3d, at 781, 691 P. 2d, at 1032. As the court itself acknowledged, the "reasonable likelihood" test places a lesser burden on the defendant than the "substantial probability" test which we hold is called for by the First Amendment. See *ibid.*; see also *id.*, at 783, 691 P. 2d, at 1033 (Lucas, J., concurring and dissenting). Moreover, that court failed to consider whether alternatives short of complete closure would have protected the interests of the accused.

In *Gannett* we observed:

> "Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Cf. *Jackson* v. *Denno*, 378 U. S. 368. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial." 443 U. S., at 378.

But this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. And even if closure were justified for the hearings on a motion to suppress, closure of an entire 41-day proceeding would rarely be warranted. The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation must be "narrowly tailored to serve that interest." *Press-Enterprise I*, *supra*, at 510.

The standard applied by the California Supreme Court failed to consider the First Amendment right of access to criminal proceedings. Accordingly, the judgment of the California Supreme Court is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE REHNQUIST joins as to Part II, dissenting.

The constitutional question presented by this case is whether members of the public have a First Amendment right to insist upon access to the transcript of a preliminary hearing during the period before the public trial, even though the accused, the prosecutor, and the trial judge have all agreed to the sealing of the transcript in order to assure a fair trial.

The preliminary hearing transcript to which petitioner sought access consists of 4,239 pages of testimony by prosecution witnesses heard over eight weeks. The testimony, contained in 47 volumes, accuses Mr. Robert Diaz, a nurse, of murdering 12 patients in the hospital in which he worked by injecting them with lethal doses of a heart drug. The transcript reveals that the defense put on no witnesses of its own.

Immediately after the Magistrate ordered the defendant bound over for trial, defense counsel moved that the transcript of the preliminary hearing be sealed to protect his cli-

ent's right to a fair trial. The transcript, in the words of the Magistrate, revealed "only one side of the story." App. 28a. The transcript also contained the Magistrate's characterization of Mr. Diaz as "the most dangerous type of individual there is." *Id.*, at 27a. The prosecutor did not oppose this motion, and the Magistrate, after hearing petitioner's objection, ordered the transcript sealed.

The Superior Court trial judge denied a motion to unseal the transcript. He found—and the finding is amply supported by the record—that "there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant's right to a fair and impartial trial." *Id.*, at 61a. Accord, *id.*, at 62a. The Magistrate had earlier rejected less restrictive alternatives to sealing the transcript, concluding that "the only way to protect" the defendant's "[fair trial] right would be to seal the transcript." *Id.*, at 37a.[1]

The Court of Appeal agreed with the trial judge and denied the peremptory writ of mandate sought by petitioner. It rejected petitioner's assertion that "the superior court failed to state any reasons or make a specific finding to support the sealing order." App. to Pet. for Cert. E–11. Instead, it confirmed the trial judge's determinations that "the transcript is indicative of only the prosecutorial side of the case," *id.*, at E–14; that the public's right of access was overborne by the "reasonable likelihood of substantial prejudice" to "the defendant's right to a fair trial," *id.*, at E–9; and that "[a]lternatives to sealing the transcript would not suffice in this

[1] In so ruling, the Magistrate recognized that he had "an affirmative constitutional duty to insure that a defendant has a fair trial," App. 37a, under *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 378 (1979) ("To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary" (citation omitted)).

case," *id.*, at E–14.[2] The California Supreme Court similarly denied petitioner's request for a peremptory writ of mandate, affirming that a preliminary hearing transcript can be sealed upon a showing of a "reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial." 37 Cal. 3d 772, 781, 691 P. 2d 1026, 1032 (1984).

In view of the above, the trial judge had an obvious and legitimate reason for refusing to make the transcript public any sooner than he did. His decision plainly did not violate the defendant's right to a public trial under the Sixth Amendment, for it was the defendant who objected to release of the transcript. See *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 383–384 (1979). In my opinion, the judge's decision did not violate the First Amendment either.

I

Although perhaps obvious, it bears emphasis that the First Amendment right asserted by petitioner is not a right to publish or otherwise communicate information lawfully or unlawfully acquired. That right, which lies at the core of the First Amendment and which erased the legacy of restraints on publication against which the drafters of that Amendment rebelled, see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245–250 (1936), may be overcome only by a governmental objective of the highest order attainable in a no less intrusive way. See, *e. g.*, *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101–106 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 837–845 (1978); *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308, 310–312 (1977) *(per curiam)*; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 556–570 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 487–497 (1975). The First Amendment right as-

[2] Indeed, the Court of Appeal determined that "[t]he release of the transcript and employment of these alternatives would tend to *exacerbate* the existing prejudice." App. to Pet. for Cert. E–15 (emphasis added and citation omitted).

serted by petitioner in this case, in contrast, is not the right to publicize information in its possession, but the right to acquire access thereto.

I have long believed that a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs.

> "As Madison wrote:
>
> "'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' 9 Writings of James Madison 103 (G. Hunt ed. 1910).
>
> "It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.
>
> "For that reason information gathering is entitled to some measure of constitutional protection." *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 31–32 (1978) (STEVENS, J., dissenting).[3]

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[3] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 586–589 (1980) (BRENNAN, J., concurring in judgment); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–864 (1974) (POWELL, J., dissenting). In a footnote to my separate writing in *Houchins*, I appended a quotation from Justice Stewart's dissenting opinion in *Branzburg* v. *Hayes*, 408 U. S. 665, 728 (1972) (emphasis added), where he stated that "a right to gather news, *of some dimensions*, must exist." The majority agreed with this observation, acknowledging that "news gathering is not without its First Amendment protections," *id.*, at 707, for "without some protection for seeking out the news, freedom of press could be eviscerated," *id.*, at 681. See also *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965) ("The right to speak and publish

Neither our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny. An official policy of secrecy must be supported by some legitimate justification that serves the interest of the public office. Thus, in *Pell* v. *Procunier*, 417 U. S. 817 (1974), and *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974), we confirmed that the warden's regulation of prearranged inmate press interviews had a legitimate disciplinary and penological basis and was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." *Pell* v. *Procunier*, 417 U. S., at 830. Accord, *Saxbe* v. *Washington Post Co.*, 417 U. S., at 848. Likewise, in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), we held that any First Amendment access right "was given all appropriate deference by the state *nisi prius* court," *id.*, at 392, which had entered a "finding on the record that an open suppression hearing would pose a 'reasonable probability of prejudice to these defendants,'" *id.*, at 376. Conversely, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), a violation of the First Amendment was established by the "total absence of any record justification for the closure order," *id.*, at 584 (STEVENS, J., concurring). Accord, *id.*, at 580–581 (opinion of BURGER, C. J.). The same constitutional infirmity afflicted the order excluding the public from attending the testimony of minor victims in a sex-offense trial in *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 608–609 (1982) ("the record indicates that the victims may have been willing to testify despite the presence of the press" (footnote omitted)), and the order closing the *voir dire* proceedings and sealing the transcript in *Press-Enterprise Co.* v. *Superior Court*, 464 U. S. 501, 510–511 (1984) ("prolonged closure was unsupported by findings"); *id.*, at 513 ("trial judge provided no explanation" for his

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does not carry with it the *unrestrained* right to gather information" (emphasis added)).

"broad order"); *id.*, at 515 (BLACKMUN, J., concurring). Cf. *Waller* v. *Georgia*, 467 U. S. 39, 48, n. 7, 49, n. 8 (1984).[4]

But it has always been apparent that the freedom to obtain information that the government has a legitimate interest in not disclosing, see *Globe Newspaper Co.* v. *Superior Court*, 457 U. S., at 621 (STEVENS, J., dissenting), is far narrower than the freedom to disseminate information, which is "virtually absolute" in most contexts, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 582 (STEVENS, J., concurring). In this case, the risk of prejudice to the defendant's right to a fair trial is perfectly obvious. For me, that risk is far more significant than the countervailing interest in publishing the transcript of the preliminary hearing sooner rather than later. Cf. *Gannett Co.* v. *DePasquale*, 443 U. S., at 393 (upholding closure of suppression hearing in part because "any denial of access in this case was not absolute but only temporary"). The interest in prompt publication—in my view—is no greater than the interest in prompt publication of grand jury transcripts. As explained more fully below, we have always recognized the legitimacy of the governmental interest in the secrecy of grand jury proceedings, and I am unpersuaded that the difference between such proceedings and the rather elaborate procedure for determining probable cause that California has adopted strengthens the First Amendment claim to access asserted in this case.

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[4] In *Houchins* I explained why I believed that the plaintiffs were entitled to put an end to the warden's policy of concealing prison conditions from the public. "Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined." 438 U. S., at 35–36. It seemed clear that an "official prison policy of concealing such knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." *Id.*, at 38 (footnote omitted).

II

The Court nevertheless reaches the opposite conclusion by applying the "two complementary considerations," *ante*, at 8, of "experience and logic," *ante*, at 9. In my view, neither the Court's reasoning nor the result it reaches is supported by our precedents.

The historical evidence proffered in this case is far less probative than the evidence adduced in prior cases granting public access to criminal proceedings. In those cases, a common-law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open. Thus, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 564, THE CHIEF JUSTICE explained that "[w]hat is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe." "[T]he historical evidence demonstrates conclusively that *at the time when our organic laws were adopted*, criminal trials both here and in England had long been presumptively open." *Id.*, at 569 (emphasis added). History was relevant because it demonstrated that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself." *Id.*, at 575. The opinion for the Court in *Globe Newspaper Co.* v. *Superior Court*, 457 U. S., at 605, which also concerned the presumptive openness of a criminal trial, relied expressly on the opinion of THE CHIEF JUSTICE in *Richmond Newspapers* for the point that criminal trials were open "at the time when our organic laws were adopted." 448 U. S., at 569. Later, in *Press-Enterprise Co.* v. *Superior Court*, the Court quoted the identical passage from *Richmond Newspapers*, see 464 U. S., at 505, and concluded that "[p]ublic jury selection thus was the common practice in America when the Constitution was

adopted," *id.*, at 508. To dispel any doubt regarding the significance of this evidence, we explained that "the question we address—whether the *voir dire* process must be open—focuses on First . . . Amendment values *and the historical backdrop against which the First Amendment was enacted.*" *Id.*, at 509, n. 8 (emphasis added). Thus, in our prior cases history mattered primarily for what it revealed about the intentions of the Framers and ratifiers of the First Amendment.

In this case, however, it is uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open. As Justice Stewart wrote for the Court in *Gannett Co.* v. *DePasquale:*

> "[T]here exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary. By the time of the adoption of the Constitution, . . . pretrial proceedings, precisely because of the . . . concern for a fair trial, were never characterized by the same degree of openness as were actual trials.
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> "Under English common law, the public had no right to attend pretrial proceedings. *E. g.*, E. Jenks, The Book of English Law 75 (6th ed. 1967) ('It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings . . .'); F. Maitland, Justice and Police 129 (1885) (The 'preliminary examination of accused persons had gradually assumed a very judicial form . . . . The place in which it is held is indeed no "open court," the public can be excluded if the magistrate thinks that the ends of justice will thus be best answered . . .'). See also Indictable Offences Act, 11 & 12 Vict., ch. 42, § 19 (1848) (pro-

viding that pretrial proceedings should not be deemed an open court and that the public could therefore be excluded); Magistrates' Courts Act, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 55, § 4(2) (1952) (same)." 443 U. S., at 387–389 (footnotes omitted).[5]

Justice Stewart included in his discussion the following quotation from Lord Ellenborough; the Law Lord explains, in reasons as relevant today as they were when the Bill of Rights was adopted, the historical basis for the closure of preliminary proceedings:

> "If any thing is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. . . . Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. . . . But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice." *King* v. *Fisher*, 2 Camp. 563, 570–571, 170 Eng. Rep. 1253, 1255 (N. P. 1811).

In the final analysis, the Court's lengthy historical disquisition demonstrates only that in many States preliminary proceedings are generally open to the public. See *ante*, at 10–11, n. 3. In other States, numbering California and Michigan among them, see *In re Midland Publishing Co.*,

[5] Accord, Geis, Preliminary Hearings and the Press, 8 UCLA L. Rev. 397, 406 (1961) ("Preliminary hearings in the American colonies closely followed the prescriptions of the sixteenth-century English statutes" (footnote omitted)). THE CHIEF JUSTICE pointed out in his concurring opinion in *Gannett* that "[a]t common law there was a very different presumption [*i. e.*, in favor of closure] for proceedings which preceded the trial." 443 U. S., at 394. "[N]o one ever suggested that there was any 'right' of the public to be present at such pretrial proceedings as were available in that time [that the Bill of Rights was adopted]." *Id.*, at 396.

420 Mich. 148, 162, 172–174, 362 N. W. 2d 580, 588, 593–594 (1984), such proceedings have been closed.[6] To paraphrase the Court's analysis in *McMillan* v. *Pennsylvania*, 477 U. S. 79, 90 (1986) (footnote omitted), "the fact that the States" have adopted different rules regarding the openness of preliminary proceedings "is merely a reflection of our federal system, which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement,' *Spencer* v. *Texas*, 385 U. S. 554, 566 (1967). That [California's] particular approach has been adopted in few other States does not render [its] choice unconstitutional."

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[6] Ironically, California and Michigan are both States in which preliminary proceedings are generally open to the public, and are thus—surprisingly—part of the recent common-law trend in favor of openness relied on by the Court. It is only on the facts of record in this case that the California courts ordered the transcript sealed. Since many—if not most—of the state-court decisions collected by the Court hold that the right to a public preliminary hearing is personal to the accused, see, *e. g.*, *State* v. *Porter Superior Court*, 274 Ind. 408, 409–410, 412 N. E. 2d 748, 750 (1980); *Azbill* v. *Fisher*, 84 Nev. 414, 419, 442 P. 2d 916, 918–919 (1968), or, more commonly, that it is overcome by a showing of potentially prejudicial publicity equivalent to or less than that required in California, see, *e. g.*, *State* v. *Burak*, 37 Conn. Supp. 627, 630, 431 A. 2d 1246, 1248 (1981) ("likelihood of prejudice"); *United States* v. *Edwards*, 430 A. 2d 1321, 1345 (D. C. 1981) ("likelihood"), cert. denied, 455 U. S. 1022 (1982); *Gannett Pacific Corp.* v. *Richardson*, 59 Haw. 224, 233, 580 P. 2d 49, 56 (1978) ("substantial likelihood"); *Westchester Rockland Newspapers* v. *Leggett*, 48 N. Y. 2d 430, 442, 399 N. E. 2d 518, 525 (1979) ("strong likelihood"); *Kearns-Tribune Corp.* v. *Lewis*, 685 P. 2d 515, 523 (Utah 1984) ("'realistic likelihood of prejudice'"); *Richmond Newspapers, Inc.* v. *Commonwealth*, 222 Va. 574, 589, 281 S. E. 2d 915, 923 (1981) ("likelihood"); *Federated Publications, Inc.* v. *Kurtz*, 94 Wash. 2d 51, 62, 615 P. 2d 440, 446 (1980) ("likelihood of jeopardy"), courts in these States would presumably have also denied access if presented with the facts of this case. On this observation, and in view of the fact that the reasoning of the state courts is heavily dependent on this Court's cases granting access to criminal proceedings (even if they are ultimately grounded in state law), it is remarkable that the Court finds any historical basis for a public right of access to preliminary proceedings on a showing in excess of that required in California and met by the defendant in this case.

As Justice Stewart admonished: we must not "confus[e] the existence of a constitutional right with the common-law tradition of open . . . proceedings." *Gannett Co.* v. *DePasquale*, 443 U. S., at 389, n. 19. The recent common-law developments reported by the Court are relevant, if at all, only insofar as they suggest that preliminary proceedings merit the "beneficial effects of public scrutiny." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S., at 492. The Court's historical crutch cannot carry the weight of opening a preliminary proceeding that the State has ordered closed; that determination must stand or fall on whether it satisfies the second component of the Court's test.

If the Court's historical evidence proves too little, the "'value of openness,'" *ante*, at 13 (quoting *Press-Enterprise Co.* v. *Superior Court*, 464 U. S., at 508), on which it relies proves too much, for this measure would open to public scrutiny far more than preliminary hearings "as they are conducted in California" (a comforting phrase invoked by the Court in one form or another more than eight times in its opinion).[7] In brief, the Court's rationale for opening the "California preliminary hearing" is that it "is often the final and most important step in the criminal proceeding"; that it provides "'the sole occasion for public observation of the criminal justice system'"; that it lacks the protective pres-

[7] Given the Court's focus on the history of preliminary proceedings in general, and its reliance on the broad values served by openness, see *ante*, at 13, I do not see the relevance of the fact that preliminary proceedings in California bear an outward resemblance to criminal trials. To the extent that it matters that in California "[t]he accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence," *ante*, at 12 (citing Cal. Penal Code Ann. §§ 859–866 (West 1985), § 1538.5 (West 1982)), it bears mention that many other States have reformed their grand juries to include one or more of these procedural reforms, see W. LaFave & J. Israel, Criminal Procedure § 15.2(b) (1984). After today's decision, one can only wonder whether the public enjoys a right of access to any or all of these proceedings as well.

ence of a jury; and that closure denies an outlet for community catharsis. *Ante*, at 12, 13 (quotation omitted). The obvious defect in the Court's approach is that its reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings. A grand jury indictment is just as likely to be the "final step" in a criminal proceeding and the "sole occasion" for public scrutiny as is a preliminary hearing. Moreover, many critics of the grand jury maintain that the grand jury protects the accused less well than does a legally knowledgeable judge who personally presides over a preliminary hearing. See *Hawkins* v. *Superior Court*, 22 Cal. 2d 584, 590, 586 P. 2d 916, 919–920 (1978) (holding deprivation of preliminary hearing to constitute a denial of equal protection under State Constitution in part because "'the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury'" (quoting Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & C. 174 (1973))). Finally, closure of grand juries denies an outlet for community rage. When the Court's explanatory veneer is stripped away, what emerges is the reality that the California preliminary hearing is functionally identical to the traditional grand jury. As THE CHIEF JUSTICE emphasized by his quotation of *Cox* v. *Coleridge*, 1 B. & C. 37, 49–50, 107 Eng. Rep. 15, 19–20 (1822), in his concurring opinion in *Gannett Co.* v. *DePasquale*, 443 U. S., at 395, n. (emphasis added):

> "'It [the proceeding] is only a preliminary inquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is *precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that.* This being only a preliminary inquiry, and not a trial, makes, in my mind, all the difference.'"

The Court's reasoning—if carried to its logical outcome—thus contravenes the "long-established policy that maintains

the secrecy of the grand jury proceedings in the federal courts" and in the courts of 19 States. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681 (1958). "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings." *Branzburg* v. *Hayes*, 408 U. S. 665, 684–685 (1972). This Court has previously described grand jury secrecy as "indispensable," *United States* v. *Johnson*, 319 U. S. 503, 513 (1943), and has remarked that "'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,'" *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424 (1983) (quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 218 (1979)).[8]

In fact, the logic of the Court's access right extends even beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket as well. As Justice Stewart explained:

> "If the existence of a common-law rule were the test for whether there is a Sixth Amendment public right to a public trial, therefore, there would be such a right in civil as well as criminal cases. . . . In short, there is no principled basis upon which a public right of access to ju-

[8] Five reasons are commonly given for the policy of grand jury secrecy:

"'(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'" *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S., at 219, n. 10 (quoting *United States* v. *Rose*, 215 F. 2d 617, 628–629 (CA3 1954)); *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681, n. 6 (1958) (same). See *Illinois* v. *Abbott & Associates, Inc.*, 460 U. S. 557, 566–567, n. 11 (1983).

dicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

"Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. . . . Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co.* v. *DePasquale*, 443 U. S., at 386–387, n. 15.

Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20, 29–37 (1984) (newspaper not allowed to publish information to which it was privy as a litigant in a civil action). Despite the Court's valiant attempt to limit the logic of its holding, the *ratio decidendi* of today's decision knows no bounds.

By abjuring strict reliance on history and emphasizing the broad value of openness, the Court tacitly recognizes the importance of public access to government proceedings generally. Regrettably, the Court has taken seriously the stated requirement that the sealing of a transcript be justified by a "compelling" or "overriding" governmental interest and that the closure order be "'narrowly tailored to serve that interest.'" *Ante*, at 9 (quoting *Press-Enterprise Co.* v. *Superior Court*, 464 U. S., at 501); *Press-Enterprise Co.* v. *Superior Court*, 464 U. S., at 510 (quoting *Globe Newspaper Co.* v. *Superior Court*, 457 U. S., at 607). See *ante*, at 13–14. This standard—as well as the two-part test of history and logic that formed the basis for the decision today—originated as two "helpful principles" in JUSTICE BRENNAN's eloquent concurrence in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 589. That concurrence recognized that "'[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow,'" *id.*, at 588 (quoting *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965)), and—in contrast with the decision today—stressed that "[a]n assertion of the prerogative to gather information must accordingly be assayed by considering the information sought

and the opposing interests invaded," 448 U. S., at 588 (footnote omitted)—a determination "as much a matter of sensitivity to practical necessities as . . . of abstract reasoning," *ibid.* The cases denying access have done so on a far lesser showing than that required by a compelling governmental interest/least restrictive means analysis, see *supra*, at 19–20, and cases granting access have recognized as legitimate grounds for closure interests that fall far short of those traditionally thought to be "compelling," see *Press-Enterprise Co.* v. *Superior Court*, 464 U. S., at 511–512 (privacy interest of venirepersons sufficient reason to close presumptively open *voir dire* proceeding); see also *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 600 (Stewart, J., concurring in judgment).

The presence of a legitimate reason for closure in this case requires an affirmance. The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial. By taking its own verbal formulation seriously, the Court reverses—without comment or explanation or any attempt at reconciliation—the holding in *Gannett* that a "reasonable probability of prejudice" is enough to overcome the First Amendment right of access to a preliminary proceeding. It is unfortunate that the Court neglects this opportunity to fit the result in this case into the body of precedent dealing with access rights generally. I fear that today's decision will simply further unsettle the law in this area.

I respectfully dissent.

THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 83–1968. Argued December 4, 1985—Decided June 30, 1986

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, *inter alia*, that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile* v. *Bolden*, 446 U. S. 55, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the disputed districts. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F. Supp. 345, affirmed in part and reversed in part.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, concluding that:

1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 52–61.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have

succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 74–76.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of circumstances" and to determine, based upon a practical evaluation of the past and present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 77–79.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Part III–C that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 61–73.

JUSTICE BRENNAN, joined by JUSTICE WHITE, concluded in Part IV–B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellees' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. P. 77.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may

be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 100–101.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellees failed to establish a violation of § 2. Pp. 101–105.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, *post*, p. 82. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 83. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 106.

Lacy H. Thornburg, Attorney General of North Carolina, *pro se*, argued the cause for appellants. With him on the briefs were *Jerris Leonard*, *Kathleen Heenan McGuan*, *James Wallace, Jr.*, Deputy Attorney General for Legal Affairs, and *Tiare B. Smiley* and *Norma S. Harrell*, Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds* and *Deputy Assistant Attorney General Cooper*.

Julius LeVonne Chambers argued the cause for appellees. With him on the briefs for appellees Gingles et al. were *Eric Schnapper*, *C. Lani Guinier*, and *Leslie J. Winner*. *C. Allen Foster*, *Kenneth J. Gumbiner*, *Robert N.*

Hunter, Jr., and *Arthur J. Donaldson* filed briefs for appellees Eaglin et al.*

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, an opinion with respect to Part III–C, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, and an opinion with respect to Part IV–B, in which JUSTICE WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate

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**Daniel J. Popeo* and *George C. Smith* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by *Cynthia Hill, Maureen T. Thornton, Laughlin McDonald*, and *Neil Bradley;* for Common Cause by *William T. Lake;* for the Lawyer's Committee for Civil Rights Under Law et al. by *James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove*, and *Richard T. Foltin;* for James G. Martin, Governor of North Carolina, by *Victor S. Friedman;* for Legal Services of North Carolina by *David H. Harris, Jr., Susan M. Perry, Richard Taylor*, and *Julian Pierce;* for the Republican National Committee by *Roger Allan Moore* and *Michael A. Hess;* and for Senator Dennis DeConcini et al. by *Walter J. Rockler.*

and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act.[3]

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White* v. *Regester*, 412 U. S. 755 (1973), and by other federal courts before *Bolden*, *supra*. S. Rep. No. 97–417, p. 28 (1982) (hereinafter S. Rep.).

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[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

[3] Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, *Gingles* v. *Edmisten*, 590 F. Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

Section 2, as amended, 96 Stat. 134, reads as follows:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U. S. C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2 elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of

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[4] These factors were derived from the analytical framework of *White* v. *Regester*, 412 U. S. 755 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*. S. Rep., at 28, n. 113.

the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep., at 28–29.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate

Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. *Gingles* v. *Edmisten*, 590 F. Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting,[5]

[5] Bullet (single-shot) voting has been described as follows:

"'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if

and designated seat plans[6] for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember

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the vote of the majority is divided among a number of candidates.'" *City of Rome* v. *United States*, 446 U. S. 156, 184, n. 19 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[6] Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, *e. g.*, *City of Rome*, *supra*, at 185, n. 21.

districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F. Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, *post*, p. 82, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court, pursuant to 28 U. S. C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U. S. 1064 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

A

SECTION 2 AND ITS LEGISLATIVE HISTORY

Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of circumstances" reveal that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." While explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in evaluating an alleged violation, § 2(b) cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[7] First and foremost, the Report dispositively rejects the position of the plurality in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which

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[7] The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, *e. g.*, *Garcia* v. *United States*, 469 U. S. 70, 76, and n. 3 (1984); *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969).

required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.[8] See, *e. g.*, S. Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.*, at 36. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9] *Id.*, at 28. See also *id.*, at 2, 27, 29, n. 118, 36.

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." *Id.*, at 27. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political

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[8] The Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). S. Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White* v. *Regester*, 412 U. S. 755 (1973), and *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S. Rep., at 16.

[9] The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.*, at 40 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Id.*, at 5 (quoting 111 Cong. Rec. 8295 (1965) (remarks of Sen. Javits)).

subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.*, at 28–29; see also *supra*, at 36–37. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.*, at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of §2 violations, particularly to vote dilution claims,[10] other factors may also be relevant and may be considered. *Id.*, at 29–30. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.*, at 29. Rather, the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" *id.*, at 30 (footnote omitted), and on a "functional" view of the political process. *Id.*, at 30, n. 120.

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[10] Section 2 prohibits all forms of voting discrimination, not just vote dilution. S. Rep., at 30.

Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.*, at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.*, at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

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[11] Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis. Stud. Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

[12] The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in

The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"[13] *Burns* v. *Richardson*, 384 U. S.

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a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

[13] Commentators are in widespread agreement with this conclusion. See, *e. g.*, Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From *Reynolds* v. *Sims* to *City of Mobile* v. *Bolden*, 34 Hastings L. J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La. L. Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo. Wash. L. Rev. 689 (1982); Jewell, The Consequences of Single- and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig,

73, 88 (1966) (quoting *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965)). See also *Rogers* v. *Lodge*, 458 U. S. 613, 617 (1982); *White* v. *Regester*, 412 U. S., at 765; *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] See, *e. g.*, Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S. Rep., at 16. Cf. *Rogers* v. *Lodge*, *supra*, at 617; *Regester*, *supra*, at 765; *Whitcomb*, *supra*, at 142. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. See, *e. g.*, S. Rep., at 16.

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly,

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Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223 (1976); Parker 87–88.

[14] Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers* v. *Lodge*, 458 U. S., at 623, leaving the minority effectively unrepresented. See, *e. g.*, Grofman, Should Representatives Be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

[15] Under a "functional" view of the political process mandated by § 2, S. Rep., at 30, n. 120, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political sub-

a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden*, 446 U. S., at 105, n. 3 (MARSHALL, J., dissenting) ("It is obvious

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division is racially polarized." *Id.*, 28–29. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to*, a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, *e. g.*, *McMillan* v. *Escambia County, Fla.*, 748 F. 2d 1037, 1043 (CA5 1984); *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U. S. 976 (1984); *Nevett* v. *Sides*, 571 F. 2d 209, 223 (CA5 1978), cert. denied, 446 U. S. 951 (1980); *Johnson* v. *Halifax County*, 594 F. Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates.[17] Cf. *Rogers*, 458

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[16] In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

[17] The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohe-

U. S., at 616. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, see, *infra*, at 57, and n. 26—usually to defeat the minority's preferred candidate. See, *e. g.*, Blacksher & Menefee 51, 53, 56–57, 60. Cf. *Rogers*, *supra*, at 616–617; *Whitcomb*, 403 U. S., at 158–159; *McMillan* v. *Escambia County, Fla.*, 748 F. 2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Davis* v. *Bandemer*, *post*, at 131–133, 139–140 (opinion of WHITE, J.); *Bolden*, *supra*, at 111, n. 7 (MARSHALL, J., dissenting); *Whitcomb*, *supra*, at 153. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L. J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

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sive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates . . . . [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55–56 (footnotes omitted; emphasis added).

III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting.[18] First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts.[19] Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate eco-

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[18] The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

[19] The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

logical regression analysis[20]—in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated.[21] The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant.[22] Finally, adopting Dr. Grofman's terminology, see

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[20] The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F. Supp., at 367, n. 28, 368, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb. Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr. 1985) (hereinafter Grofman, Migalski, & Noviello).

[21] The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." *Id.*, at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See *infra*, at 55–58.

[22] The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F. Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.

Tr. 195, the court found that in all but 2 of the 53 elections[23] the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F. Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." *Id.*, at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina main-

[23] The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F. Supp., at 368, n. 31.

tains that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. *Id.*, at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is deemed to exist whenever "'the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.'" Brief for United States as *Amicus Curiae* 29 (quoting 590 F. Supp., at 368). We read the District Court opinion differently.

2

The Standard for Legally Significant Racial Bloc Voting

The Senate Report states that the "extent to which voting in the elections of the state or political subdivision is racially polarized," S. Rep., at 29, is relevant to a vote dilution claim. Further, courts and commentators agree that racial bloc voting is a key element of a vote dilution claim. See, *e. g.*, *Escambia County, Fla.*, 748 F. 2d, at 1043; *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U. S. 976 (1984); *Nevett* v. *Sides*, 571 F. 2d 209, 223 (CA5 1978), cert. denied, 446 U. S. 951 (1980); *Johnson* v. *Halifax County*, 594 F. Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen, 465, 469; Parker 107; Note, Geometry and Geography 199. Because, as we explain below, the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary

from district to district. Nonetheless, it is possible to state some general principles and we proceed to do so.

The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See *supra*, at 48–51. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. *Id.*, at 60. The amount of white bloc voting that can generally "minimize or cancel," S. Rep., at 28; *Regester*, 412 U. S., at 765, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.[24] See, *e. g.*, Butler 874–876; Davidson 5; Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb. Aff. Q. 345 (1976); United States Commis-

[24] This list of factors is illustrative, not comprehensive.

sion on Civil Rights, The Voting Rights Act: Unfulfilled Goals 38–41 (1981).

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb*, 403 U. S., at 153, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.[25] Blacksher & Menefee 61; Note, Geometry and Geography 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[26]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will

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[25] The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

[26] This list of special circumstances is illustrative, not exclusive.

vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of "substantive significance" that the United States ascribes to it—"'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,'" Brief for United States as *Amicus Curiae* 29 (quoting 590 F. Supp., at 368)—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is *legally* significant through mechanical reliance on this standard.[27] While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

The District Court's findings concerning black support for black candidates in the five multimember districts at issue

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[27] The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, *post*, p. 80, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See *ibid.* The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.[28]

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[28] In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2–10, that the court relied on

While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see *infra*, at 77, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, *post*, p. 82. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,[29] as well as of the

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data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

[29] For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent — who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did *not* vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

very different order of preference blacks and whites assigned black candidates,[30] in reaching its conclusion that legally significant racial polarization exists in each district.

We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a *correlation* between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income[,] incumbency, education, campaign expenditures," Brief for

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[30] The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

Appellants 42, "media use measured by cost, . . . name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as *Amicus Curiae* 30, n. 57, can prove that race was the primary determinant of voter behavior.[31]

Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.[32] Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate *infra*, appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S. Rep., at 30, n. 119, and the "searching practical evaluation of the 'past

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[31] Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

[32] The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See *Lee County Branch of NAACP* v. *Opelika*, 748 F. 2d 1473, 1482 (1984); *Jones* v. *Lubbock*, 730 F. 2d 233, 234 (1984) (Higginbotham, J., concurring).

and present reality,'" *id.*, at 30 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way *caused by race*, rather than to voting patterns that are merely *correlated with the race of the voter*, is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, *e. g.*, S. Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, *supra*, at 47–48, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws

that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race*, but to voting patterns that are *determined primarily by the voter's race*, rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, *e. g.*, Butler 902 (Minority group "members' shared concerns, including political ones, are . . . a function of group status, and as such are largely involuntary. . . . As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151–152 (1972) ("Socioeconomic status . . . is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which

holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S. Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. *Id.*, at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are *always* defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex-44. As is the case in Senate District 2, blacks in this

hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S. Rep. 30, n. 119, and conduct a searching and practical evaluation of reality. *Id.*, at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical

element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, *id.*, at 33, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. *Id.*, at 29. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives *of their choice*."

(Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, *supra*, the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, *e. g.*, Blacksher & Menefee 59–60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S. Rep., at 5, 40; H. R. Rep. No. 97–227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, *e. g.*, *White* v. *Regester*, 412 U. S., at 768–769; *Kirksey* v. *Board of Supervisors of Hinds County, Miss.*, 554 F. 2d 139, 145–146 (CA5) (en banc), cert. denied, 434 U. S. 968 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S. Rep., at 29 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win

election in a multimember district than in a single-member district. See, *e. g.*, *Graves* v. *Barnes*, 343 F. Supp. 704, 720–721 (WD Tex. 1972), aff'd in part and rev'd in part *sub nom. White* v. *Regester*, *supra*. Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122–123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, *Escambia County*, 748 F. 2d, at 1043 ("'[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination'") (quoting *United States* v. *Dallas County Comm'n*, 739 F. 2d 1529, 1536 (CA11 1984)); *United States* v. *Marengo County Comm'n*, 731 F. 2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

Finally, we reject the suggestion that racially polarized voting refers only to white bloc voting which is caused by

white voters' *racial hostility* toward black candidates.[33] To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile* v. *Bolden*, 446 U. S. 55 (1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden*, *supra*, that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.[34] Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L. J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee . . . heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S. Rep., at 36. The Committee found the testimony of Dr. Arthur S.

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[33] It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166 (1977); *Rogers* v. *Lodge*, 458 U. S., at 623. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

[34] The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S. Rep., at 27–28, n. 109.

Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> "'[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.'" *Ibid.* (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. *Ibid.* The new intent test would be equally, if not more, burdensome. In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant *causal factors*, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

> "Many of the[se] independent variables . . . would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L. J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S. Rep., at 36. Amended §2 asks instead "whether minorities have equal access to the process of electing their representatives." *Ibid.*

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under §2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, *supra*, requiring proof that racial considerations actually *caused* voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a §2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court . . . make a separate . . . finding of intent, after accepting the proof of the factors involved in the *White* [v. *Regester*, 412 U. S. 755] analysis . . . [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." *Id.*, at 37. We therefore decline to adopt such a requirement.

6

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.[35] They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly proportional representation.[36] This electoral

[35] The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

[36] The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, *supra*, House District 21 elected a black to its six-member delegation in 1980, House District 39

success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U. S. C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115, quoting *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*. The Senate Committee decided, instead, to "'require an independent consideration of the record.'" S. Rep., at 29, n. 115. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past

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elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

and present reality,'" the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, *id.*, at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[37] 590 F. Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

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[37] See also *Zimmer* v. *McKeithen*, 485 F. 2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

B

The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,[38] but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute

[38] We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

black citizens' votes is a mixed question of law and fact subject to *de novo* review on appeal. In support of their proposed standard of review, they rely primarily on *Bose Corp.* v. *Consumers Union of U. S., Inc.*, 466 U. S. 485 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as *Amicus Curiae* 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S., at 622–627; *City of Rome* v. *United States*, 446 U. S. 156, 183 (1980); *White* v. *Regester*, 412 U. S., at 765–770. Cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985).

In *Regester*, *supra*, we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise." *Id.*, at 769–770.

Quoting this passage from *Regester* with approval, we expressly held in *Rogers* v. *Lodge*, *supra*, that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s

clearly-erroneous standard. 458 U. S., at 622–623. Similarly, in *City of Rome* v. *United States*, we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U. S., at 183.

We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S. Rep., at 30 (footnote omitted), whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" *Rogers*, *supra*, at 621, quoting *Nevett* v. *Sides*, 571 F. 2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U. S., at 622. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in *Bose*, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U. S., at 501, citing *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 855, n. 15 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

B

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see *supra*, at 77, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

	Primary		*General*	
	White	*Black*	*White*	*Black*
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

House District 21

	Primary		*General*	
	White	*Black*	*White*	*Black*
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		*General*	
	White	*Black*	*White*	*Black*
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36

	Primary		*General*	
	White	*Black*	*White*	*Black*
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

House District 39

	Primary		*General*	
	White	*Black*	*White*	*Black*
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25

House District 39

	Primary		*General*	
	White	*Black*	*White*	*Black*
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

590 F. Supp., at 369–371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District (No. Seats)	Prior to 1972	1972	1974	1976	1978	1980	1982
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0

See Brief for Appellees, table printed between pages 8 and 9; App. 93–94.

JUSTICE WHITE, concurring.

I join Parts I, II, III–A, III–B, IV–A, and V of the Court's opinion and agree with JUSTICE BRENNAN's opinion as to Part IV–B. I disagree with Part III–C of JUSTICE BRENNAN's opinion.

JUSTICE BRENNAN states in Part III–C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under JUSTICE BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb* v. *Chavis*, 403 U. S. 124, 149–160 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446

U. S. 55 (1980). S. Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S. Rep.). Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep., at 28. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.*, at 193–194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.*, at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the

level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White*.

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The black

voters in these districts would often be able to elect the representative of their choice in each of these two districts, but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white vot-

ers backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see *ante*, at 38–39, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White*, 412 U. S., at 765. See also *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely

with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. *Ante*, at 48–49, n. 15. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee* v. *Brooks*, 469 U. S. 1002, 1012 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30%

of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ante*, at 50. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.[1] Second, "the minority group must be able

[1] I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether

to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante*, at 51. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a

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it is imposed by § 2. I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante*, at 46–47, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the

black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2. Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Ante*, at 56. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White*'s results test and which were highlighted in the Senate Report. S. Rep., at 28–29; see *Zimmer* v. *Mc-*

Keithen, 485 F. 2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," *ante*, at 44, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," *ante*, at 45, or "the exclusion of members of the minority group from candidate slating processes," *ibid.*, or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," *ibid.*, or "the use of overt or subtle racial appeals in political campaigns," *ibid.*, or that "elected officials are unresponsive to the particularized needs of the members of the minority group." *Ibid.* Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." *Gingles* v. *Edmisten*, 590 F. Supp. 345, 358–359 (EDNC 1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable

standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

What appellants *do* contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them* (*i. e.*, in proportion to their presence in the population)," standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U. S. C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F. Supp., at 372.[2] The District Court attached great weight

[2]At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, *e. g.*, 590 F. Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*, at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors, as the Court's thorough summary of the District Court's findings indicates. See *ante*, at 38–41.

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> "The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be consid-

ered, and is not dispositive." S. Rep., at 194 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport to redefine or alter the ultimate showing of discriminatory effect required by *Whitcomb* and *White*. In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See *White*, 412 U. S., at 766. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," *id.*, at 765–766, and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U. S., at 156. To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U. S., at 766. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis* v. *Bandemer*, *post*, at 131 (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden*. The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White*. The Court's test for vote dilution, combined with its standard for evaluating "voting potential," *White*, *supra*, at 766, means that any racial minority with distinctive interests must *usually* "be represented in legislative halls if

it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." *Whitcomb*, 403 U. S., at 156. Nothing in *Whitcomb*, *White*, or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden*. Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U. S. C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Davis* v. *Bandemer*, *post*, at 132. Of course, the relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. *Davis* v. *Bandemer*, *post*, at 169–170 (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent

under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White, supra*, at 765.

III

Only three Justices of the Court join Part III–C of JUSTICE BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the

Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep., at 29. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics . . . dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.*, at 33–34. Similarly, I agree with JUSTICE WHITE that JUSTICE BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case. *Ante*, at 83 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in *aggregating* data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate in the primary elections selected for study. *Ante*, at 59–60, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. *White* calls for "an intensely local appraisal of the design and impact of the . . . multimember district," 412 U. S., at 769–770, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtu-

ally proportional minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But JUSTICE BRENNAN, joined by JUSTICE WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Ante*, at 77. I agree with JUSTICE BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, *ante*, at 82, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each

of these districts in three of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F. Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution . . . is district-specific." *Ante*, at 59, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," *ante*, at 76, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F. Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend *some* support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and . . . in each district it presently operates to

minimize the voting strength of black voters." *Id.*, at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other *Zimmer* factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against *necessarily* foreclosing a vote dilution claim on the basis of isolated black successes, 485 F. 2d, at 1307; see S. Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, *e. g.*, *Turner* v. *McKeithen*, 490 F. 2d 191 (CA5 1973) (no black candidates elected); *Wallace* v. *House*, 515 F. 2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U. S. 947 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such

weight was clearly erroneous, and the District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with JUSTICE BRENNAN that appellees failed to establish a violation of § 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White*, 412 U. S., at 765.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 37–41, 52–54, and n. 23, 59–61, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante*, at 75–76, is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.[2]

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not

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[1] See *ante*, at 75 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U. S. C. § 1973(b). . . . However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote,"' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' . . . The Senate Committee decided, instead, to '"require an independent consideration of the record"'") (internal citations omitted).

[2] See *ante*, at 79 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

inconsistent with the District Court's ultimate finding concerning House District 23.[3] The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante*, at 82, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." *Ante*, at 80.

To paraphrase the Court's conclusion about the other districts, *ibid.*, I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.[4] Accordingly, I con-

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[3] See *ante*, at 52–54, and n. 23, 60, n. 29, 75–76.

[4] Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. *ante*, at 77, n. 38 ("We have no occasion in this case

cur in the Court's opinion except Part IV–B and except insofar as it explains why it reverses the judgment respecting House District 23.

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to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," *ante*, at 77, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.

DAVIS ET AL. *v.* BANDEMER ET AL.

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

No. 84–1244. Argued October 7, 1985—Decided June 30, 1986

The Indiana Legislature consists of a 100-member House of Representatives and a 50-member Senate. Representatives serve 2-year terms, with elections for all seats every two years. Senators serve 4-year terms, with half of the seats up for election every two years. Senators are elected from single-member districts, while representatives are elected from a mixture of single-member and multimember districts. In 1981, the legislature reapportioned the districts pursuant to the 1980 census. At that time, there were Republican majorities in both the House and the Senate. The reapportionment plan provided 50 single-member districts for the Senate and 7 triple-member, 9 double-member, and 61 single-member districts for the House. The multimember districts generally included the State's metropolitan areas. In 1982, appellee Indiana Democrats filed suit in Federal District Court against appellant state officials, alleging that the 1981 reapportionment plan constituted a political gerrymander intended to disadvantage Democrats, and that the particular district lines that were drawn and the mix of single-member and multimember districts were intended to and did violate their right, as Democrats, to equal protection under the Fourteenth Amendment. In November 1982, before the case went to trial, elections were held under the new plan. Democratic candidates for the House received 51.9% of votes cast statewide but only 43 out of the 100 seats to be filled. Democratic candidates for the Senate received 53.1% of the votes cast statewide, and 13 out of the 25 Democratic candidates were elected. In Marion and Allen Counties, both divided into multimember House districts, Democratic candidates drew 46.6% of the vote, but only 3 of the 21 Democratic candidates were elected. Subsequently, relying primarily on the 1982 election results as proof of unconstitutionally discriminatory vote dilution, the District Court invalidated the 1981 reapportionment plan, enjoined appellants from holding elections pursuant thereto, and ordered the legislature to prepare a new plan.

Held: The judgment is reversed.

603 F. Supp. 1479, reversed.

JUSTICE WHITE delivered the opinion of the Court with respect to Part II, concluding that political gerrymandering, such as occurred in this case, is properly justiciable under the Equal Protection Clause.

Here, none of the identifying characteristics of a nonjusticiable political question are present. Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government. There is no risk of foreign or domestic disturbance. Nor is this Court persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided. The mere fact that there is no likely arithmetic presumption, such as the "one person, one vote" rule, in the present context does not compel a conclusion that the claims presented here are nonjusticiable. The claim is whether each political group in the State should have the same chance to elect representatives of its choice as any other political group, and this Court declines to hold that such claim is never justiciable. That the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. Pp. 118–127.

JUSTICE WHITE, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded in Parts III and IV that the District Court erred in holding that appellees had alleged and proved a violation of the Equal Protection Clause. Pp. 127–143.

(a) A threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation. The District Court's findings of an adverse effect on appellees do not surmount this threshold requirement. The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group's electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, as here, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionally underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. The District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or prove an equal protection violation, unless justified by some acceptable state interest, in addition to being contrary to the above-described conception of an unconstitutional political gerrymander, would invite attack on all or almost all reapportionment statutes. Pp. 127–134.

(b) Relying on a single election to prove unconstitutional discrimination, as the District Court did, is unsatisfactory. Without finding that because of the 1981 reapportionment the Democrats could not in one of the next few elections secure a sufficient vote to take control of the legislature, that the reapportionment would consign the Democrats to a minority status in the legislature throughout the 1980's, or that they would have no hope of doing any better in the reapportionment based on the 1990 census, the District Court erred in concluding that the 1981 reapportionment violated the Equal Protection Clause. Simply showing that there are multimember districts and that those districts are constructed so as to be safely Republican or Democratic in no way bolsters the contention that there has been a *statewide* discrimination against Democratic voters. Pp. 134–137.

(c) The view that intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause would allow a constitutional violation to be found where the only proven effect on a political party's electoral power was disproportionate results in one election (possibly two elections), and would invite judicial interference in legislative districting whenever a political party suffers at the polls. Even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, there has been no unconstitutional violation against members of that party unless the redistricting does in fact disadvantage it at the polls. As noted, a mere lack of proportionate results in one election cannot suffice in this regard. Pp. 138–143.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concluding that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question, would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable. The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and does not confer group rights to an equal share of political power. Racial gerrymandering claims are justiciable because of the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, and because of the stronger nexus between individual rights and group interests that is present in the case of a discrete and insular racial group. But members of the major political parties cannot claim that they are vulnerable to exclusion from the political process, and it has not been established that there is a need or a constitutional basis for judicial intervention to resolve political gerrymandering claims. The costs of judicial intervention will be severe, and such intervention requires courts to make policy choices that are not of a kind suited for judicial discretion. Nor is

there any clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group. Accordingly, political gerrymandering claims present a nonjusticiable political question. Pp. 144–155.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part II, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts I, III, and IV, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 143. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 144. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 161.

William M. Evans argued the cause for appellants. With him on the briefs were *Linley E. Pearson*, Attorney General of Indiana, *Michael T. Schaefer*, Deputy Attorney General, and *Alan W. Becker*.

Theodore R. Boehm argued the cause for appellees. With him on the briefs for appellees Bandemer et al. was *John B. Swarbrick, Jr.* *Grover T. Hawkins* filed a brief for appellees Indiana NAACP State Conference of Branches.*

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*Briefs of *amici curiae* urging reversal were filed for the Assembly of the State of California by *Joseph Remcho* and *Charles C. Marson;* for the Mexican American Legal Defense and Educational Fund by *Jose Garza*, *Antonia Hernandez*, and *John E. Huerta;* and for the Senate of the State of California by *Allan Browne*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Arthur N. Eisenberg*, *Burt Neuborne*, *Charles S. Sims*, and *Lawrence M. Reuben;* for Common Cause by *Philip Heymann;* and for the Republican National Committee by *Roger Allan Moore*, *E. Mark Braden*, *Michael A. Hess*, *James R. Parrinello*, and *Marguerite Mary Leoni*.

Richard C. Borow, *Jonathan H. Steinberg*, and *Daniel Hays Lowenstein* filed a brief for the California Democratic Congressional Delegation as *amicus curiae*.

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court as to Part II and an opinion as to Parts I, III, and IV, in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join.

In this case, we review a judgment from a three-judge District Court, which sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. 603 F. Supp. 1479 (SD Ind. 1984). Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve 2-year terms, with elections held for all seats every two years. The members of the Senate serve 4-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multimember districts. The division of the State into districts is accomplished by legislative enactment, which is signed by the Governor into law. Reapportionment is required every 10 years and is based on the federal decennial census. There is no prohibition against more frequent reapportionments.

In early 1981, the General Assembly initiated the process of reapportioning the State's legislative districts pursuant to the 1980 census. At this time, there were Republican majorities in both the House and the Senate, and the Governor

was Republican.[1] Bills were introduced in both Houses, and a reapportionment plan was duly passed and approved by the Governor.[2] This plan provided 50 single-member districts for the Senate; for the House, it provided 7 triple-member, 9 double-member, and 61 single-member districts. In the Senate plan, the population deviation between districts was 1.15%; in the House plan, the deviation was 1.05%. The multimember districts generally included the more metropolitan areas of the State, although not every metropolitan area was in a multimember district. Marion County, which includes Indianapolis, was combined with portions of its neighboring counties to form five triple-member districts. Fort Wayne was divided into two parts, and each part was combined with portions of the surrounding county or counties to make two triple-member districts. On the other hand, South Bend was divided and put partly into a double-member district and partly into a single-member district (each part

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[1] Politically speaking, the State of Indiana is a "swing" State: It has supported both the Democrats and the Republicans at various times, often following national trends and major candidates. Although at times within the last few decades the State has voted up to 56% Democratic, in 1980 the Republicans took the State.

[2] These bills were "vehicle bills"—bills that had no real content. Both bills were passed and were then referred to the other House and eventually to a Conference Committee, which consisted entirely of Republican members. Four Democratic "advisers" to the Committee were appointed, but they had no voting powers. Further, they were excluded from the substantive work of the Committee: The Republican State Committee funded a computerized study by an outside firm that produced the districting map that was eventually used, and the Democratic "advisers" were not allowed access to the computer or to the results of the study. They nevertheless attempted to develop apportionment proposals of their own using the 1980 census data. A few days before the end of the 1981 legislative session, the Conference Committee presented its plan to the legislature. The Democratic minority also presented its alternative plan. The majority plan was passed in both Houses with voting along party lines and was signed into law by the Governor.

combined with part of the surrounding county or counties). Although county and city lines were not consistently followed, township lines generally were. The two plans, the Senate and the House, were not nested; that is, each Senate district was not divided exactly into two House districts. There appears to have been little relation between the lines drawn in the two plans.

In early 1982, this suit was filed by several Indiana Democrats (here the appellees) against various state officials (here the appellants), alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats. Specifically, they contended that the particular district lines that were drawn and the mix of single-member and multimember districts were intended to and did violate their right, as Democrats, to equal protection under the Fourteenth Amendment. A three-judge District Court was convened to hear these claims.

In November 1982, before the case went to trial, elections were held under the new districting plan. All of the House seats and half of the Senate seats were up for election. Over all the House races statewide, Democratic candidates received 51.9% of the vote. Only 43 Democrats, however, were elected to the House. Over all the Senate races statewide, Democratic candidates received 53.1% of the vote. Thirteen (of twenty-five) Democrats were elected. In Marion and Allen Counties, both divided into multimember House districts, Democratic candidates drew 46.6% of the vote, but only 3 of the 21 House seats were filled by Democrats.

On December 13, 1984, a divided District Court issued a decision declaring the reapportionment to be unconstitutional, enjoining the appellants from holding elections pursuant to the 1981 redistricting, ordering the General Assembly to prepare a new plan, and retaining jurisdiction over the case. See 603 F. Supp. 1479.

To the District Court majority, the results of the 1982 elections seemed "to support an argument that there is a built-in bias favoring the majority party, the Republicans, which instituted the reapportionment plan." *Id.*, at 1486. Although the court thought that these figures were unreliable predictors of future elections, it concluded that they warranted further examination of the circumstances surrounding the passage of the reapportionment statute. See *ibid.*[3] In the course of this further examination, the court noted the irregular shape of some district lines, the peculiar mix of single-member and multimember districts,[4] and the failure of the district lines to adhere consistently to political subdivision boundaries to define communities of interest. The court also found inadequate the other explanations given for the configuration of the districts, such as adherence to the one person, one vote imperative and the Voting Rights Act's no retrogression requirement. These factors, concluded the court, evidenced an intentional effort to favor Republican incumbents and candidates and to disadvantage Democratic voters.[5] This was achieved by "stacking" Democrats into

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[3] A multitude of conflicting statistical evidence was also introduced at the trial. The District Court, however, specifically declined to credit any of this evidence, noting that it did not "wish to choose which statistician is more credible or less credible." 603 F. Supp., at 1485.

[4] The court noted that various House districts combined urban and suburban or rural voters with dissimilar interests and that many of the districts were unwieldy shapes. Using Marion County as one example, the court observed that the county itself had exactly the population to support 14 House seats; nevertheless, it was combined with various surrounding areas to form five triple-member districts, which maintained the county's prior 15-member delegation even though it had in fact suffered a population decrease. Believing that the resulting multimember districts were suspect in terms of compactness, the court concluded that no rational reason could support them.

[5] In addition, the court quoted from the deposition testimony of the Speaker of the House as follows:

"MR. SUSSMAN: What I would like you to do here again is to give me whatever reasons were operative to your mind in maintaining or creating

districts with large Democratic majorities and "splitting" them in other districts so as to give Republicans safe but not excessive majorities in those districts.[6] Because the 1982 elections indicated that the plan also had a discriminatory effect in that the proportionate voting influence of Democratic voters had been adversely affected and because any scheme "which purposely inhibit[s] or prevent[s] proportional representation cannot be tolerated," *id.*, at 1492, the District Court invalidated the statute.[7]

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multi-member districts with regard to (Districts) 48 through 52 [the Marion County districts].

"MR. DAILEY: Political.

"MR. SUSSMAN: What were the political factors?

"MR. DAILEY: We wanted to save as many incumbent Republicans as possible." *Id.*, at 1484.

The court also quoted from the deposition testimony of Senator Bosma as follows:

"MR. SUSSMAN: This (newspaper) article says further, 'Under further questioning from Townsend about input in actual map drawing, Bosma said "You will have the privilege to offer a minority map. But I will advise you in advance that it will not be accepted."' Is that accurate?

"MR. BOSMA: That's accurate. I might add that I don't make goals for the opposite team." *Ibid.*

[6] These are familiar techniques of political gerrymandering. Democratic (or Republican, as the case may be) votes are "stacked" and "wasted" by creating districts where Democrats form majorities much greater than the 50% necessary to carry those districts. Concurrently, Republican votes are spread among districts in which they form safe, perhaps 55%, majorities, and Democratic votes are "cracked" or "split" by dispersing them in such a way as to be ineffectual.

[7] Judge Pell, writing in dissent, disagreed. Assuming for the purposes of his analysis that a political gerrymandering case was justiciable, he concluded that the appellees had not proved discrimination. Rather, once the relative voting strengths were properly ascertained, it was his view that the plan had advantaged and disadvantaged both parties equally: The Democrats won more than their voting strength in the Senate and less in the House. See *id.*, at 1501–1502. Judge Pell also rejected the majority's analysis of the multimember districts and thought that the State had followed rational nondiscriminatory criteria in formulating the 1981 plan.

The defendants appealed, seeking review of the District Court's rulings that the case was justiciable and that, if justiciable, an equal protection violation had occurred.[8] We noted probable jurisdiction. 470 U. S. 1083 (1985).

II

We address first the question whether this case presents a justiciable controversy or a nonjusticiable political question. Although the District Court never explicitly stated that the case was justiciable, its holding clearly rests on such a finding. The appellees urge that this Court has in the past acknowledged and acted upon the justiciability of purely political gerrymandering claims. The appellants contend that we have affirmed on the merits decisions of lower courts finding such claims to be nonjusticiable.

A

Since *Baker* v. *Carr*, 369 U. S. 186 (1962), we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the "one person, one vote" principle. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964).

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[8] Consolidated with this suit in the proceedings below was another lawsuit, filed by the Indiana NAACP. The NAACP suit challenged the plans as unconstitutional dilutions of the black vote in Indiana in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, 42 U. S. C. § 1973 (as amended).

In rejecting the NAACP claims, the District Court majority found: "[T]he voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race. It is not in dispute that blacks in this state vote overwhelmingly Democratic." 603 F. Supp., at 1489–1490. Consequently, the majority found no Fifteenth Amendment or Voting Rights Act violation. The dissent concurred with this result but gave different reasons for reaching this conclusion.

The NAACP did not appeal these dispositions. Consequently, the only claims now before us are the political gerrymandering claims.

Our past decisions also make clear that even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim. In the multimember district context, we have reviewed, and on occasion rejected, districting plans that unconstitutionally diminished the effectiveness of the votes of racial minorities. See *Rogers* v. *Lodge*, 458 U. S. 613 (1982); *Mobile* v. *Bolden*, 446 U. S. 55 (1980); *White* v. *Regester*, 412 U. S. 755 (1973); *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Burns* v. *Richardson*, 384 U. S. 73 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965). We have also adjudicated claims that the configuration of single-member districts violated equal protection with respect to racial and ethnic minorities, although we have never struck down an apportionment plan because of such a claim. See *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977); *Wright* v. *Rockefeller*, 376 U. S. 52 (1964).

In the multimember district cases, we have also repeatedly stated that districting that would "operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population" would raise a constitutional question. *Fortson*, *supra*, at 439 (emphasis added). See also *Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973); *Whitcomb* v. *Chavis*, *supra*, at 143; *Burns* v. *Richardson*, *supra*, at 88. Finally, in *Gaffney* v. *Cummings*, *supra*, we upheld against an equal protection political gerrymandering challenge a state legislative single-member redistricting scheme that was formulated in a bipartisan effort to try to provide political representation on a level approximately proportional to the strength of political parties in the State. In that case, we adjudicated the type of purely political equal protection claim that is brought here, although we did not, as a threshold matter, expressly hold such a claim to be justiciable. Regardless of this lack of a specific holding, our consideration of the merits of the claim in *Gaffney* in the face of a discussion of justiciability in appellant's brief, combined

with our repeated reference in other opinions to the constitutional deficiencies of plans that dilute the vote of political groups, at the least supports an inference that these cases are justiciable.

In the years since *Baker* v. *Carr*, both before and after *Gaffney*, however, we have also affirmed a number of decisions in which the lower courts rejected the justiciability of purely political gerrymandering claims. In *WMCA, Inc.* v. *Lomenzo*, 382 U. S. 4 (1965), summarily aff'g 238 F. Supp. 916 (SDNY), the most frequently cited of these cases, we affirmed the decision of a three-judge District Court upholding a temporary apportionment plan for the State of New York. The District Court had determined that political gerrymandering equal protection challenges to this plan were nonjusticiable. See *id.*, at 925–926. Justice Harlan, in his opinion concurring in the Court's summary affirmance, expressed his understanding that the affirmance was based on the Court's approval of the lower court's finding of nonjusticiability. See 382 U. S., at 6. See also *Jimenez* v. *Hidalgo County Water Improvement District No. 2*, 424 U. S. 950 (1976), summarily aff'g 68 F. R. D. 668 (SD Tex. 1975); *Ferrell* v. *Hall*, 406 U. S. 939 (1972), summarily aff'g 339 F. Supp. 73 (WD Okla.); *Wells* v. *Rockefeller*, 398 U. S. 901 (1970), summarily aff'g 311 F. Supp. 48 (SDNY). Although these summary affirmances arguably support an inference that these claims are not justiciable, there are other cases in which federal or state courts adjudicated political gerrymandering claims and we summarily affirmed or dismissed for want of a substantial federal question. See, *e. g.*, *Wiser* v. *Hughes*, 459 U. S. 962 (1982), dismissing for want of a substantial federal question an appeal from *In re Legislative Districting*, 299 Md. 658, 475 A. 2d 428; *Kelly* v. *Bumpers*, 413 U. S. 901 (1973), summarily aff'g 340 F. Supp. 568 (ED Ark. 1972); *Archer* v. *Smith*, 409 U. S. 808 (1972), summarily aff'g *Graves* v. *Barnes*, 343 F. Supp. 704, 734 (WD Tex.).

These sets of cases may look in different directions, but to the extent that our summary affirmances indicate the nonjusticiability of political gerrymander cases, we are not bound by those decisions. As we have observed before, "[i]t is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 477, n. 20 (1979). See also *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974). The issue that the appellants would have us find to be precluded by these summary dispositions is an important one, and it deserves further consideration.

B

The outlines of the political question doctrine were described and to a large extent defined in *Baker* v. *Carr*. The synthesis of that effort is found in the following passage in the Court's opinion:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 369 U. S., at 217.

In *Baker*, the Court applied this analysis to an equal protection claim based on a state legislative apportionment that allowed substantial disparities in the number of voters represented by each state representative. See *id.*, at 253–258 (Clark, J., concurring). In holding that claim to be justiciable, the Court concluded that none of the identifying characteristics of a political question were present:

> "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.*, at 226.

This analysis applies equally to the question now before us. Disposition of this question does not involve us in a matter more properly decided by a coequal branch of our Government. There is no risk of foreign or domestic disturbance, and in light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.

It is true that the type of claim that was presented in *Baker* v. *Carr* was subsequently resolved in this Court by the formulation of the "one person, one vote" rule. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S., at 557–561. The mere fact, however, that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable. The one person, one vote principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability. Instead, as the language quoted above clearly indicates, the Court contemplated simply that legislative line drawing in the districting context would be susceptible of adjudication under the applicable constitutional criteria.

Furthermore, in formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation. In such cases, it is not that anyone is deprived of a vote or that any person's vote is not counted. Rather, it is that one electoral district elects a single representative and another district of the same size elects two or more—the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one legislator, while his neighbor in the adjoining district votes for and is represented by two or more. *Reynolds* accordingly observed:

> "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative

> apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race . . . ." 377 U. S., at 565–566.

Reynolds surely indicates the justiciability of claims going to the adequacy of representation in state legislatures.

The issue here is of course different from that adjudicated in *Reynolds*. It does not concern districts of unequal size. Not only does everyone have the right to vote and to have his vote counted, but each elector may vote for and be represented by the same number of lawmakers. Rather, the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group. Nevertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable.

Our racial gerrymander cases such as *White* v. *Regester* and *Whitcomb* v. *Chavis* indicate as much. In those cases, there was no population variation among the districts, and no one was precluded from voting. The claim instead was that an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice and that district lines should be redrawn to remedy this alleged defect. In both cases, we adjudicated the merits of such claims, rejecting the claim in *Whitcomb* and sustaining it in *Regester*. Just as clearly, in *Gaffney* v. *Cummings*, where the districts also passed muster under the *Reynolds* formula, the claim was that the legislature had manipulated district lines to afford political groups in various districts an enhanced opportunity to elect legislators of their choice. Although advising caution, we said that "we *must* . . . respond to [the] claims . . . that even if acceptable populationwise, the . . . plan was

invidiously discriminatory because a 'political fairness principle' was followed . . . ." 412 U. S., at 751–752 (emphasis added). We went on to hold that the statute at issue did not violate the Equal Protection Clause.

These decisions support a conclusion that this case is justiciable. As *Gaffney* demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.

In fact, JUSTICE O'CONNOR's attempt to distinguish this political gerrymandering claim from the racial gerrymandering claims that we have consistently adjudicated demonstrates the futility of such an effort. Her conclusion that the claim in this case is not justiciable seems to rest on a dual concern that no judicially manageable standards exist and that adjudication of such claims requires an initial policy decision that the judiciary should not make. Yet she does not point out how the standards that we set forth here for adjudicating this political gerrymandering claim are less manageable than the standards that have been developed for racial gerrymandering claims. Nor does she demonstrate what initial policy decision—regarding, for example, the desirability of fair group representation—we have made here that we have not made in the race cases.[9] She merely asserts that because

[9] As to the illegitimate policy determinations that JUSTICE O'CONNOR believes that we have made, she points to two. The first is a preference for nonpartisan as opposed to partisan gerrymanders, and the second is a preference for proportionality. On a group level, however, which must be our focus in this type of claim, neither of these policy determinations is "of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). The first merely recognizes that nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation. The second, which is not a preference for proportionality *per se*

race has historically been a suspect classification individual minority voters' rights are more immediately related to a racial minority group's voting strength. This, in combination with "the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, suffice to render racial gerrymandering claims justiciable." *Post*, at 151 (O'CONNOR, J., concurring in judgment).

Reliance on these assertions to determine justiciability would transform the narrow categories of "political questions" that *Baker* v. *Carr* carefully defined into an ad hoc litmus test of this Court's reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim. JUSTICE O'CONNOR's own discussion seems to reflect such an approach: She concludes that because political gerrymandering may be a "self-limiting enterprise" there is no need for judicial intervention. *Post*, at 152. She also expresses concern that our decision today will lead to "political instability and judicial malaise," *post*, at 147, because nothing will prevent members of other identifiable groups from bringing similar claims. To begin with, JUSTICE O'CONNOR's factual assumptions are by no means obviously correct: It is not clear that political gerrymandering *is* a self-limiting enterprise or that other groups will have any great incentive to bring gerrymandering claims, given the requirement of a showing of discriminatory intent. At a more fundamental level, however, JUSTICE O'CONNOR's analysis is flawed because it focuses on the perceived need for judicial review and on the potential practical problems with allowing such review. Validation of the con-

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but a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status, is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation recognized in *Reynolds* v. *Sims*, 377 U. S. 533 (1964).

sideration of such amorphous and wide-ranging factors in assessing justiciability would alter substantially the analysis the Court enunciated in *Baker* v. *Carr*, and we decline JUSTICE O'CONNOR's implicit invitation to rethink that approach.

III

Having determined that the political gerrymandering claim in this case is justiciable, we turn to the question whether the District Court erred in holding that the appellees had alleged and proved a violation of the Equal Protection Clause.

A

Preliminarily, we agree with the District Court that the claim made by the appellees in this case is a claim that the 1981 apportionment discriminates against Democrats on a statewide basis. Both the appellees and the District Court have cited instances of individual districting within the State which they believe exemplify this discrimination, but the appellees' claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination. See, *e. g.*, Complaint of Bandemer Plaintiffs 3–7. Although the statewide discrimination asserted here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts.

We also agree with the District Court that in order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. See, *e. g.*, *Mobile* v. *Bolden*, 446 U. S., at 67–68. Further, we are confident that if the law challenged here had discriminatory effects on Democrats, this record would support a finding that the discrimination was intentional. Thus, we decline to overturn the District Court's finding of discriminatory intent as clearly erroneous.

Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. As we said in *Gaffney* v. *Cummings*, 412 U. S., at 752–753:

> "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. See *White* v. *Regester*, [412 U. S. 755 (1973)]; *Burns* v. *Richardson*, [384 U. S. 73 (1966)]; *Whitcomb* v. *Chavis*, [403 U. S. 124 (1971)]; *Abate* v. *Mundt*, [403 U. S. 182 (1971)]. The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the elec-

tion of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

"It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." [10]

As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.[11]

B

We do not accept, however, the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause. The District Court held that because any apportion-

[10] This passage from *Gaffney* expresses a view similar to that of Robert G. Dixon, Jr., one of the foremost scholars of reapportionment, who observed:

"[W]hether or not nonpopulation factors are expressly taken into account in shaping political districts, they are inevitably everpresent and operative. They influence all election outcomes in all sets of districts. The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." Dixon, Fair Criteria and Procedures for Establishing Legislative Districts 7–8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).

[11] That discriminatory intent may not be difficult to prove in this context does not, of course, mean that it need not be proved at all to succeed on such a claim.

ment scheme that purposely prevents proportional representation is unconstitutional, Democratic voters need only show that their proportionate voting influence has been adversely affected. 603 F. Supp., at 1492. Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. *Whitcomb* v. *Chavis*, 403 U. S., at 153, 156, 160; *White* v. *Regester*, 412 U. S., at 765–766.

The typical election for legislative seats in the United States is conducted in described geographical districts, with the candidate receiving the most votes in each district winning the seat allocated to that district. If all or most of the districts are competitive—defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%—even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates. As we have said: "[W]e are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." *Whitcomb* v. *Chavis*, *supra*, at 160. This is true of a racial as well as a political group. *White* v. *Regester*, *supra*, at 765–766. It is also true of a statewide claim as well as an individual district claim.

To draw district lines to maximize the representation of each major party would require creating as many safe seats

for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this "political fairness" approach in *Gaffney* v. *Cummings*, despite its tendency to deny safe district minorities any realistic chance to elect their own representatives. But *Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.

In cases involving individual multimember districts, we have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution. Only where there is evidence that excluded groups have "less opportunity to participate in the political processes and to elect candidates of their choice" have we refused to approve the use of multimember districts. *Rogers* v. *Lodge*, 458 U. S., at 624. See also *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S., at 167; *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, *supra*, at 150. In these cases, we have also noted the lack of responsiveness by those elected to the concerns of the relevant groups. See *Rogers* v. *Lodge*, *supra*, at 625–627; *White* v. *Regester*, *supra*, at 766–767.[12]

These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a per-

[12] Although these cases involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts. We note, however, that the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group. For example, historical patterns of exclusion from the political processes, evidence which would support a vote dilution claim, are in general more likely to be present for a racial group than for a political group.

ception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election. Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. See *Mobile* v. *Bolden*, 446 U. S., at 111, n. 7 (MARSHALL, J., dissenting).

As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

Although this is a somewhat different formulation than we have previously used in describing unconstitutional vote dilution in an individual district, the focus of both of these inquiries is essentially the same.[13] In both contexts, the question is whether a particular group has been unconstitutionally de-

[13] Although this opinion relies on our cases relating to challenges by racial groups to individual multimember districts, nothing herein is intended in any way to suggest an alteration of the standards developed in those cases for evaluating such claims.

nied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Based on these views, we would reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one person, one vote imperative often mandates departure from this result as does the no-retrogression rule required by § 5 of the Voting Rights Act. Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major

step toward that end, which would be so much at odds with our history and experience.

The view that a prima facie case of illegal discrimination in reapportionment requires a showing of more than a *de minimis* effect is not unprecedented. Reapportionment cases involving the one person, one vote principle such as *Gaffney* v. *Cummings* and *White* v. *Regester* provide support for such a requirement. In the present, considerably more complex context, it is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions.[14]

C

The District Court's findings do not satisfy this threshold condition to stating and proving a cause of action. In reaching its conclusion, the District Court relied primarily on the results of the 1982 elections: Democratic candidates for the State House of Representatives had received 51.9% of the votes cast statewide and Republican candidates 48.1%; yet, out of the 100 seats to be filled, Republican candidates won 57 and Democrats 43. In the Senate, 53.1% of the votes were cast for Democratic candidates and 46.9% for Republicans; of the 25 Senate seats to be filled, Republicans won 12 and Democrats 13. The court also relied upon the use of multimember districts in Marion and Allen Counties, where Democrats or those inclined to vote Democratic in 1982 amounted to 46.6% of the population of those counties but Republicans won 86%—18 of 21—seats allocated to the districts in those counties. These disparities were enough to require a neutral

[14] The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.

justification by the State, which in the eyes of the District Court was not forthcoming.[15]

Relying on a single election to prove unconstitutional discrimination is unsatisfactory. The District Court observed, and the parties do not disagree, that Indiana is a swing State. Voters sometimes prefer Democratic candidates, and sometimes Republican. The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly. Indeed, the District Court declined to hold that the 1982 election results were the predictable consequences of the 1981 Act and expressly refused to hold that those results were a reliable prediction of future ones. The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The appellants argue here, without a persuasive response from the appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's or that the Democrats would have no hope of doing

[15] The District Court apparently thought that the political group suffering discrimination was all those voters who voted for Democratic Assembly candidates in 1982. Judge Pell, in dissent, argued that the allegedly disfavored group should be defined as those voters who could be counted on to vote Democratic from election to election, thus excluding those who vote the Republican ticket from time to time. He would have counted the true believers by averaging the Democratic vote cast in two different elections for those statewide offices for which party-line voting is thought to be the rule and personality and issue-oriented factors are relatively unimportant. Although accepting Judge Pell's definition of Democratic voters would have strongly suggested that the 1981 reapportionment had no discriminatory effect at all, there was no response to his position. The appellees take up the challenge in this Court, claiming that Judge Pell chose the wrong election years for the purpose of averaging the Democratic votes. The dispute need not now be resolved.

any better in the reapportionment that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.

The District Court's discussion of the multimember districts created by the 1981 Act does not undermine this conclusion. For the purposes of the statewide political gerrymandering claim, these districts appear indistinguishable from safe Republican and safe Democratic single-member districts. Simply showing that there are multimember districts in the State and that those districts are constructed so as to be safely Republican or Democratic in no way bolsters the contention that there has been *statewide* discrimination against Democratic voters. It could be, were the necessary threshold effect to be shown, that multimember districts could be demonstrated to be suspect on the ground that they are particularly useful in attaining impermissibly discriminatory ends; at this stage of the inquiry, however, the multimember district evidence does not materially aid the appellees' case.

Furthermore, in determining the constitutionality of multimember districts challenged as racial gerrymanders, we have rejected the view that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single-member district." *Whitcomb*, 403 U. S., at 156. Rather, we have required that there be proof that the complaining minority "had less opportunity . . . to participate in the political processes and to elect legislators of their choice." *Id.*, at 149. In *Whitcomb*, we went on to observe that there was no proof that blacks were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when candidates were chosen, or to be included among the candidates slated by the Democratic Party.

Against this background, we concluded that the failure of the minority "to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." *Id.*, at 153. *Whitcomb* accordingly rejected a challenge to multimember districts in Marion County, Indiana. A similar challenge was sustained in *White* v. *Regester*, but only by employing the same criterion, namely, that the plaintiffs must produce evidence to support a finding "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U. S., at 766.

This participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats, for it could hardly be said that Democrats, any more than Republicans, are excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected. For constitutional purposes, the Democratic claim in this case, insofar as it challenges *vel non* the legality of the multimember districts in certain counties, is like that of the Negroes in *Whitcomb* who failed to prove a racial gerrymander, for it boils down to a complaint that they failed to attract a majority of the voters in the challenged multimember districts.[16]

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[16] It should be noted that even if the District Court correctly identified constitutional shortcomings in the House districting, this did not automatically call for invalidating the provisions for the Senate. The only relevant fact about the Senate appearing in the District Court's findings is that in the 1982 elections to fill 25 Senate seats, Democrats won 53.1% of the statewide vote and elected 13 of their candidates. That on its face is

D

In response to our approach, JUSTICE POWELL suggests an alternative method for evaluating equal protection claims of political gerrymandering. In his view, courts should look at a number of factors in considering these claims: the nature of the legislative procedures by which the challenged redistricting was accomplished and the intent behind the redistricting; the shapes of the districts and their conformity with political subdivision boundaries; and "evidence concerning population disparities and statistics tending to show vote dilution." *Post*, at 173 (concurring in part and dissenting in part). The District Court in this case reviewed these factors in reaching its ultimate conclusion that unconstitutional vote dilution had occurred, and JUSTICE POWELL concludes that its findings on these factors—and on the ultimate question of vote discrimination—should be upheld. According to JUSTICE POWELL, those findings adequately support a conclusion that "the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Post*, at 165. This deliberate and arbitrary distortion of boundaries, in turn, apparently distinguishes gerrymandering in a "loose" sense, "the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls," *post*, at 164, from gerrymandering in an "unconstitutional" sense.

Although we are not completely clear as to the distinction between these two categories of gerrymander, the crux of JUSTICE POWELL's analysis seems to be that—at least in some cases—the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself. We disagree, however,

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hardly grounds for invalidating the Senate districting, and we have counselled before against striking down an entire apportionment statute when the constitutional evil could be cured by lesser means. *Whitcomb* v. *Chavis*, 403 U. S., at 160–161.

with this conception of a constitutional violation. Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.

Moreover, as we discussed above, a mere lack of proportionate results in one election cannot suffice in this regard. We have reached this conclusion in our cases involving challenges to individual multimember districts, and it applies equally here. In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. See *supra,* at 131. In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process.[17] In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears in conjunction

[17] Although JUSTICE POWELL asserts that we mischaracterize these cases and that any effects in addition to disproportionality were required to be demonstrated only to prove discriminatory intent, we note that the effects test we cite was initially set forth in *White* v. *Regester*, 412 U. S. 755 (1973), which was decided before the Court expressly determined that proof of discriminatory intent was a necessary component of an equal protection claim. Moreover, the Voting Rights Act, which to a large extent borrowed the effects test from *White*, explicitly declined to require any showing of discriminatory intent. It may be true that our more recent cases have turned on the question of discriminatory intent, but that does not imply that we have abandoned the effects discussion we adopted earlier. Moreover, we believe that JUSTICE POWELL incorrectly asserts that more than one election must pass before a successful racial or political gerrymandering claim may be brought. *Post,* at 171–172, n. 10 (concurring in part and dissenting in part). *Projected* election results based on district boundaries and past voting patterns may certainly support this type of claim, even where *no* election has yet been held under the challenged districting.

with similar indicia. The mere lack of control of the General Assembly after a single election does not rise to the requisite level.

This requirement of more than a showing of possibly transitory results is where we appear to depart from JUSTICE POWELL. Stripped of its "factors" verbiage, JUSTICE POWELL's analysis turns on a determination that a lack of proportionate election results can support a finding of an equal protection violation, at least in some circumstances. Here, the only concrete effect on the Democrats in Indiana in terms of election results that the District Court had before it was one election in which the percentage of Democrats elected was lower than the percentage of total Democratic votes cast.[18] In JUSTICE POWELL's view, this disproportionality, when combined with clearly discriminatory intent on the part of the 1981 General Assembly and the manipulation of district lines in the apportionment process, is sufficient to conclude that fair representation has been denied.

The factors other than disproportionate election results, however, do not contribute to a finding that Democratic voters have been disadvantaged in fact. They support a finding that an intention to discriminate was present and that districts were drawn in accordance with that intention, but they do not show any actual disadvantage beyond that shown by the election results: It surely cannot be an actual disadvantage in terms of fair representation on a group level just to be placed in a district with a supermajority of other Demo-

[18] JUSTICE POWELL proffers additional election results from the 1984 elections in support of his conclusion. These results were not considered by the District Court, and we decline to determine their significance without the benefit of any factual development as to their meaning in terms of Democratic power overall or in the long run. Nevertheless, we note that in terms of actual percentages, the 1984 House election results cited by JUSTICE POWELL exhibited less of a discrepancy between Democratic votes cast and Democratic representatives elected than did the 1982 results (5% as opposed to 8%). This casts at least some doubt on the import of the 1982 results.

cratic voters or a district that departs from pre-existing political boundaries. Only when such placement affects election results and political power statewide has an actual disadvantage occurred.

Consequently, JUSTICE POWELL's view would allow a constitutional violation to be found where the only proven effect on a political party's electoral power was disproportionate results in one (or possibly two) elections. This view, however, contains no explanation of why a lack of proportionate election results should suffice in these political gerrymandering cases while it does not in the cases involving racial gerrymandering. In fact, JUSTICE POWELL's opinion is silent as to the relevance of the substantive standard developed in the multimember district cases to these political gerrymandering cases.

In rejecting JUSTICE POWELL's approach, we do not mean to intimate that the factors he considers are entirely irrelevant. The election results obviously are relevant to a showing of the effects required to prove a political gerrymandering claim under our view. And the district configurations may be combined with vote projections to predict future election results, which are also relevant to the effects showing. The other factors, even if not relevant to the effects issue, might well be relevant to an equal protection claim. The equal protection argument would proceed along the following lines: If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests.

This course is consistent with our equal protection cases generally and is the course we follow here: We assumed that there was discriminatory intent, found that there was insuffi-

cient discriminatory effect to constitute an equal protection violation,[19] and therefore did not reach the question of the state interests (legitimate or otherwise) served by the particular districts as they were created by the legislature. Consequently, the valid or invalid configuration of the districts was an issue we did not need to consider.[20]

It seems inappropriate, however, to view these separate components of an equal protection analysis as "factors" to be considered together without regard for their separate functions or meaning. This undifferentiated consideration of the various factors confuses the import of each factor and disguises the essential conclusion of JUSTICE POWELL's opinion: that disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation.

In sum, we decline to adopt the approach enunciated by JUSTICE POWELL. In our view, that approach departs from our past cases and invites judicial interference in legislative districting whenever a political party suffers at the polls. We recognize that our own view may be difficult of application. Determining when an electoral system has been "ar-

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[19] In most equal protection cases, it is true, a discriminatory effect will be readily apparent, and no heightened effect will be required, see n. 14, *supra*, but that is the only real difference between this type of equal protection claim and others.

[20] Thus, we have rejected none of the District Court's subsidiary factual conclusions. We have merely, based on our view of the applicable law, disregarded those that were irrelevant in this case and held insufficient those that inadequately supported the District Court's ultimate legal conclusions. Specifically, we have not rejected the District Court's finding of discriminatory intent. Nor have we rejected the District Court's findings as to any of the election results or the contours of particular districts. We have simply determined that aside from the election results, none of the facts found by the District Court were relevant to the question of discriminatory effects. Consequently, since we did not need to progress beyond that point, given our conclusion that no unconstitutional discriminatory effects were shown as a matter of law, we did not need to consider the District Court's factual findings on the other "factors" addressed by JUSTICE POWELL.

ranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," *supra*, at 132, is of necessity a difficult inquiry.[21] Nevertheless, we believe that it recognizes the delicacy of intruding on this most political of legislative functions and is at the same time consistent with our prior cases regarding individual multimember districts, which have formulated a parallel standard.[22]

IV

In sum, we hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause. We also conclude, however, that a threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation. In this case, the findings made by the District Court of an adverse effect on the appellees do not surmount the threshold requirement. Consequently, the judgment of the District Court is

Reversed.

CHIEF JUSTICE BURGER, concurring in the judgment.

I join JUSTICE O'CONNOR's opinion.

It is not surprising that citizens who are troubled by gerrymandering turn first to the courts for redress. De Tocqueville, that perceptive commentator on our country, observed that "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." 1 A. De Tocqueville, Democracy in America 330 (H. Reeve trans. 1961). What I question is the Court's urge

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[21] Although we recognize the difficulty of this inquiry, we do not share JUSTICE O'CONNOR's apparent lack of faith in the lower courts' abilities to distinguish between disproportionality *per se* and the lack of fair representation that continued disproportionality in conjunction with other indicia may demonstrate. See *post*, at 157 (opinion concurring in judgment).

[22] We are puzzled by JUSTICE POWELL's conclusion that we contemplate a test under which only the "one person, one vote" requirement has any relevance. This opinion clearly does not adopt such a limited review.

to craft a judicial remedy for this perceived "injustice." In my view, the Framers of the Constitution envisioned quite a different scheme. They placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives. As Justice Frankfurter wrote when the Court entered this political arena:

> "The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope." *Baker* v. *Carr*, 369 U. S. 186, 270 (1962) (dissenting opinion).

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended. Accordingly, I would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable.

There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed

enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.

To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate. I do not believe, and the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed. Nor do I believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions, or our political institutions.

The Court pays little heed to these considerations, which should inform any sensible jurisprudence of Article III and of the Equal Protection Clause. The Court's reflexive application of precedent ignores the maxim that "[p]articularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave

rise to them, must not be applied out of context in disregard of variant controlling facts." *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343–344 (1960). In cases such as this one, which may profoundly affect the governance of this Nation, it is not enough to cite precedent: we should examine it for possible limits, and if they are lacking, for possible flaws.

I

Appellees are Indiana Democrats who claim that Indiana's 1981 state apportionment discriminates against Democrats on a statewide basis by diluting their votes, thereby depriving them of "their proportionate share of political influence." *Baker* v. *Carr*, 369 U. S. 186, 299 (1962) (Frankfurter, J., dissenting). The Court, relying principally on *Baker* v. *Carr*, *supra*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964), *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), and the line of racial gerrymandering cases including *Rogers* v. *Lodge*, 458 U. S. 613 (1982), and *White* v. *Regester*, 412 U. S. 755 (1973), holds that appellees' "purely political equal protection claim," *ante*, at 119, does not present a political question and is therefore justiciable. Specifically, the Court holds that the fact that a vote dilution claim "is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Ante*, at 125.

A plurality of the Court recognizes, however, that "[i]nviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls." *Ante*, at 133. Accordingly, although the plurality's analysis is generally modeled on the racial gerrymandering cases, the plurality would require a somewhat different threshold showing that the apportionment has discriminatory effects: "unconstitutional discrimination occurs only when the electoral system is arranged in a

manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Ante*, at 132.

The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups. Even if there were some way of limiting such claims to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court. Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

In my view, this enterprise is flawed from its inception. The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment. The Court rests its case on precedent, but

the cases on which the Court relies do not require that we take this next and most far-reaching step into the "political thicket." *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946) (opinion of Frankfurter, J.).

Baker v. *Carr* reaffirmed that a lawsuit will be held to involve a political question where there is "a lack of judicially discoverable and manageable standards for resolving it," or where "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" is apparent. 369 U. S., at 217. The Court first found a workable constitutional standard for applying the Equal Protection Clause to state legislative districting in *Reynolds* v. *Sims*, *supra*. But until today the Court has not extended the principles of *Baker* v. *Carr* and *Reynolds* v. *Sims* to test a legislative districting plan on grounds of partisan political gerrymandering. Indeed, one year after *Reynolds* v. *Sims*, the Court was unanimous in summarily affirming a judgment determining that a political gerrymandering challenge was nonjusticiable; as Justice Harlan pointed out, the Court's action constituted a rejection of "contentions that . . . partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment." *WMCA, Inc.* v. *Lomenzo*, 382 U. S. 4, 6 (1965) (concurring opinion).

The question raised again today, 21 years later, is whether a court can apply the familiar "[j]udicial standards under the Equal Protection Clause," *Baker* v. *Carr*, 369 U. S., at 226, without being forced to make a nonjudicial policy determination or to resort to a standard that is not judicially manageable. In order to answer that question, it is necessary to interpret the Equal Protection Clause. As Justice Harlan pointed out in his dissent in *Baker* v. *Carr*, "[t]he suggestion . . . that courts lack standards by which to decide such cases as this, is relevant not only to the question of 'justiciability,' but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case." *Id.*, at 337. *Baker* v. *Carr*

itself involved just such an initial interpretation of the Equal Protection Clause: the Court in effect ruled that an arbitrary and capricious discrimination against individual voters with respect to the weight of their votes would state a cognizable claim under the Equal Protection Clause. See *id.*, at 226; *id.*, at 338–339 (Harlan, J., dissenting). That threshold determination about the reach and meaning of the Equal Protection Clause was the basis for the Court's holding that the complaint of the Tennessee voters was justiciable. Even this "arbitrary and capricious" standard threatened to prove unmanageable, but the difficulty was pretermitted when a relatively simple and judicially manageable requirement of population equality among districts was adopted the following Term in *Reynolds* v. *Sims*. See Bickel, The Supreme Court and Reapportionment, in Reapportionment in the 1970's, pp. 57, 64 (N. Polsby ed. 1971).

Baker v. *Carr* does not require that we hold that the right asserted in this case is similarly within the intendment of the Equal Protection Clause and determinable under the standards developed to enforce that Clause. The right asserted in *Baker* v. *Carr* was an individual right to a vote whose weight was not arbitrarily subjected to "debasement," 369 U. S., at 194. The rights asserted in this case are *group* rights to an equal share of political power and representation, and the "arbitrary and capricious" standard discussed in *Baker* v. *Carr* cannot serve as the basis for recognizing such rights. Indeed, the Court today does not rely on such a standard.

Instead, the Court justifies the extension of vote dilution claims to mainstream political groups with the pronouncement that "*Reynolds* surely indicates the justiciability of claims going to the adequacy of representation in state legislatures." *Ante*, at 124. But *Reynolds* makes plain that the one person, one vote principle safeguards the individual's right to vote, not the interests of political groups: "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or

there is not a legitimate reason for overweighting or diluting the efficacy of his vote." 377 U. S., at 567. For that reason, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.*, at 568. Thus, the right guaranteed by the Equal Protection Clause as interpreted in *Reynolds* is "the right of *each voter* to 'have his vote weighted equally with those of all other citizens.'" *Mobile* v. *Bolden*, 446 U. S. 55, 78 (1980) (plurality opinion).

In the case of mainstream political groups, the Court has not accepted the argument that an "asserted entitlement to group representation," *Bolden*, 446 U. S., at 77, can be traced to the one person, one vote principle:

> "It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation. And the Court's decisions hold squarely that they do not." *Id.*, at 78–79 (citing *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977); *White* v. *Regester*, 412 U. S. 755 (1973); and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971)).

Where representation is apportioned substantially on a population basis, it is "obvious that nobody's vote has been 'diluted' in the sense in which that word was used in the *Reynolds* case." *Bolden*, *supra*, at 78. Thus, the individual's right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength. Treating the vote dilution claims of political groups as cognizable would effectively collapse the "fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership

in a democratically governed community." *Bolden, supra,* at 83 (STEVENS, J., concurring in judgment).

Nor do this Court's racial gerrymandering cases require the recognition of any such group right outside the context of racial discrimination. As Justice Frankfurter observed:

> "The cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms, and it is no less true of the Equal Protection Clause of the Fourteenth. *Slaughter-House Cases*, 16 Wall. 36, 67–72; *Strauder* v. *West Virginia*, 100 U. S. 303, 306–307; *Nixon* v. *Herndon*, 273 U. S. 536, 541." *Baker* v. *Carr*, 369 U. S., at 285–286 (dissenting opinion).

In my view, where a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973); see also *Johnson* v. *Robison*, 415 U. S. 361, 375, n. 14 (1974), individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process. In these circumstances, the stronger nexus between individual rights and group interests, and the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, suffice to render racial gerrymandering claims justiciable. Even so, the individual's right is infringed only if the racial minority

group can prove that it has "essentially been shut out of the political process." *Ante*, at 139.

Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process. Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise. See B. Cain, The Reapportionment Puzzle 151–159 (1984). In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat—risks they may refuse to accept past a certain point. *Id.*, at 154–155. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. *Id.*, at 152. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

The plurality agrees that it would be unwise to "embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature." *Ante*, at 133. Moreover, the plurality is willing to presume that elected candidates will not ignore the interests of voters for the losing candidate, and it correctly observes that "the power to influence the political process is not limited to win-

ning elections." *Ante*, at 132. But these propositions support my position—that the costs of judicial intervention will be severe and that political gerrymandering simply does not cause intolerable harm to the ability of major political groups to advance their interests.

Moreover, the new group right created by today's decision is particularly unjustifiable in the context of the claim here, which is founded on a supposed diminution of the *statewide* voting influence of a political group. None of the elections for the Indiana Legislature are statewide. Voters in each district elect their representatives from that district. To treat the loss of candidates nominated by the party of a voter's choice as a harm to the individual voter, when that voter cannot vote for such candidates and is not represented by them in any direct sense, clearly exceeds the limits of the Equal Protection Clause. On the Court's reasoning, members of a political party in one State should be able to challenge a congressional districting plan adopted in any other State, on the grounds that their party is unfairly represented in that State's congressional delegation, thus injuring them as members of the national party.

The Court's reliance on *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), is insufficient to overcome these objections to a general group right to equal political representation. Although *Gaffney* treated a political gerrymandering claim as justiciable, the opinion's observation that "districting inevitably has and is intended to have substantial political consequences," *id.*, at 753, and its reluctance to undertake "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," *id.*, at 754, would equally support a holding that whatever harms political gerrymandering may sometimes occasion should be tolerated as inextricably associated with the legislative business of redistricting. In addition, since *Gaffney* rejected the challenge to bipartisan gerrymandering out of hand, the Court simply did not confront the difficulties in framing a

manageable standard for adjudicating such claims. Accordingly, *Gaffney* should not bar a full consideration of those difficulties here.

Furthermore, the Court fails to explain why a bipartisan gerrymander—which is what was approved in *Gaffney*—affects individuals any differently than a partisan gerrymander, which the Court makes vulnerable to constitutional challenge today. In *Gaffney*, Connecticut, as part of a bipartisan effort, had drawn up a plan intended to "provide a rough sort of proportional representation," *id.*, at 754, for the two major political parties. The Court declined to invalidate this plan, which undertook "not to minimize or eliminate the political strength of any group or party, but to recognize it," *ibid.*, and suggested that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Ibid.* (citations omitted).

A bipartisan gerrymander employs the same technique, and has the same effect on individual voters, as does a partisan gerrymander. In each instance, groups of individuals are assigned to districts with an eye towards promoting the ends of a political party and its incumbent legislators. Some groups within each party will lose any chance to elect a representative who belongs to their party, because they have been assigned to a district in which the opposing party holds an overwhelming advantage. Independent voters may lose any chance to influence the outcome of elections in their district, if one party has a sufficiently strong majority. As the plurality acknowledges, the scheme upheld in *Gaffney* tended to "deny safe district minorities any realistic chance to elect their own representatives." *Ante*, at 131. If this bipartisan arrangement between two groups of self-interested legislators is constitutionally permissible, as I believe and as the Court held in *Gaffney*, then—in terms of the rights of individuals—it should be equally permissible for a legislative major-

ity to employ the same means to pursue its own interests over the opposition of the other party.

The Court's determination to treat the claims of mainstream political parties as justiciable thus emerges as precisely the sort of "initial policy determination of a kind clearly for nonjudicial discretion" that *Baker* v. *Carr* recognized as characteristic of political questions. 369 U. S., at 217. The Court has in effect decided that it is constitutionally acceptable for both parties to "waste" the votes of individuals through a bipartisan gerrymander, so long as the *parties* themselves are not deprived of their group voting strength to an extent that will exceed the plurality's threshold requirement. This choice confers greater rights on powerful political groups than on individuals; that cannot be the meaning of the Equal Protection Clause.

II

The standard the plurality proposes exemplifies the intractable difficulties in deriving a judicially manageable standard from the Equal Protection Clause for adjudicating political gerrymandering claims. The plurality rejects any standard that would require drawing "district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," *ante*, at 130, and states that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Ante*, at 132. In my view, this standard will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality. Cf. Shapiro, Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L. Rev. 227, 252–256 (1985). Either outcome would be calamitous for the federal courts, for the States, and for our two-party system.

Vote dilution analysis is far less manageable when extended to major political parties than if confined to racial minority groups. First, an increase in the number of competing claims to equal group representation will make judicial review of apportionment vastly more complex. Designing an apportionment plan that does not impair or degrade the voting strength of several groups is more difficult than designing a plan that does not have such an effect on one group for the simple reason that, as the number of criteria the plan must meet increases, the number of solutions that will satisfy those criteria will decrease. Even where it is not impossible to reconcile the competing claims of political, racial, and other groups, the predictable result will be greater judicial intrusion into the apportionment process.

Second, while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party. It is difficult enough to measure "a voter's or a group of voters' influence on the political process as a whole," *ante*, at 132, when the group is a racial minority in a particular district or community. When the group is a major political party the difficulty is greater, and the constitutional basis for intervening far more tenuous.

Moreover, any such intervention is likely to move in the direction of proportional representation for political parties. This is clear by analogy to the problem that arises in racial gerrymandering cases: "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg* v. *Gingles*, *ante*, at 88 (O'CONNOR, J., concurring in judgment). Any such norm must make some reference, even if only a loose one, to the relation between the racial

minority group's share of the electorate and its share of the elected representatives. In order to implement the plurality's standard, it will thus be necessary for courts to adopt an analogous norm, in order to assess whether the voting strength of a political party has been "degraded" by an apportionment, either on a statewide basis or in particular districts. Absent any such norm, the inquiry the plurality proposes would be so standardless as to make the adjudication of political gerrymandering claims impossible.

Implicit in the plurality's opinion today is at least some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party. That is why the plurality can say that "a history (actual or projected) of disproportionate results," together with proof of "the denial of fair representation" and of "lack of political power," will constitute an equal protection violation. *Ante*, at 139. To be sure, the plurality has qualified its use of a *standard* of proportional representation in a variety of ways so as to avoid a *requirement* of proportional representation. The question is whether these qualifications are likely to be enduring in the face of the tremendous political pressures that courts will confront when called on to decide political gerrymandering claims. Because the most easily measured indicia of political power relate solely to winning and losing elections, there is a grave risk that the plurality's various attempts to qualify and condition the group right the Court has created will gradually pale in importance. What is likely to remain is a loose form of proportionality, under which *some* deviations from proportionality are permissible, but any significant, persistent deviations from proportionality are suspect. Courts will be forced to look for some form of "undue" disproportionality with respect to electoral success if political gerrymandering claims are justiciable, because otherwise they will find their decisions turning on imponderables such as whether the legislators of one party have fairly represented the voters of the other.

Of course, in one sense a requirement of proportional representation, whether loose or absolute, is judicially manageable. If this Court were to declare that the Equal Protection Clause required proportional representation within certain fixed tolerances, I have no doubt that district courts would be able to apply this edict. The flaw in such a pronouncement, however, would be the use of the Equal Protection Clause as the vehicle for making a fundamental policy choice that is contrary to the intent of its Framers and to the traditions of this Republic. The political question doctrine as articulated in *Baker* v. *Carr* rightly requires that we refrain from making such policy choices in order to evade what would otherwise be a lack of judicially manageable standards. See 369 U. S., at 217.

Unfortunately, a drift towards proportional representation is apparent even in the plurality opinion. Although at times the plurality seems to require that the political party be "essentially . . . shut out of the political process" before a constitutional violation will be found, *ante*, at 139, the plurality's explanation of the deficiencies in the District Court's approach focuses not on access to the political process as a whole, but entirely on statewide electoral success. Thus, the critical inquiry appears to be into whether the complaining political party could be expected to regain control of the state legislature in the next few elections if backed by a majority of voters. *Ante*, at 135–136. As an aid in this inquiry, courts must apparently also ask "by what percentage the statewide . . . vote" for the complaining political party would have to increase to control the legislature or one of its Houses. *Ibid.*

Under the plurality's approach, where it is shown that under a challenged apportionment plan one party will consistently fail to gain control of the legislature even if it wins a majority of the votes, a court would be justified in finding the "threshold showing" met, at which point "the legislation would be examined for valid underpinnings." *Ante*, at 141.

It may fairly be doubted that this last step is anything more than a formality, except perhaps in the case of bipartisan gerrymanders that have proved unexpectedly favorable to one party. Consequently, although the plurality criticizes JUSTICE POWELL for effectively concluding that "disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation," *ante*, at 142, the plurality itself arrives at the conclusion that foreseeable, disproportionate *long-term* election results suffice to prove a constitutional violation.

Thus, the plurality opinion ultimately rests on a political preference for proportionality—not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes. This preference for proportionality is in serious tension with essential features of state legislative elections. Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties. If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question: the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives. Moreover, one implication of the districting system is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist—statewide elections for representatives along party lines.

The plurality's theory is also internally inconsistent. The plurality recognizes that, given a normal dispersion of party strength and winner-take-all, district-based elections, it is likely that even a narrow statewide preference for one party will give that party a disproportionately large majority in the legislature. *Ante*, at 130. The plurality is prepared to tol-

erate this effect, because not to do so would spell the end of district-based elections, or require reverse gerrymandering to ensure greater proportionality for the minority party. But this means that the plurality would extend greater protection to a party that can command a majority of the statewide vote than to a party that cannot: the explanation, once again, is that the plurality has made a political judgment—in this instance, that district-based elections must be taken as a given.

Because a statewide majority for a party's candidates will frequently result only if the "winning" party attracts independent voters and voters from the other party, under the plurality's approach a great deal will turn on whether the support of these voters is included as part of the party's voting strength. The plurality would reserve this question, but, however it is ultimately answered, anomalies will result. To measure a party's voting strength by including voters who only occasionally vote for that party's candidates is arbitrary; to ignore the role these voters play will be to further discriminate against parties that do not command a permanent majority of the electorate in a given State.

I would avoid the difficulties generated by the plurality's efforts to confine the effects of a generalized group right to equal representation by not recognizing such a right in the first instance. To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites "findings" on matters as to which neither judges nor anyone else can have any confidence. Once it is conceded that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult," *ante*, at 132, the virtual impossibility of reliably predicting how difficult it will be to win an election in 2, or 4, or 10 years should, in my view, weigh in favor of holding such challenges nonjusticiable. Racial gerrymandering should remain justiciable, for the harms it en-

genders run counter to the central thrust of the Fourteenth Amendment. But no such justification can be given for judicial intervention on behalf of mainstream political parties, and the risks such intervention poses to our political institutions are unacceptable. "Political affiliation is the keystone of the political trade. Race, ideally, is not." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S., at 171, n. 1 (BRENNAN, J., concurring).

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, the plurality expresses the view, with which I agree, that a partisan political gerrymander violates the Equal Protection Clause only on proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Ante*, at 127. The plurality acknowledges that the record in this case supports a finding that the challenged redistricting plan was adopted for the purpose of discriminating against Democratic voters. *Ibid.* The plurality argues, however,

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

that appellees failed to establish that their voting strength was diluted statewide despite uncontradicted proof that certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates. This argument appears to rest solely on the ground that the legislature accomplished its gerrymander consistent with "one person, one vote," in the sense that the legislature designed voting districts of approximately equal population and erected no direct barriers to Democratic voters' exercise of the franchise. Since the essence of a gerrymandering claim is that the members of a political party as a group have been denied their right to "fair and effective representation," *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964), I believe that the claim cannot be tested solely by reference to "one person, one vote." Rather, a number of other relevant neutral factors must be considered. Because the plurality ignores such factors and fails to enunciate standards by which to determine whether a legislature has enacted an unconstitutional gerrymander, I dissent.

I

The facts are exhaustively described in the District Court's opinion and may be briefly restated here. In 1981, the Republican Party controlled both houses of the Indiana General Assembly, and its candidate held the Governor's seat. Pursuant to the requirements of the State Constitution, the General Assembly undertook legislative redistricting based on 1980 census data. A Conference Committee, all of whose members were Republicans, was assigned the task of drawing district maps with the assistance of a private computer firm. The information fed into the computer primarily concerned the political complexion of the State's precincts. The redistricting process was conducted in secret. Democratic legislators were not afforded *any* participation in designing the district maps that were adopted. There were no hearings where members of the public were invited to express

their views. The Republican Committee revealed its proposed redistricting plan two days before the end of the legislative session, and the Democrats hurriedly presented an alternative plan. On the last day of the session, the Republican plan was adopted by party line vote in both Houses of the General Assembly. The Governor signed the plan into law.

In 1982 and 1984, elections were held under the new redistricting plan. Prior to the 1982 election, this lawsuit was commenced by appellees, a group of Indiana Democrats who claimed that the plan constitutes a partisan political gerrymander designed to disenfranchise Democratic voters in violation of the Equal Protection Clause of the Fourteenth Amendment.[2] Since trial was completed after the 1982 election, appellees relied in part on the disparity between votes cast for Democratic legislative candidates in that election and seats captured by Democrats. The case was heard by a three-judge panel in the District Court for the Southern District of Indiana. The District Court, over the dissent of Judge Pell, made extensive findings of fact and determined that appellees had established an unconstitutional partisan gerrymander. 603 F. Supp. 1479 (SD Ind. 1984). The

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[2] In the District Court, appellees' lawsuit was consolidated with a suit brought by the Indiana NAACP. The plaintiffs in the NAACP suit argued that the redistricting intentionally fragmented concentrations of black voters in violation of the Fourteenth and Fifteenth Amendments, and of § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973. The District Court determined that the plan discriminated against black voters, not because of their race, but because blacks had a demonstrated and overwhelming tendency to vote as a bloc for Democratic candidates. Indeed, the District Court explicitly found that the "disadvantaging effect of the plan's multi-member districts falls particularly hard and harsh upon black voters in the state." 603 F. Supp. 1479, 1488 (SD Ind. 1984). Rather than taking a cross-appeal challenging the District Court's rejection of their constitutional and statutory claims, the NAACP plaintiffs have filed a brief in this Court urging affirmance of the District Court's judgment that the plan unconstitutionally discriminates against Democratic voters as a group and against blacks as members of that group.

Court today reverses the District Court, without concluding that any of its findings was clearly erroneous.

II

A

Gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 538 (1969) (Fortas, J., concurring).[3] As JUSTICE STEVENS correctly observed, gerrymandering violates the Equal Protection Clause only when the redistricting plan serves "no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community." *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (concurring opinion).

The term "gerrymandering," however, is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls. An intent to discriminate in this sense may be present whenever redistricting occurs. See *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 847 (CA7) (Stevens, J., dissenting), cert. denied, 409 U. S. 893 (1972). Moreover, since legislative

[3] Webster's Third New International Dictionary (unabridged ed. 1961) defines "gerrymander" as "to divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." The term "gerrymander" was coined by combining the last name of Elbridge Gerry with the word "salamander" in order to describe the "fancied resemblance to a salamander . . . of the irregularly shaped outline of an election district in northeastern Massachusetts that had been formed for partisan purposes in 1812 during Gerry's governorship" of that State. *Ibid.* Though many of the voting districts appearing in the plans challenged here have bizarre shapes, House District 66 perhaps most closely resembles a salamander. See the redistricting maps appended to this opinion. These maps were reproduced from trial exhibits provided by the parties.

bodies rarely reflect accurately the popular voting strength of the principal political parties, the effect of any particular redistricting may be perceived as unfair. See 412 U. S., at 752–754. Consequently, only a sensitive and searching inquiry can distinguish gerrymandering in the "loose" sense from gerrymandering that amounts to unconstitutional discrimination. Because it is difficult to develop and apply standards that will identify the unconstitutional gerrymander, courts may seek to avoid their responsibility to enforce the Equal Protection Clause by finding that a claim of gerrymandering is nonjusticiable. I agree with the Court that such a course is mistaken, and that the allegations in this case raise a justiciable issue.[4]

Moreover, I am convinced that appropriate judicial standards can and should be developed. Justice Fortas' definition of unconstitutional gerrymandering properly focuses on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends. *Kirkpatrick* v. *Preisler*, *supra*, at 538. Under this definition, the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting. See *Karcher* v. *Daggett*, *supra*, at 755–759 (STEVENS, J., concurring). In this case, the District Court examined the redistricting in light of such factors and found, among other facts, that the boundaries of a number of districts were deliberately distorted to deprive Democratic voters of an equal opportunity to participate in the State's legislative processes. The plurality makes no reference to any of these findings of fact. It rejects the District Court's

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[4] As the Court properly explains, our prior decisions make clear that an equal protection challenge to redistricting does not present a nonjusticiable political question. See *Baker* v. *Carr*, 369 U. S. 186 (1962); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Gaffney* v. *Cummings*, 412 U. S. 735 (1973). Accordingly, I join Part II of JUSTICE WHITE's opinion.

ultimate conclusion with no explanation of the respects in which appellees' proof fell short of establishing discriminatory effect. A brief review of the Court's jurisprudence in the context of another kind of challenge to redistricting, a claim of malapportionment, demonstrates the pressing need for the Court to enunciate standards to guide legislators who redistrict and judges who determine the constitutionality of the legislative effort.

B

The Equal Protection Clause guarantees citizens that their State will govern them impartially. See *Karcher* v. *Daggett*, *supra*, at 748 (STEVENS, J., concurring). In the context of redistricting, that guarantee is of critical importance because the franchise provides most citizens their only voice in the legislative process. *Reynolds* v. *Sims*, 377 U. S., at 561–562, 565–566. Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation. *Chapman* v. *Meier*, 420 U. S. 1, 17 (1975); *Gaffney* v. *Cummings*, *supra*, at 751.

The first cases in which this Court entertained equal protection challenges to redistricting involved allegations that state legislatures had refused to redesign States' voting districts to eliminate gross population disparities among those districts. *E. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962); *Reynolds* v. *Sims*, *supra*. The Court's decision in *Reynolds* v. *Sims* illustrates two concepts that are vitally important in evaluating an equal protection challenge to redistricting. First, the Court recognized that equal protection encompasses a guarantee of equal *representation*, requiring a State to seek to achieve through redistricting "fair and effective representation for all citizens." *Reynolds* v. *Sims*, *supra*, at

565–566; see *Gaffney* v. *Cummings*, 412 U. S., at 748. The concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, *as a group*, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment.

Second, at the same time that it announced the principle of "one person, one vote" to compel States to eliminate gross disparities among district populations, the Court plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one. *Reynolds* v. *Sims* identified several of the factors that should guide a legislature engaged in redistricting. For example, the Court observed that districts should be compact and cover contiguous territory, precisely because the alternative, "[i]ndiscriminate districting," would be "an open invitation to partisan gerrymandering." 377 U. S., at 578–579. Similarly, a State properly could choose to give "independent representation" to established political subdivisions. Adherence to community boundaries, the Court reasoned, would both "deter the possibilities of gerrymandering," and allow communities to have a voice in the legislature that directly controls their local interests. *Id.*, at 580–581. See also *Mahan* v. *Howell*, 410 U. S. 315, 325–326 (1973). Thus, *Reynolds* v. *Sims* contemplated that "one person, one vote" would be only one among several neutral factors that serve the constitutional mandate of fair and effective representa-

tion. See *Gaffney* v. *Cummings*, *supra*, at 748–749. It was not itself to be the only goal of redistricting.[5]

A standard that judges the constitutionality of a districting plan solely by reference to the doctrine of "one person, one vote" may cause two detrimental results.[6] First, as a perceived way to avoid litigation, legislative bodies may place undue emphasis on mathematical exactitude, subordinating or ignoring entirely other criteria that bear directly on the fairness of redistricting. See *Karcher* v. *Daggett*, 462 U. S., at 753 (STEVENS, J., concurring); *id.*, at 774 (WHITE, J., dissenting); *Gaffney* v. *Cummings*, *supra*, at 749. Second, as this case illustrates, and as *Reynolds* v. *Sims* anticipated, exclusive or primary reliance on "one person, one vote" can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering. See *Wells* v. *Rockefeller*, 394 U. S. 542, 551 (1969) (Harlan, J., dissenting).

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[5] The doctrine of "one person, one vote" originally was regarded as a means to prevent discriminatory gerrymandering since "opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts." *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 534, n. 4 (1969). Advances in computer technology achieved since the doctrine was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters. See *Karcher* v. *Daggett*, 462 U. S. 725, 752, n. 10 (1983) (STEVENS, J., concurring). For "one person, one vote" to serve its intended purpose of implementing the constitutional mandate of fair and effective representation, therefore, consideration also must be given to other neutral factors.

[6] In decisions concerning congressional redistricting, the Court has focused its attention almost exclusively on whether a challenged plan satisfies "one person, one vote." See *Karcher* v. *Daggett*, *supra*; *White* v. *Weiser*, 412 U. S. 783 (1973); *Kirkpatrick* v. *Preisler*, *supra*. In cases involving state legislative redistricting, such as the case before us today, the Court has refused to limit a legislature to the single goal of precise population equality. *Gaffney* v. *Cummings*, 412 U. S., at 745; *Mahan* v. *Howell*, 410 U. S. 315, 322–325 (1973).

C

In light of the foregoing principles, I believe that the plurality's opinion is seriously flawed in several respects. First, apparently to avoid the forceful evidence that some district lines indisputably were designed to and did discriminate against Democrats, the plurality describes appellees' claim as alleging that "Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." *Ante*, at 127. This characterization is not inconsistent with appellees' proof, and the District Court's finding, of statewide discriminatory effect resulting from "individual districting" that "exemplif[ies] this discrimination." *Ibid.* If Democratic voters in a number of critical districts are the focus of unconstitutional discrimination, as the District Court found, the *effect* of that discrimination will be felt over the State as a whole.

The plurality also erroneously characterizes the harm members of the losing party suffer as a group when they are deprived, through deliberate and arbitrary distortion of district boundaries, of the opportunity to elect representatives of their choosing.[7] It may be, as the plurality suggests, that

[7] The plurality correctly concludes that a redistricting plan is not unconstitutional merely because the plan makes it more difficult for a group of voters to elect the candidate of its choice or merely because the plan does not provide proportional representation. *Ante*, at 132. While the "Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters," *Mobile* v. *Bolden*, 446 U. S. 55, 77 (1980) (plurality opinion), the Constitution does not guarantee proportional representation or protect any group from defeat at the polls, *id.*, at 77–80; see *White* v. *Regester*, 412 U. S. 755, 765–766 (1973). But the plurality leaps from that conclusion to the assumption that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Ante*, at 132. Thus, the plurality apparently believes that effects on election results are of little import, as long as the losers have some access to their representatives. Though effects on election results do not suffice to establish an unconstitutional gerrymander, they certainly are

representatives will not "entirely ignore the interests" of opposition voters. *Ante*, at 132. But it defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party. Even the most conscientious state legislators do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns. Similarly, no one doubts that partisan considerations play a major role in the passage of legislation and the appointment of state officers. Not surprisingly, therefore, the District Court expressly found that "[c]ontrol of the General Assembly is crucial" to members of the major political parties in Indiana. 603 F. Supp., at 1483.[8] In light of those findings, I cannot accept the plurality's apparent conclusion that loss of this "crucial" position is constitutionally insignificant as long as the losers are not "entirely ignored" by the winners.

The plurality relies almost exclusively on the "one person, one vote" standard to reject appellees' convincing proof that the redistricting plan had a seriously discriminatory effect on their voting strength in particular districts. The plurality properly describes the claim in this case as a denial of fair and effective "representation," *ante*, at 124, but it does not provide any explanation of how complying with "one person, one

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relevant to such a claim, and they may suffice to show that the claimants have been injured by the redistricting they challenge.

[8] The District Court found: "Control of the General Assembly is crucial to a political party for a number of reasons. The majority party elects the Speaker of the House, a person who wields considerable power in the assigning of bills to committees, the conduct of the actual legislative sessions, and is empowered, under legislative rules, to prevent bills from reaching the floor for debate or vote. Similarly, the majority party elects floor leaders in both houses who control the flow of legislation, the assignment of members to committees, and the appointment of committee chairmen. All of these powers are important to the achievement of a party's legislative goals. There is little doubt that the minority party plays a less substantial role in the drafting and enactment of legislation." 603 F. Supp., at 1483.

vote" deters or identifies a gerrymander that unconstitutionally discriminates against a cognizable group of voters. While that standard affords some protection to the voting rights of individuals, "it protects groups only indirectly at best," *Karcher* v. *Daggett*, 462 U. S., at 752 (STEVENS, J., concurring), even when the group's identity is determined solely by reference to the fact that its members reside in a particular voting district. "One person, one vote" alone does not protect the voting rights of a group made up of persons affiliated with a particular political party who seek to achieve representation through their combined voting strength. Thus, the facts that the legislature permitted each Democratic voter to cast his or her one vote, erected no direct barriers to Democratic voters' exercise of the franchise, and drew districts of equal population, are irrelevant to a claim that district lines were drawn for the purpose and with the effect of substantially debasing the strength of votes cast by Democrats as a group.[9]

The final and most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts.[10] Legislators and judges are left to

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[9] As was said in the context of a constitutional challenge by black voters to an at-large voting scheme, "[t]he absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system" from constitutional attack. *Mobile* v. *Bolden*, *supra*, at 102 (WHITE, J., dissenting).

[10] The plurality describes its standard as requiring a "threshold" showing that the "electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence in the political process as a whole." *Ante*, at 132; see *ante*, at 134, n. 14. Plaintiffs apparently can meet the plurality's "threshold" only after a number of elections have been held under the challenged plan. *Ante*, at 135–136. At one point, the plurality acknowledges that this formulation is "somewhat different" from any standard we have previously used to test an electoral plan against an equal protection challenge, *ante*, at 132, and also takes pains to say that its opinion here does not suggest any "alteration of the standards developed" for evaluating racial challenges, *ante*, at 132, n. 13; see *ante*, at 134, n. 14. Curiously, the plurality then goes on to claim that its standard is consistent

wonder whether compliance with "one person, one vote" completely insulates a partisan gerrymander from constitutional scrutiny, or whether a fairer but as yet undefined standard applies. The failure to articulate clear doctrine in this area

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with that used when a racial group challenges an electoral scheme, *ante*, at 139–140, and with our "equal protection cases generally," *ante*, at 141. This claim is simply incorrect.

Our cases have construed the Equal Protection Clause to require proof of intentional discrimination, placing the burden on plaintiffs to trace the "'invidious quality of a law claimed to be racially discriminatory . . . to a racially discriminatory purpose.'" *Rogers* v. *Lodge*, 458 U. S. 613, 616 (1982), quoting *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). In none of those cases was the Court willing to assume discriminatory intent, as the plurality suggests today is the proper course. *Ante*, at 141. While the plurality correctly observes that our prior decisions have held that disproportionate election results alone do not violate the Constitution, it erroneously suggests that those holdings flowed solely from the "perception that the power to influence the political process is not limited to winning elections." *Ante*, at 131–132. The plurality wholly ignores the basic problem underlying all of those prior decisions, namely, that the plaintiffs came into court with no direct proof of discriminatory intent. In those cases, the Court concluded that proof of discriminatory effect, including disproportionate election results, if serious enough, could give rise to an inference of purposeful discrimination. See *Rogers* v. *Lodge*, *supra*, at 618. As JUSTICE WHITE has explained, the Court's decisions in both *White* v. *Regester*, 412 U. S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), rested on the proposition that the requisite "invidious discriminatory purpose" can be inferred from proof of "objective factors" concerning discriminatory effect. *Mobile* v. *Bolden*, 446 U. S., at 95; see *id.*, at 94–97, 102–103 (dissenting opinion); see also *White* v. *Regester*, *supra*, at 765 (multimember districts are unconstitutional where "used *invidiously* to cancel out" racial groups' voting strength). I cannot agree, as the plurality suggests, that a standard requiring proof of "heightened effect," where invidious intent has been established directly, has support in any of our cases, or that an equal protection violation can be established "only where a history (actual or projected) of disproportionate results appears." *Ante*, at 139. If a racial minority established that the legislature adopted a redistricting law for no purpose other than to disadvantage that group, the plurality's new and erroneous standard would require plaintiffs to wait for the results of several elections, creating a history of discriminatory effect, before they can challenge the law in court. *Ante*, at 135–136.

places the plurality in the curious position of inviting further litigation even as it appears to signal the "constitutional green light"[11] to would-be gerrymanderers.

III

In *Karcher* v. *Daggett*, JUSTICE STEVENS, echoing the decision in *Reynolds* v. *Sims*, described factors that I believe properly should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges. 462 U. S., at 753–761. The most important of these factors are the shapes of voting districts and adherence to established political subdivision boundaries.[12] Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals. To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive.[13]

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[11] Edwards, The Gerrymander and "One Man, One Vote," 46 N. Y. U. L. Rev. 879, 880 (1971).

[12] In some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering. In addition to the maps appended to this opinion, see the redistricting maps appended to the Court's opinions in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 348 (1960), and in *Karcher* v. *Daggett*, 462 U. S., at 744.

[13] Groups may consistently fail to elect representatives under a perfectly neutral election scheme. Thus, a test that turns only on election results, as the plurality's standard apparently does, likely would identify an unconstitutional gerrymander where none existed. The test that I would adopt requires consideration of all the circumstances surrounding the plan, including factors initially identified in *Reynolds* v. *Sims*, to determine if a constitutional violation has occurred. Since democracy can work well and fairly only when citizens have an opportunity to become familiar with their voting districts, where they must focus their political activities, district boundaries must have some rationality. Confusion inevitably follows, as clearly will be the case in Indiana, when a citizen finds himself or herself

In this case, appellees offered convincing proof of the ease with which mapmakers, consistent with the "one person, one vote" standard, may design a districting plan that purposefully discriminates against political opponents as well as racial minorities. Computer technology now enables gerrymanderers to achieve their purpose while adhering perfectly to the requirement that districts be of equal population. Relying on the factors correctly described by JUSTICE STEVENS in *Karcher* v. *Daggett*, the District Court carefully reviewed appellees' evidence and found that the redistricting law was intended to and did unconstitutionally discriminate against Democrats as a group. We have held that a district court's ultimate determination that a redistricting plan was "being maintained for discriminatory purposes," as well as its "subsidiary findings of fact," may not be set aside by a reviewing court unless they are clearly erroneous. *Rogers* v. *Lodge*, 458 U. S. 613, 622–623 (1982); see, *e. g.*, *White* v. *Regester*, 412 U. S. 755, 769–770 (1973). The plurality ignores these precedents.[14] The plurality also disregards the various factors discussed by the District Court as adequate indicia of unconstitutional gerrymandering.

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forced to associate with several artificial communities, depending on which office is on the ballot. Thus, irrational lines themselves affect the ability of all voters to exercise their political influence, with disproportionate election results illustrating the effect of a plan that was deliberately designed to serve no purpose other than to minimize the voting strength of a disfavored group.

[14] The plurality ignores the "clearly erroneous" standard of Rule 52(a), by saying that it has not rejected any of the District Court's findings of fact, but has "merely . . . disregarded those that were irrelevant in this case and held insufficient those that inadequately supported the District Court's ultimate legal conclusions." *Ante*, at 142, n. 20. In a gerrymandering case the *facts* as to how, where, and why the legislature drew the district boundaries are at the heart of the equal protection violation. Beyond stating that appellees' statistical proof failed to satisfy its proposed threshold, the plurality makes no effort to explain its flat assertions that the District Court's careful findings were "irrelevant" or "insufficient."

A

A court should look first to the legislative process by which the challenged plan was adopted. Here, the District Court found that the procedures used in redistricting Indiana were carefully designed to exclude Democrats from participating in the legislative process. In February 1981, both Houses of the General Assembly passed reapportionment bills with no substantive content and referred them to the other chamber where conflicting amendments were made. The purpose of this process was to send "vehicle bills" to a Conference Committee whose task was to apportion representation. Four conferees and four advisers served on the Committee. The conferees, all Republicans, were responsible for designing the voting districts and were entitled to vote on the result of their own efforts. The advisers, Democrats, were excluded from the mapmaking process and were given no Committee vote. 603 F. Supp., at 1483.

The legislative process consisted of nothing more than the majority party's private application of computer technology to mapmaking. The Republican State Committee engaged the services of a computer firm to aid the conferees in their task. *Id.*, at 1483–1484. According to the Conference Committee Chairman, the only data used in the computer program were precinct population, race of precinct citizens, precinct political complexion, and statewide party voting trends. Access to the mapmaking process was strictly limited. No member of the Democratic Party and no member of the public was provided with any of the information used in or generated by the computer program. When questioned about the lack of minority party participation in the redistricting process, the Chairman of the Conference Committee stated that the Democrats would "have the privilege to offer a minority map. But I will advise you in advance that it will not be accepted." *Id.*, at 1484.

Republicans promised to hold public hearings on redistricting. No hearing was held during the mapmaking process, the only time during which voters' views could be expected to influence their legislators. *Ibid.* Two days before the end of the General Assembly's regular session, during the first and only public hearing on reapportionment, the Conference Committee revealed for the first time the result of its mapmaking effort. This timing gave the Democrats but 40 hours in which to review the districting of more than 4,000 precincts. *Ibid.* On the last day of the session, April 30, 1981, the Conference Committee report was introduced for a vote and was adopted by party line vote in both Houses of the General Assembly.[15] *Ibid.*

B

Next, the District Court found that the maps "conspicuously ignore[d] traditional political subdivisions, with no concern for any adherence to principles of community interest." *Id.*, at 1493. The court carefully described how the mapmakers carved up counties, cities, and even townships in their effort to draw lines beneficial to the majority party. Many districts meander through several counties, picking up a number of townships from each.[16] The District Court explained why this failure to honor county boundaries could be expected to have a detrimental impact on citizens' exercise of their vote. In Indiana, the county government is the seat of local affairs. *Id.*, at 1494. The redistricting dissects counties into strange shapes lacking in common interests, on one occasion even placing the seat of one county in a voting dis-

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[15] Presumably as a result of the haste with which the redistricting law was pushed through the General Assembly, parts of the State were "wholly omitted in the 1981 legislation." 603 F. Supp., at 1484. In the 1982 legislative session, therefore, amendments were passed to assign the omitted areas to voting districts. *Ibid.*

[16] *E. g.*, House Districts 20, 22, 25, 28, 42, 45, 46, 55, 57, 62, 66, 70, 73, 74; Senate Districts 7, 24, 37, 39, 45, 47. See the redistricting maps appended to this opinion.

trict composed of townships from other counties. *Id.*, at 1487; see House Districts 45, 46, *infra*. Under these conditions, the District Court expressly found that "the potential for voter disillusion and nonparticipation is great," as voters are forced to focus their political activities in artificial electoral units. 603 F. Supp., at 1494. Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose.

Deposition testimony of the Chairman of the Conference Committee revealed that the mapmakers gave no consideration to the interests of communities. In the Chairman's view, the concept of honoring community interests meant only that mapmakers should refuse to divide a small, suburban community. The shapes of the voting districts and the manner in which the districts divide established communities, from the county to the township level, illustrate that community interests were ignored by appellants. As the District Court observed, for example, "it is difficult to conceive the interests shared by blacks in Washington Township and white suburbanites in Hamilton and Boone Counties, or the shared interest of Allen and Noble County farmers with residents of downtown Fort Wayne." *Id.*, at 1487.

C

In addition to the foregoing findings that apply to both the House and Senate plans, the District Court also noted the substantial evidence that appellants were motivated solely by partisan considerations. *Id.*, at 1484. There is no evidence that the public interest in a fair electoral process was given any consideration by appellants. Indeed, as noted above, the mapmakers' partisan goals were made explicitly clear by contemporaneous statements of Republican leaders who openly acknowledged that their goal was to disadvantage Democratic voters. As one Republican House member concisely put it, "[t]he name of the game is to keep

us in power."[17] NAACP Plaintiffs' Exhibit 232 (Indianapolis Star, Mar. 22, 1981, section 2, p. 3). When the plan was completed, Republican leaders announced that the House map was designed to yield 56 "safe" Republican seats and 30 Democratic seats, with the remainder being "tossups." NAACP Plaintiffs' Exhibit 242 (Post-Tribune, Gary, Ind., Apr. 29, 1981, p. 1). Republicans expected that their Senate map would regularly produce 30 Republican seats and 8 to 10 Democratic seats so that Republicans would maintain their grip on the Senate even if Democrats won the remaining seats. NAACP Plaintiffs' Exhibit 241 (Post-Tribune, Gary, Ind., Apr. 29, 1981, p. 1). In short, the record unequivocally demonstrates that in 1981 the Republican-dominated General Assembly deliberately sought to design a redistricting plan under which members of the Democratic Party would be deprived of a fair opportunity to win control of the General Assembly at least until 1991, the date of the next redistricting.

IV

A

I turn now to the District Court's findings with respect particularly to the gerrymandering of the House districts. The court found that the plan contained voting districts whose irrational shapes called for justification. *E. g.*, House Districts 20, 22, 25, 45, 46, 48, 62, 66, 70, 73. The findings concerning the district configurations reflect the panel's familiarity with Indiana geography and the particular characteristics of the State's political subdivisions. As the District Court noted, the voter confusion generated by irrational dis-

[17] Evidence of partisan sparring during the redistricting process, of course, is not sufficient to establish an equal protection violation or to show that the legislature pursued no legitimate objectives in adopting the plan. But such evidence is probative of contemporaneous legislative goals, adding support to the objective facts showing that the legislature adopted the plan for the sole purpose of disadvantaging members of the political party that happened to be out of power.

trict boundaries is exacerbated in this case by the fact that the lines in the House plan were drawn independently of those in the Senate plan. 603 F. Supp., at 1484–1485. When the Senate voting districts are overlaid on the House districts, the potential for voter confusion becomes readily apparent as lines and districts intersect in a crazy quilt.[18]

The District Court carefully considered the multimember districts contained in the House plan and found that they were intentionally employed to minimize Democratic voting power. This Court has expressly recognized that "[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Gaffney* v. *Cummings*, 412 U. S., at 751 (quoting *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965)).[19] In this case, invidious purpose may be inferred from the mapmakers' selection of areas to be divided into multimember districts. These districts appear in some areas where they had been used previously and not in others, in some urban areas and not in others, and in some areas where

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[18] Since the Indiana House of Representatives has 100 members, and the Senate has 50, the mapmakers readily could have designed a "nested" plan, that is, a plan that included "two House districts within one Senate district." 603 F. Supp., at 1484–1485. By permitting voters readily to identify their voting districts and corresponding representatives, a nested plan can be expected to foster voter participation. See Grofman, 33 UCLA L. Rev., at 88, 92. Instead, as the District Court observed, the mapmakers drew House districts that were "not at all relevant to the Senate districts." 603 F. Supp., at 1484.

[19] In the context of racial gerrymandering claims, the Court has refused to adopt a *per se* rule barring the use of multimember districts. *White* v. *Regester*, 412 U. S., at 765. But the Court has repeatedly recognized that the characteristics of multimember districts, namely, their tendency to submerge the voting strength of the minority by allowing the majority to capture all of the district's assigned seats, make them a ready means for legislative discrimination against racial groups or political opponents. *E. g.*, *Rogers* v. *Lodge*, 458 U. S., at 616.

their use required combining rural townships with urban areas from another county.[20] The only discernible pattern is the appearance of these districts in areas where their winner-take-all aspects can best be employed to debase Democratic voting strength. The District Court determined that the multimember districts diluted Democratic voting strength by "stacking" Democrats into districts "where their majority would be overwhelming" and by fragmenting populations of Democratic voters among other districts where their voting strength would be reduced. 603 F. Supp., at 1488–1489, 1494. For example, the mapmakers split Fort Wayne, a city with a demonstrated tendency to vote for Democratic candidates, and associated each of the halves with areas from outlying counties whose residents had a pattern of voting for Republican candidates. *Id.*, at 1488, 1494; see House Districts 19, 20. Similarly, the redistricting of Marion County presents a clear example of dilution of Democrats' voting strength through the use of multimember districts. Though population figures entitled the county to elect exactly 14 House members, the mapmakers decided to tack on portions of two neighboring counties in order artificially to create a population base entitled to elect 15 representatives. Then, they carved that artificial geographical unit into five three-member districts whose irregular shapes were designed to fence Democrats into one heavily Democratic district and scatter pockets of Democratic strength among the other four districts. *Id.*, at 1487, 1489; see House Districts 48, 49, 50, 51, 52.[21]

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[20] The multimember districts are House Districts 7, 9, 10, 11, 12, 14, 15, 19, 20, 31, 48, 49, 50, 51, 52, 75.

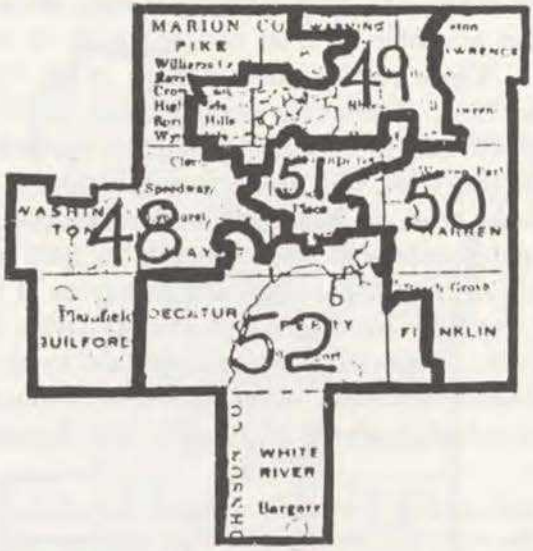
[21] The District Court found that the multimember districts employed in Marion County were "particularly suspect with respect to compactness." 603 F. Supp., at 1487. Of all the districts in the challenged plan, the court determined that House District 48 "presents the most grievous example of the political cartographer's handiwork in this case." *Ibid.* That district "forms the letter 'C' around the central city of Indianapolis" and "includes portions of the urban southwestside of the city, the airport and suburban

Appellees further demonstrated through a statistical showing that the House plan debased the effectiveness of their votes. In 1982, all 100 House seats were up for election.

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area around Ben Davis High School on the west side, and the Meridian Hills area at the northern part of the county." *Ibid.* The court expressly determined that, even though House District 48 satisfies "one person, one vote," there was "simply no conceivable justification for this kind of district." *Ibid.*

The following map, taken from an exhibit provided by the parties, shows this grotesque gerrymandering. The legislature first proceeded to disregard Marion County's boundary lines, which essentially form a square, and then carved the area it created into oddly shaped multimember districts.



The District Court also noted the discriminatory purpose served by the Marion County House Districts, including District 48: "[T]he powerful Marion County delegation forced neighboring counties to cede turf to permit a preservation of the multi-member districts which had consistently returned Republicans to the Statehouse." *Id.*, at 1487, n. 1. Moreover, as appellees' statistical showing of vote dilution plainly demonstrates, these gerrymandered districts had a discriminatory impact on the votes of Democrats as a group.

Democratic candidates received about 51.9 percent of the vote, and Republican candidates received about 48.1 percent. Forty-three Democratic representatives were elected; 57 Republicans were elected.[22] Appellees offered startling statistics with respect to House results in Marion and Allen Counties, two areas in which multimember districts were used. In these counties, Democratic candidates earned 46.3 percent of the vote, but won only 3 of 21 House seats. As the District Court observed, "such a disparity speaks for itself." *Id.*, at 1489.[23]

B

Since half of the Senate membership is up for election every two years, the only election results under the challenged plan available at trial related to 25 of the 50 Senate seats. Those results showed that, of the seats up for election in 1982, Democrats were elected to 13 seats and Republicans to 12. Democratic candidates earned about 53.1 percent of the vote, and Republicans received about 46.9 percent. At trial, it was appellees' contention that most of the Senate seats won by Democrats in 1982 were "safe" Democratic seats so that their party's success at the polls in that year was fully consistent with the statewide Republican gerrymander. This contention is borne out by the results of the 1984 Senate election. In that election, Democratic candidates received 42.3 percent of the vote, and Republicans 57.7

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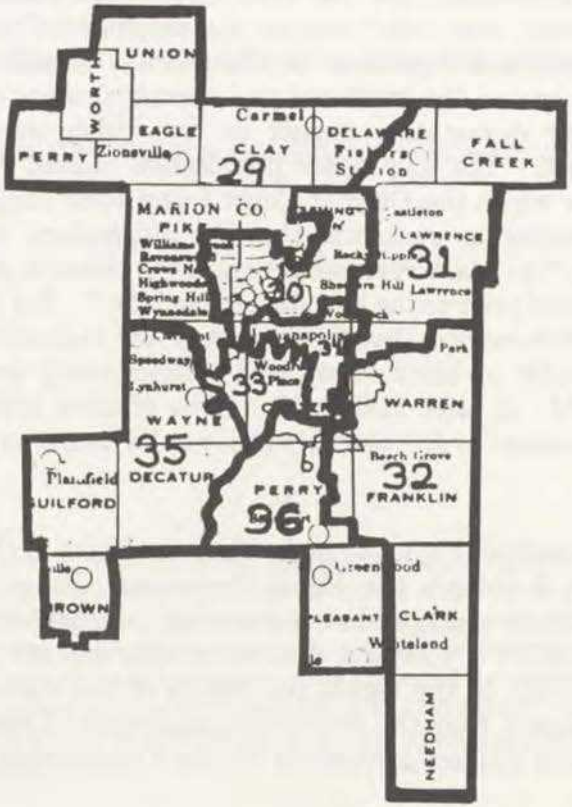
[22] In the 1984 election, Democratic candidates earned approximately 44 percent of the vote, and Republicans earned approximately 56 percent. Thirty-nine Democrats were elected to the House, and 61 Republicans were elected. The figures for the 1984 elections cited in this opinion were provided by the Elections Research Center, Washington, D. C. A supplemental statement filed by appellants in the District Court following trial also quoted some of the 1984 election results, including the fact that in 1984 the Democratic candidate for Governor won 48 percent of the vote.

[23] The 1984 House election in the Marion and Allen County House districts reflected a similar disparity, when Republicans again captured 18 of the 21 House seats and the Democrats 3 despite the fact that Democratic candidates earned approximately 38 percent of the vote in these counties.

percent. Yet, of the 25 Senate positions up for election, only 7 were captured by Democrats.[24]

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[24] The District Court's discussion of district shapes focused primarily on the House plan. As the following map of the Senate districts in the Marion County area illustrates, the Senate plan also contains districts with unusual shapes. Although the population of Marion County, whose boundary lines form a square, was entitled to elect exactly seven Senators, 603 F. Supp., at 1487, n. 1, the mapmakers ignored both that population figure and the county boundaries, and created eight wholly irrational voting districts. As one Democratic voter remarked when the Senate plan was unveiled: "People who live near the [district line separating Senate districts 33 and 34] are going to need an Indian guide and a compass to figure out which district they're in." NAACP Plaintiffs' Exhibit 252 (Indianapolis Star, May 10, 1981, section 2, p. 3).



C

The District Court found, and I agree, that appellants failed to justify the discriminatory impact of the plan by showing that the plan had a rational basis in permissible neutral criteria. Appellants' primary justification was that the plan comports with the principle of "one person, one vote." Their plan did adhere to that objective, with population deviations between House districts of 1.05 percent and between Senate districts of 1.15 percent. But reliance on "one person, one vote" does not sufficiently explain or justify the discrimination the plan inflicted on Democratic voters as a group. The District Court expressly found that the irregular district shapes could not be justified on the basis of population distribution. *Id.*, at 1494. Nor does adherence to "one person, one vote" excuse the mapmakers' failure to honor established political or community boundaries. It does not excuse the irrational use of multimember districts, with their devastating impact on the voting strength of Democrats. The only other justification offered by appellants, for which the District Court found some support as a contemporaneous goal, was that the mapmakers sought to maintain "the black representation in the General Assembly that existed prior to the new districting plan." But the court further determined that the impact of the redistricting fell most harshly on black voters who predominantly are Democrats. *Id.*, at 1488, 1489–1490. None of these critical findings was found by the plurality today to be clearly erroneous.

V

In conclusion, I want to make clear the limits of the standard that I believe the Equal Protection Clause imposes on legislators engaged in redistricting. Traditionally, the determination of electoral districts within a State has been a matter left to the legislative branch of the state government. Apart from the doctrine of separation of powers and the federal system prescribed by the Constitution, federal

judges are ill equipped generally to review legislative decisions respecting redistricting. As the Court's opinion makes clear, however, our precedents hold that a colorable claim of discriminatory gerrymandering presents a justiciable controversy under the Equal Protection Clause. Federal courts in exercising their duty to adjudicate such claims should impose a heavy burden of proof on those who allege that a redistricting plan violates the Constitution. In light of *Baker* v. *Carr*, *Reynolds* v. *Sims*, and their progeny, including such comparatively recent decisions as *Gaffney* v. *Cummings*, this case presents a paradigm example of unconstitutional discrimination against the members of a political party that happened to be out of power. The well-grounded findings of the District Court to this effect have not been, and I believe cannot be, held clearly erroneous.

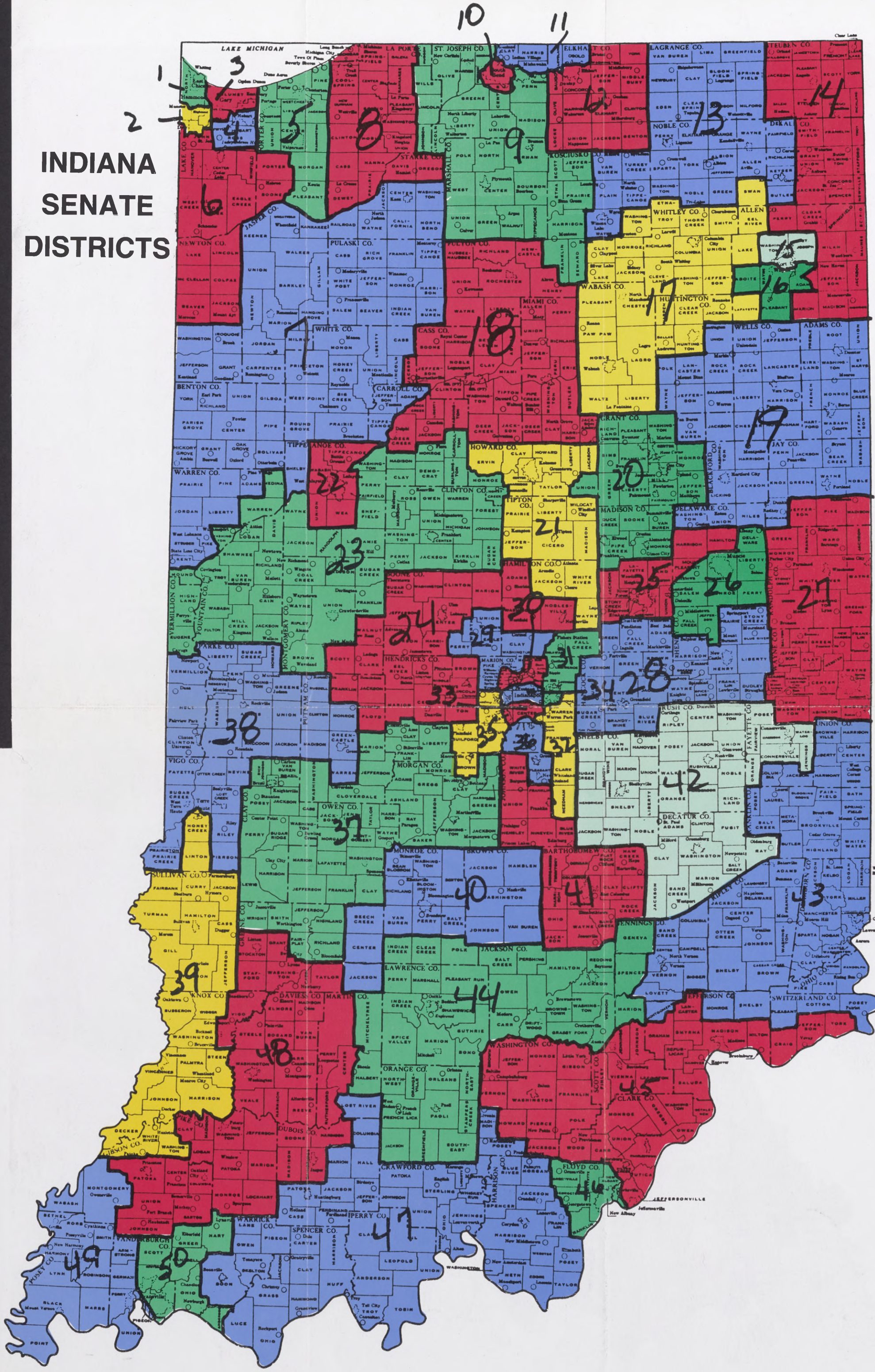
Accordingly, I would affirm the judgment of the District Court.[25]

[Maps of the Indiana House and Senate Districts follow this page.]

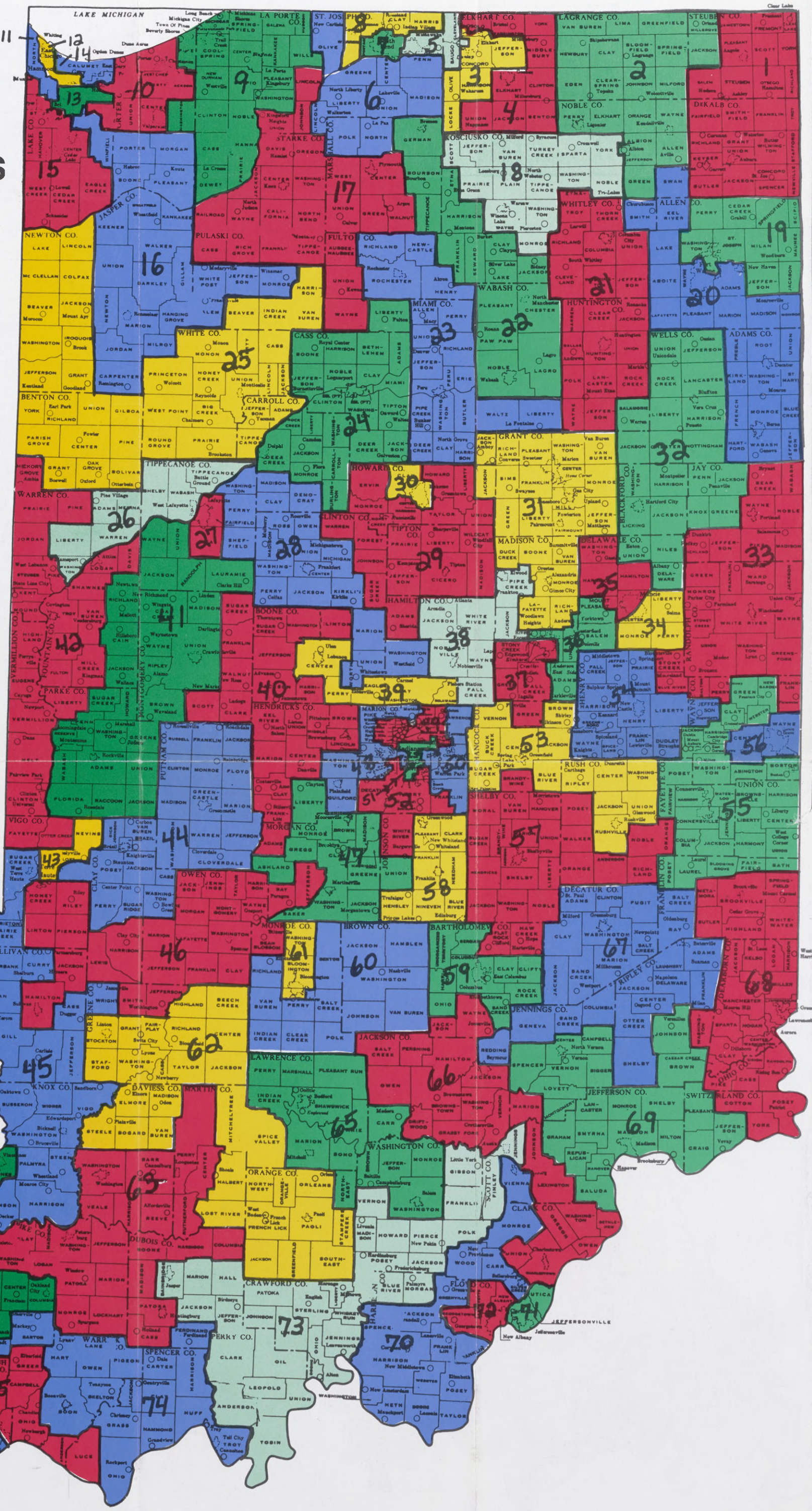
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[25] As is evident from the several opinions filed today, there is no "Court" for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander. The standard proposed by the plurality is explicitly rejected by two Justices, and three Justices also have expressed the view that the plurality's standard will "prove unmanageable and arbitrary." *Ante*, at 155 (O'CONNOR, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment).

INDIANA SENATE DISTRICTS



INDIANA HOUSE DISTRICTS



BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL.

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

No. 85–140. Argued March 31, 1986—Decided June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held: The Georgia statute is constitutional. Pp. 190–196.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Pp. 190–191.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Pp. 191–194.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. Pp. 194–195.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley* v. *Georgia*, 394 U. S. 557, distinguished. Pp. 195–196.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 196.

760 F. 2d 1202, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., *post*, p. 196, and POWELL, J., *post*, p. 197, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 199. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 214.

Michael E. Hobbs, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers*, Attorney General, *pro se*, *Marion O. Gordon*, First Assistant Attorney General, and *Daryl A. Robinson*, Senior Assistant Attorney General.

Laurence H. Tribe argued the cause for respondent Hardwick. With him on the brief were *Kathleen M. Sullivan* and *Kathleen L. Wilde*.*

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute crimi-

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*Briefs of *amici curiae* urging reversal were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John W. Whitehead, Thomas O. Kotouc,* and *Alfred Lindh;* and for David Robinson, Jr., *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *Robert Hermann*, Solicitor General, *Lawrence S. Kahn, Howard L. Zwickel, Charles R. Fraser,* and *Sanford M. Cohen*, Assistant Attorneys General, and *John Van de Kamp*, Attorney General of California; for the American Jewish Congress by *Daniel D. Levenson, David Cohen,* and *Frederick Mandel;* for the American Psychological Association et al. by *Margaret Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub,* and *Herbert Semmel;* for the Association of the Bar of the City of New York by *Steven A. Rosen;* for the National Organization for Women by *John S. L. Katz;* and for the Presbyterian Church (U. S. A.) et al. by *Jeffrey O. Bramlett*.

Briefs of *amici curiae* were filed for the Lesbian Rights Project et al. by *Mary C. Dunlap;* and for the National Gay Rights Advocates et al. by *Edward P. Errante, Leonard Graff,* and *Jay Kohorn*.

nalizing sodomy[1] by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U. S. 901 (1976).

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[1] Georgia Code Ann. § 16–6–2 (1984) provides, in pertinent part, as follows:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ."

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16–6–2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F. 2d 1202, 1206–1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F. 2d 1202 (1985). The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Georgia*, 394 U. S. 557 (1969); and *Roe* v. *Wade*, 410 U. S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case,[3] we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment.[4]

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[3] See *Baker* v. *Wade*, 769 F. 2d 289, rehearing denied, 774 F. 2d 1285 (CA5 1985) (en banc); *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 741 F. 2d 1388, rehearing denied, 241 U. S. App. D. C. 262, 746 F. 2d 1579 (1984).

[4] Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 309, n. 1 (1976); *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Cf. *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975).

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), were described as dealing with child rearing and education; *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), with procreation; *Loving* v. *Virginia*, 388 U. S. 1 (1967), with marriage; *Griswold* v. *Connecticut*, *supra*, and *Eisenstadt* v. *Baird*, *supra*, with contraception; and *Roe* v. *Wade*, 410 U. S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey* v. *Population Services International*, *supra*, at 688–689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the

claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U. S., at 688, n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither

liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold* v. *Connecticut*, 381 U. S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.[5] In 1868, when the Fourteenth Amendment was

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[5] Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680–1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.[6] In fact, until 1961,[7] all 50 States outlawed sodomy, and today, 24 States and the District of Columbia

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At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647–1719, p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).

At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Hening's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

[6] Criminal sodomy statutes in effect in 1868:

Alabama: Ala. Rev. Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark. Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal. Gen. Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo. Rev. Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del. Rev. Stat., ch. 131, § 7 (1893).

Florida: Fla. Rev. Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga. Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw. Penal Code, ch. 13, § 11 (1869).

Illinois: Ill. Rev. Stat., div. 5, §§ 49, 50 (1845).

Kansas (Terr.): Kan. Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La. Rev. Stat., Crimes and Offences, § 5 (1856).

Maine: Me. Rev. Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland: 1 Md. Code, Art. 30, § 201 (1860).

Massachusetts: Mass. Gen. Stat., ch. 165, § 18 (1860).

Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn. Stat., ch. 96, § 13 (1859).

Mississippi: Miss. Rev. Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, § 47 (1866).

[Footnote 6 is continued on p. 194]

continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., *supra*, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudi-

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Nevada (Terr.): Nev. Comp. Laws, 1861–1900, Crimes and Punishments, § 45.

New Hampshire: N. H. Laws, Act. of June 19, 1812, § 5 (1815).

New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N. C. Rev. Code, ch. 34, § 6 (1855).

Oregon: Laws of Ore., Crimes—Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700–1903, p. 1011 (Purdon 1905).

Rhode Island: R. I. Gen. Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682–1716, p. 493 (1837).

Tennessee: Tenn. Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va. Code, ch. 149, § 12 (1868).

West Virginia: W. Va. Code, ch. 149, § 12 (1868).

Wisconsin (Terr.): Wis. Stat. § 14, p. 367 (1839).

[7] In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11–2, 11–3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, ¶¶ 11–2, 11–3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

ation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley* v. *Georgia*, 394 U. S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.*, at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.*, at 568, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct

while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[8]

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante*, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

[8] Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

and the Western Christian Tradition 70–81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i. e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16–6–2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a

felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16–5–24, first-degree arson, § 16–7–60, and robbery, § 16–8–40.[1]

In this case, however, respondent has not been tried, much less convicted and sentenced.[2] Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

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[1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A–6–65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13–1411, 13–1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41–1813 (1977) (1-year maximum); D. C. Code § 22–3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code Ann. § 16–6–2 (1984) (1 to 20 years); Idaho Code § 18–6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21–3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. § 14:89 (West 1986) (5-year maximum); Md. Ann. Code, Art. 27, §§ 553–554 (1982) (10-year maximum); Mich. Comp. Laws § 750.158 (1968) (15-year maximum); Minn. Stat. § 609.293 (1984) (1-year maximum); Miss. Code Ann. § 97–29–59 (1973) (10-year maximum); Mo. Rev. Stat. § 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. § 45–5–505 (1985) (10-year maximum); Nev. Rev. Stat. § 201.190 (1985) (6-year maximum); N. C. Gen. Stat. § 14–177 (1981) (10-year maximum); Okla. Stat., Tit. 21, § 886 (1981) (10-year maximum); R. I. Gen. Laws § 11–10–1 (1981) (7 to 20 years); S. C. Code § 16–15–120 (1985) (5-year maximum); Tenn. Code Ann. § 39–2–612 (1982) (5 to 15 years); Tex. Penal Code Ann. § 21.06 (1974) ($200 maximum fine); Utah Code Ann. § 76–5–403 (1978) (6-month maximum); Va. Code § 18.2–361 (1982) (5-year maximum).

[2] It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

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

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 191, than *Stanley* v. *Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States*, 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16–6–2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16–6–2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." *Ante*, at 190. But the fact that the moral judgments expressed by statutes like § 16–6–2 may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Roe* v. *Wade*, 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most inti-

mate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.'" *Herring* v. *State*, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," *ante*, at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante*, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16–6–2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16–6–2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.[1] I therefore see no basis for the

[1] Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code § 26–5901 (1933). In *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that § 26–5901 did not prohibit lesbian activity. And in *Riley* v. *Garrett*, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia

Court's decision to treat this case as an "as applied" challenge to § 16–6–2, see *ante*, at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16–6–2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4–5; cf. 760 F. 2d 1202, 1205–1206 (CA11 1985). But his claim that § 16–6–2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16–6–2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante*, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold* v. *Connecticut*, 381 U. S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10–12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."

Supreme Court held that § 26–5901 did not prohibit heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley*," Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167, n. 47 (1967).

Bramlet v. *Wilson*, 495 F. 2d 714, 716 (CA8 1974); see *Parr* v. *Great Lakes Express Co.*, 484 F. 2d 767, 773 (CA7 1973); *Due* v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630, 631 (CA5 1964); *United States* v. *Howell*, 318 F. 2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601–602 (1969); see also *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16–6–2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed.[2] The Court's cramped reading of the

[2] In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In *Powell* v. *Texas*, 392 U. S. 514 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.*, at 532. JUSTICE WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label 'condition.' In *Robinson* the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense . . . .' 370 U. S., at 666. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson* . . . . The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are suf-

issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat dis-

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ficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" *Id.*, at 550–551, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8–11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey* v. *Population Services International*, 431 U. S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to § 16–6–2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16–6–2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, *e. g.*, *Rowland* v. *Mad River Local School District*, 470 U. S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).

tinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. *E. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E. g.*, *United States* v. *Karo*, 468 U. S. 705 (1984); *Payton* v. *New York*, 445 U. S. 573 (1980); *Rios* v. *United States*, 364 U. S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante*, at 190–191. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore* v. *East Cleveland*, 431 U. S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S., at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288–289 (1977). And so we protect the decision whether to

marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold* v. *Connecticut*, 381 U. S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore* v. *East Cleveland*, 431 U. S., at 500–506 (plurality opinion). The Court recognized in *Roberts*, 468 U. S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973); see also *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Roe* v. *Wade*, 410 U. S., at 153.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose

how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California* v. *Ciraolo*, 476 U. S. 207, 226 (1986) (POWELL, J., dis-

senting), quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

The Court's interpretation of the pivotal case of *Stanley* v. *Georgia*, 394 U. S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante*, at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> "'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> . . . . . .
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U. S., at 564–565, quoting *Olmstead* v. *United States*, 277 U. S., at 478 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), the Court suggested that reliance on the Fourth

Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" 413 U. S., at 66. "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," *ante*, at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16–6–2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.[3] In light of the state of the record, I see

[3] Even if a court faced with a challenge to § 16–6–2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show

no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante*, at 195, to which *Stanley* refused to extend its protection. 394 U. S., at 568, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante*, at 195: drugs and weapons are inherently dangerous, see, *e. g.*, *McLaughlin* v. *United States*, 476 U. S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16–6–2 to be physically dangerous, either to the persons engaged in it or to others.[4]

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an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16–6–2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, *e. g.*, Brief for Petitioner 36–37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23–28, on the one hand, with *People* v. *Onofre*, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11–14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19–27, on the other.

[4] Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante*, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity

The core of petitioner's defense of § 16–6–2, however, is that respondent and others who engage in the conduct prohibited by § 16–6–2 interfere with Georgia's exercise of the "'right of the Nation and of the States to maintain a decent society,'" *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 59–60, quoting *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16–6–2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante*, at 190, 192–194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[5] As Justice Jackson wrote so eloquently

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is warranted. See Tr. of Oral Arg. 21–22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

[5] The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20–21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving* v. *Virginia*, O. T. 1966, No. 395, pp. 28–29, with *ante*, at 192–194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., at 6, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante*, at 193–194 (noting that 24 States and the District of Columbia have sodomy

for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 641–642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16–6–2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 429–453 (1961); *Stone* v. *Graham*, 449 U. S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16–6–2 represents a legitimate use of secular coercive power.[6] A State can no more punish private behavior be-

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statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., at 7–12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*, at 12.

[6]The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense

cause of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).

Nor can § 16–6–2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U. S., at 68–69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning

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was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, A History of the Criminal Law of England 429–430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U. S., at 66, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965)).[7]

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond* v. *Charles*, 476 U. S. 54, 65–66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District* v. *Gobitis*, 310 U. S.

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[7] At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16–6–2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10–11. The suggestion misses the point entirely. If the law is not invalid, then the police *can* invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), was precisely the possibility, and repugnancy, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.*, at 485–486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16–6–2 seems no less intrusive, or repugnant. Cf. *Winston* v. *Lee*, 470 U. S. 753 (1985); *Mary Beth G.* v. *City of Chicago*, 723 F. 2d 1263, 1274 (CA7 1983).

586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

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

Like the statute that is challenged in this case,[1] the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3]

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[1] See Ga. Code Ann. § 16-6-2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[2] The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Ante*, at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra*. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[3] See, *e. g.*, 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, . . . with burying alive"); 4 W. Blackstone, Commentaries *215

That condemnation was equally damning for heterosexual and homosexual sodomy.[4] Moreover, it provided no special exemption for married couples.[5] The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.[6] Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.[7] The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, *ante*, at 192–194,

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(discussing "the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

[4] See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

[5] See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman—his wife, in which case, if she consent, she is an accomplice").

[6] The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, *e. g.*, *Comer* v. *State*, 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

[7] See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939).

and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.[8]

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[9] Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972).

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[8] A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

[9] See *Loving* v. *Virginia*, 388 U. S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); *id.*, at 288 (discussing crime of miscegenation).

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the

State—to decide.[10] The essential "liberty" that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold*, 381 U. S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U. S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16–6–2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary

[10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in *Griswold*.

associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Ante*, at 196. But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades.[11] The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representa-

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[11] *Ante*, at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4–5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

tions about the importance of the State's selective application of its generally applicable law.[12]

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.[13]

I respectfully dissent.

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[12] It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey* v. *Population Services International*, 431 U. S. 678, 715, n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra*, the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

[13] Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part).

JAPAN WHALING ASSOCIATION ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.

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

No. 85–954. Argued April 30, 1986—Decided June 30, 1986*

The International Convention for the Regulation of Whaling (ICRW) included a Schedule regulating whale harvesting practices of member nations (including the United States and Japan) and setting harvest limits for various whale species. It also established the International Whaling Commission (IWC) and authorized it to set harvest quotas. However, the IWC has no power to impose sanctions for quota violations, and any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit. Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, directing the Secretary of Commerce (Secretary) to certify to the President if nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of an international fishery conservation program. The President, in his discretion, may then direct the imposition of sanctions on the certified nation. Later, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, requiring expedition of the certification process and mandating that, if the Secretary certifies that nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of the ICRW, economic sanctions must be imposed by the Executive Branch against the offending nation. After the IWC established a zero quota for certain sperm whales and ordered a 5-year moratorium on commercial whaling to begin in 1985, Japan filed objections to both limitations and thus was not bound thereby. However, in 1984 Japan and the United States concluded an executive agreement whereby Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988, and the Secretary agreed that the United States would not certify Japan under either the Pelly Amendment or the Packwood Amendment if Japan complied with its pledges. Shortly before consum-

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*Together with No. 85–955, *Baldrige, Secretary of Commerce, et al.* v. *American Cetacean Society et al.*, also on certiorari to the same court.

mation of the executive agreement, several wildlife conservation groups filed suit in Federal District Court, seeking a writ of mandamus to compel the Secretary to certify Japan, and the court granted summary judgment for the groups, concluding that any taking of whales in excess of the IWC's quotas diminished the effectiveness of the ICRW. The court ordered the Secretary immediately to certify to the President that Japan was in violation of the sperm whale quota. The Court of Appeals affirmed.

Held:

1. The political question doctrine does not bar judicial resolution of the instant controversy. The courts have the authority to construe international treaties and executive agreements and to interpret congressional legislation. The challenge to the Secretary's decision not to certify Japan presents a purely legal question of statutory interpretation. The Judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may have significant political overtones. Pp. 229–230.

2. Neither the Pelly Amendment nor the Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas. The Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than to rely on the possibility that certification and imposition of economic sanctions would produce the same or a better result, is a reasonable construction of the Amendments. Pp. 231–241.

(a) Under the terms of the Amendments, certification is neither permitted nor required until the Secretary determines that nationals of a foreign country are conducting fishing operations in a manner that "diminishes the effectiveness" of the ICRW. Although the Secretary must promptly make a certification decision, there is no statutory definition of the words "diminish the effectiveness" or specification of the factors that the Secretary should consider in making the decision entrusted to him alone. The statutory language does not direct the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling Schedule. Pp. 231–234.

(b) Nothing in the legislative history of either Amendment addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whaling. The history of the Pelly Amendment and its subsequent amendment shows that Congress had no intention to require the Secretary to certify every departure from the limits set by an international conservation program, and that Congress used the phrase "diminish the effectiveness" to give the Secretary a range of certification discretion. Although the Packwood Amendment was designed to remove executive discretion in impos-

ing sanctions once certification had been made, Congress specifically retained the identical certification standard of the Pelly Amendment, and the legislative history does not indicate that the certification standard requires the Secretary, regardless of the circumstances, to certify each and every departure from the IWC's whaling Schedules. Pp. 234–241.

247 U. S. App. D. C. 309, 768 F. 2d 426, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and REHNQUIST, JJ., joined, *post*, p. 241.

Associate Attorney General Burns argued the cause for petitioners in No. 85–955. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, *Peter R. Steenland, Jr.*, *Donald A. Carr*, *Dianne H. Kelly*, and *Abraham D. Sofaer*. *Scott C. Whitney* argued the cause for petitioners in No. 85–954. With him on the briefs were *Steven R. Perles* and *William H. Allen*.

William D. Rogers argued the cause for respondents in both cases. With him on the brief were *James A. Beat* and *Donald T. Hornstein*.†

JUSTICE WHITE delivered the opinion of the Court.

In these cases, we address the question whether, under what are referred to in these cases as the Pelly and Packwood Amendments, 85 Stat. 786, as amended, 22 U. S. C. § 1978; 90 Stat. 337, as amended, 16 U. S. C. § 1821 (1982 ed. and Supp. III), the Secretary of Commerce is required to certify that Japan's whaling practices "diminish the effectiveness" of the International Convention for the Regulation of Whaling because that country's annual harvest exceeds quotas established under the Convention.

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†*Steven R. Ross*, *Charles Tiefer*, and *Michael L. Murray* filed a brief for the Speaker of the House of Representatives et al. as *amici curiae* urging affirmance.

I

For centuries, men have hunted whales in order to obtain both food and oil, which, in turn, can be processed into a myriad of other products. Although at one time a harrowing and perilous profession, modern technological innovations have transformed whaling into a routine form of commercial fishing, and have allowed for a multifold increase in whale harvests worldwide.

Based on concern over the effects of excessive whaling, 15 nations formed the International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716, T. I. A. S. No. 1849 (entered into force Nov. 10, 1948). The ICRW was designed to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry," *id.*, at 1717, and today serves as the principal international mechanism for promoting the conservation and development of whale populations. See generally Smith, The International Whaling Commission: An Analysis of the Past and Reflections on the Future, 16 Nat. Resources Law. 543 (1984). The United States was a founding member of the ICRW; Japan joined in 1951.

To achieve its purposes, the ICRW included a Schedule which, *inter alia*, regulates harvesting practices and sets harvest limits for various whale species. Art. I, 62 Stat. 1717, 1723–1727. In addition, the ICRW established the International Whaling Commission (IWC), which implements portions of the Convention and is authorized to amend the Schedule and set new harvest quotas. See Art. III, 62 Stat. 1717–1718; Art. V, 62 Stat. 1718–1719. See generally Smith, *supra*, at 547–550. The quotas are binding on IWC members if accepted by a three-fourths' majority vote. Art. III, 62 Stat. 1717. Under the terms of the Convention, however, the IWC has no power to impose sanctions for quota violations. See Art. IX, 62 Stat. 1720. Moreover, any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation

to comply with the limit unless and until the objection is withdrawn. Art. V, 62 Stat. 1718–1719. All nonobjecting countries remain bound by the amendment.

Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress passed the Pelly Amendment to the Fishermen's Protective Act of 1967. 22 U. S. C. § 1978. Principally intended to preserve and protect North American Atlantic salmon from depletion by Danish fishermen in violation of the ban imposed by the International Convention for the Northwest Atlantic Fisheries, the Amendment protected whales as well. See 117 Cong. Rec. 34752 (1971) (remarks of Rep. Pelly); H. R. Rep. No. 92–468, p. 6 (1971). The Amendment directs the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program . . . ." 22 U. S. C. § 1978(a)(1). Upon certification, the President, in his discretion, may then direct the Secretary of the Treasury to prohibit the importation of fish products from the certified nation. § 1978(a)(4). The President may also decline to impose any sanctions or import prohibitions.

After enactment of the Pelly Amendment, the Secretary of Commerce five times certified different nations to the President as engaging in fishing operations which "diminish[ed] the effectiveness" of IWC quotas. H. R. Rep. No. 95–1029, p. 9 (1978); 125 Cong. Rec. 22084 (1979) (remarks of Rep. Oberstar). None of the certifications resulted in the imposition of sanctions by the President. After each certification, however, the President was able to use the threat of discretionary sanctions to obtain commitments of future compliance from the offending nations.

Although "the Pelly Amendment . . . served the useful function of quietly persuading nations to adhere to the deci-

sions of international fishery conservation bodies," H. R. Rep. No. 95–1029, *supra*, at 9, Congress grew impatient with the Executive's delay in making certification decisions and refusal to impose sanctions. See 125 Cong. Rec. 22083 (1979) (remarks of Rep. Murphy); *id.*, at 22084 (remarks of Rep. Oberstar). As a result, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U. S. C. § 1801 *et seq.* (1982 ed. and Supp. III). This Amendment requires the Secretary of Commerce to "periodically monitor the activities of foreign nationals that may affect [international fishery conservation programs]," 22 U. S. C. § 1978(a)(3)(A); "promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification . . . ," § 1978(a)(3)(B); and "promptly conclude; and reach a decision with respect to; [that] investigation." § 1978(a)(3)(C).

To rectify the past failure of the President to impose the sanctions authorized—but not required—under the Pelly Amendment, the Packwood Amendment removes this element of discretion and mandates the imposition of economic sanctions against offending nations. Under the Amendment, if the Secretary of Commerce certifies that "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling," 16 U. S. C. § 1821(e)(2)(A)(i), the Secretary of State must reduce, by at least 50%, the offending nation's fishery allocation within the United States' fishery conservation zone. § 1821(e)(2)(B). Although the Amendment requires the imposition of sanctions when the Secretary of Commerce certifies a nation, it did not alter the initial certification process, except for requiring expedition. It was also provided that a certificate under the Packwood Amendment also serves as a certification for the purposes of the Pelly Amendment. § 1821(e)(2)(A)(i).

In 1981, the IWC established a zero quota for the Western Division stock of Northern Pacific sperm whales. The next year, the IWC ordered a 5-year moratorium on commercial whaling to begin with the 1985–1986 whaling season and last until 1990. In 1982, the IWC acted to grant Japan's request for a 2-year respite—for the 1982–1983 and 1983–1984 seasons—from the IWC's earlier decision banning sperm whaling.

Because Japan filed timely objections to both the IWC's 1981 zero quota for Northern Pacific sperm whales and 1982 commercial whaling moratorium, under the terms of the ICRW, it was not bound to comply with either limitation. Nonetheless, as the 1984–1985 whaling season grew near, it was apparently recognized that under either the Pelly or Packwood Amendment, the United States could impose economic sanctions if Japan continued to exceed these whaling quotas.

Following extensive negotiations, on November 13, 1984, Japan and the United States concluded an executive agreement through an exchange of letters between the Chargé d'Affaires of Japan and the Secretary of Commerce. See App. to Pet. for Cert. in No. 85–955, pp. 102A–109A. Subject to implementation requirements,[1] Japan pledged to ad-

[1] The details of the Japanese commitments were explained in a summary accompanying the letter from the Chargé d'Affaires to the Secretary. First, the countries agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective April 1, 1988. App. to Pet. for Cert. in No. 85–955, pp. 104A–105A. Japan fulfilled this portion of the agreement on December 11, 1984. *Id.*, at 110A, 112A–114A.

Second, the two nations agreed that if Japan would end all commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Japan agreed to harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whale species—under lim-

here to certain harvest limits and to cease commercial whaling by 1988. *Id.*, at 104A–106A. In return and after consulting with the United States Commissioner to the IWC, the Secretary determined that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to discontinue all commercial whaling by 1988, "would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program." *Id.*, at 107A. Accordingly, the Secretary informed Japan that, so long as Japan complied with its pledges, the United States would not certify Japan under either Amendment. See *id.*, at 104A.

Several days before consummation of the executive agreement, several wildlife conservation groups[2] filed suit in District Court seeking a writ of mandamus compelling the Secretary of Commerce to certify Japan.[3] Because in its view any taking of whales in excess of the IWC quotas diminishes the

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its acceptable to the United States after consultation with Japan—through the end of the 1986–1987 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate commercial whaling operations by withdrawing its objection to the 1982 IWC moratorium on or before April 1, 1985, effective April 1, 1988. *Id,* at 105A–106A.

[2] The original plaintiffs to this action are: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U. S. A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former United States Representative to the IWC.

[3] In addition, plaintiffs also requested (1) a declaratory judgment that the Secretary's failure to certify violated both the Pelly and Packwood Amendments, because any whaling activities in excess of IWC quotas necessarily "diminishes the effectiveness" of the ICRW; and (2) a permanent injunction prohibiting any executive agreement which would violate the certification and sanction requirements of the Amendments. 604 F. Supp. 1398, 1401 (DC 1985). The Japan Whaling Association and Japan Fishing Association (Japanese petitioners), trade groups representing private Japanese interests, were allowed to intervene.

effectiveness of the ICRW, the District Court granted summary judgment for respondents and ordered the Secretary of Commerce immediately to certify to the President that Japan was in violation of the IWC sperm whale quota. 604 F. Supp. 1398, 1411 (DC 1985). Thereafter, Japan's Minister for Foreign Affairs informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the District Court's order. App. to Pet. for Cert. in No. 85–955, pp. 116A–118A.

A divided Court of Appeals affirmed. 247 U. S. App. D. C. 309, 768 F. 2d 426 (1985). Recognizing that the Pelly and Packwood-Magnuson Amendments did not define the specific activities which would "diminish the effectiveness" of the ICRW, the court looked to the Amendments' legislative history and concluded, as had the District Court, that the taking by Japanese nationals of whales in excess of quota automatically called for certification by the Secretary. We granted certiorari, 474 U. S. 1053 (1986), and now reverse.

II

We address first the Japanese petitioners' contention that the present actions are unsuitable for judicial review because they involve foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international agreement. Relying on the political question doctrine, and quoting *Baker* v. *Carr*, 369 U. S. 186, 217 (1969), the Japanese petitioners argue that the danger of "embarrassment from multifarious pronouncements by various departments on one question" bars any judicial resolution of the instant controversy.

We disagree. *Baker* carefully pointed out that not every matter touching on politics is a political question, *id.*, at 209, and more specifically, that it is "error to suppose that every

case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.*, at 211. The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *United States ex rel. Joseph* v. *Cannon*, 206 U. S. App. D. C. 405, 411, 642 F. 2d 1373, 1379 (1981) (footnote omitted), cert. denied, 455 U. S. 999 (1982).

As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.[4]

[4] We also reject the Secretary's suggestion that no private cause of action is available to respondents. Respondents brought suit against the

III

The issue before us is whether, in the circumstances of these cases, either the Pelly or Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas. We have concluded that certifica-

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Secretary of Commerce, the head of a federal agency, and the suit, in essence, is one to "compel agency action unlawfully withheld," 5 U. S. C. § 706(1), or alternatively, to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). The "right of action" in such cases is expressly created by the Administrative Procedure Act (APA), which states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," § 704, at the behest of "[a] person . . . adversely affected or aggrieved by agency action." § 702 (1982 ed., Supp. III). A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review. See, *e. g.*, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345 (1984); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967).

It is clear that respondents may avail themselves of the right of action created by the APA. First, the Secretary's actions constitute the actions of an agency. See 5 U. S. C. § 551(1); *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, at 410. In addition, there has been "final agency action," in that the Secretary formally has agreed with the Japanese that there will be no certification, and this appears to be an action "for which there is no other adequate remedy in a court," as the issue whether the Secretary's failure to certify was lawful will not otherwise arise in litigation. Next, it appears that respondents are sufficiently "aggrieved" by the agency's action: under our decisions in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), and *United States* v. *SCRAP*, 412 U. S. 669 (1973), they undoubtedly have alleged a sufficient "injury in fact" in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the "zone of interests" protected by the Pelly and Packwood Amendments. See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). Finally, the Secretary has failed to point to any expressed intention on the part of Congress to foreclose APA review of actions under either Amendment. We find, therefore, that respondents are entitled to pursue their claims under the right of action created by the APA.

tion was not necessary and hence reject the Court of Appeals' holding and respondents' submission that certification is mandatory whenever a country exceeds its allowable take under the ICRW Schedule.

Under the Packwood Amendment, certification is neither permitted nor required until the Secretary makes a determination that nationals of a foreign country "are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness" of the ICRW. It is clear that the Secretary must promptly make the certification decision, but the statute does not define the words "diminish the effectiveness of" or specify the factors that the Secretary should consider in making the decision entrusted to him alone. Specifically, it does not state that certification must be forthcoming whenever a country does not abide by IWC Schedules, and the Secretary did not understand or interpret the language of the Amendment to require him to do so. Had Congress intended otherwise, it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits.

Here, as the Convention permitted it to do, Japan had filed its objection to the IWC harvest limits and to the moratorium to begin with the 1985–1986 season. It was accordingly not in breach of its obligations under the Convention in continuing to take whales, for it was part of the scheme of the Convention to permit nations to opt out of Schedules that were adopted over its objections. In these circumstances, the Secretary, after consultation with the United States Commissioner to the IWC and review of the IWC Scientific Committee opinions, determined that it would better serve the conservation ends of the Convention to accept Japan's pledge to limit its harvest of sperm whales for four years and to cease all commerical whaling in 1988, rather than to impose sanctions and risk continued whaling by the Japanese. In any event, the Secretary made the determination assigned to him by the Packwood Amendment and concluded that the

limited taking of whales in the 1984 and 1985 coastal seasons would not diminish the effectiveness of the ICRW or its conservation program, and that he would not make the certification that he would otherwise be empowered to make.

The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). But as the courts below and respondents concede, the statutory language itself contains no direction to the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling Schedule. The language of the Pelly and Packwood Amendments might reasonably be construed in this manner, but the Secretary's construction that there are circumstances in which certification may be withheld, despite departures from the Schedules and without violating his duty, is also a reasonable construction of the language used in both Amendments. We do not understand the Secretary to be urging that he has *carte blanche* discretion to ignore and do nothing about whaling in excess of IWC Schedules. He does not argue, for example, that he could refuse to certify for any reason not connected with the aims and conservation goals of the Convention, or refuse to certify deliberate flouting of schedules by members who have failed to object to a particular schedule. But insofar as the plain language of the Amendments is concerned, the Secretary is not forbidden to refuse to certify for the reasons given in these cases. Furthermore, if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the "executive department's construction of a statutory scheme it is entrusted to administer," *Chevron*, *supra*, at 844, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress. *United*

States v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 131 (1985). See *Chemical Mfrs. Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985).

IV

Contrary to the Court of Appeals' and respondents' views, we find nothing in the legislative history of either Amendment that addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whaling. The Pelly Amendment was introduced in 1971 to protect Atlantic salmon from possible extinction caused by overfishing in disregard of established salmon quotas. Under the International Convention for the Northwest Atlantic Fisheries (ICNAF), zero harvest quotas had been established in 1969 to regulate and control high seas salmon fishing. 117 Cong. Rec. 34751 (1971) (remarks of Rep. Dingell). Denmark, Germany, and Norway, members of the ICNAF, exercised their right to file timely objections to the quotas, however, and thus were exempt from their limitations. Although respondents are correct that Congress enacted the Pelly Amendment primarily as a means to enforce those international fishing restrictions against these three countries, particularly Denmark, they fail to establish that the Amendment requires automatic certification of every nation whose fishing operations exceed international conservation quotas.

Both the Senate and House Committee Reports detail the "conservation nightmare" resulting from Denmark's failure to recognize the ICNAF quota; a position which "effectively nullified" the ban on high seas harvesting of Atlantic salmon. S. Rep. No. 92–582, pp. 4–5 (1971); H. R. Rep. No. 92–468, pp. 5–6 (1971). In addition, Danish operations were seen as leading to the "eventual destruction of this valuable sports fish," a matter of "critical concern" to both the Senate and House Committees. S. Rep. No. 92–582, at 4; H. R. Rep. No. 92–468, at 5. There is no question but that both Com-

mittees viewed Denmark's excessive fishing operations as "diminish[ing] the effectiveness" of the ICNAF quotas, and envisioned that the Secretary would certify that nation under the Pelly Amendment. The Committee Reports, however, do not support the view that the Secretary must certify every nation that exceeds every international conservation quota.[5]

The discussion on the floor of the House by Congressman Pelly and other supporters of the Amendment further demonstrates that Congress' primary concern in enacting the Pelly Amendment was to stave off the possible extermination of both the Atlantic salmon as well as the extinction of other heavily fished species, such as whales, regulated by international fishery conservation programs. 117 Cong. Rec. 34752–34754 (1971) (remarks of Reps. Pelly, Wylie, Clausen, and Hogan). The comments of Senator Stevens, acting Chairman of the reporting Senate Committee and the only

[5] The Court of Appeals relied upon the statement in S. Rep. No. 92–582 that the purpose of the Amendment was "'to prohibit the importation of fishery products from nations that do not conduct their fishing operations in a manner that is consistent with international conservation programs. It would accomplish this by providing that whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he must certify such fact to the President.'" 247 U. S. App. D. C. 309, 319, 768 F. 2d 426, 436 (1985) (emphasis omitted), quoting S. Rep. No. 92–582, at 2. This is indeed an explicit statement of purpose, but this is not the operative language in the statute chosen to effect that purpose. The section-by-section analysis contained in the same Report recites that the operative section directs the Secretary of Commerce to certify to the President the fact that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international conservation program whenever he determines the existence of such operations. *Id.*, at 5. These are not the words of a ministerial duty, but the imposition of duty to make an informed judgment. Even respondents do not contend that every merely negligent or unintentional violation must be certified. It should be noted that the statement of purpose contained in the House Report tracks the language of the operative provisions of the Amendment. H. R. Rep. No. 92–468, p. 2 (1971).

speaker on the bill during the Senate debate, were to the same effect. See *id.*, at 47054 (if countries continue indiscriminately to fish on the high seas, salmon may become extinct). Testimony given during congressional hearings on the Pelly Amendment also supports the conclusion that Congress had no intention to require the Secretary to certify every departure from the limits set by an international conservation program.[6]

Subsequent amendment of the Pelly Amendment in 1978 further demonstrates that Congress used the phrase, "diminish the effectiveness," to give the Secretary a range of certification discretion. The 1978 legislation expanded coverage of the Pelly Amendment "to authorize the President to embargo wildlife products from countries where nationals have acted in a manner which, directly or indirectly, diminishes the effectiveness of any international program for the conservation of endangered or threatened species." H. R. Rep. No. 95–1029, p. 8 (1978). This extension was premised on the success realized by the United States in using the

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[6] Representative Pelly testified at the Senate hearings that the sanctions authorized by the Amendment were to be applied "in the case of flagrant violation of any international fishery conservation program to which the United States has committed itself." Hearings on S. 1242 et al. before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce, 92d Cong., 1st Sess., 47 (1971). Similarly, Donald McKernan, Special Assistant for Fisheries and Wildlife, and Coordinator of Ocean Affairs, United States Department of State, stated:

"We do not anticipate that there would be any need to invoke the proposed legislation where conservation needs are effectively met by the agreement of all nations involved to an international conservation regime.

"However, there are some situations where one or more nations have failed to agree to a program otherwise agreed among the involved nations, or having once agreed failed to abide by the agreement.

"Under the proposed legislation, if the action of such countries diminished the effectiveness of the international fishery conservation program, consideration would need to be given to taking trade measures as necessary to support the conservation program." *Id.*, at 97.

Amendment to convince other nations to adhere to IWC quotas, thus preserving the world's whale stocks. *Id.*, at 9.

In the House Report for the 1978 amendment, the Merchant Marine and Fisheries Committee specifically addressed the "diminish the effectiveness" standard and recognized the Secretary's discretion in making the initial certification decision:

> "The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section." *Id.*, at 15.

This statement makes clear that, under the Pelly Amendment as construed by Congress, the Secretary is to exercise his judgment in determining whether a particular fishing operation "diminishes the effectiveness" of an international fishery conservation program like the IWC.[7]

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[7] The Committee also detailed two actions which "dramatically demonstrate[d] the value of the Pelly amendment to the United States in the conduct of international fishery negotiations." H. R. Rep. No. 95–1029, p. 9 (1978).

"In November, 1977, the Secretary of Commerce reported to the President that two nonmembers of the IWC—Peru and Korea—were taking whales in excess of IWC quotas. In March, 1978, the Secretary of Commerce reported to the subcommittee that although these nations are violating IWC quotas, certification under the Pelly amendment is pending a thorough documentation and substantiation of each action that may diminish the effectiveness of the IWC conservation program." *Ibid.*

The fact that the Committee approved of the Secretary's actions in not automatically certifying these nations, even though they were found to be taking whales in excess of IWC quotas, is additional evidence that the Pelly Amendment does not require the *per se* rule respondents now urge.

The Court of Appeals held that this definition applies only to the 1978 addition to the Pelly Amendment, designed to enforce the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U. S. T. 1087, T. I. A. S. No. 8249, and not to the ICRW. We are unpersuaded. Congress perceived the two Conventions as seeking the same objectives. Both programs are designed to conserve endangered or threatened species, whether it be the sperm whale or the stumptail macaque. See H. R. Rep. No. 95–1029, pp. 9–10 (1978). This explains why the House Report noted that the purpose behind the 1978 extension of the Pelly Amendment was "to expand the success the United States has achieved in the conservation of whales to the conservation of endangered and threatened species." *Id.*, at 9.

Both Conventions also operate in a similar, and often parallel, manner,[8] and nothing in the legislative history of the 1978 amendment shows that Congress intended the phrase "diminish the effectiveness" to be applied inflexibly with respect to departures from fishing quotas, but to be applied flexibly vis-à-vis departures from endangered species quotas. Without strong evidence to the contrary, we doubt that Congress intended the same phrase to have significantly different

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[8]The CITES regulates trade in endangered and threatened species through inclusion of those species in one of three Appendices. CITES, Arts. II–IV, 27 U. S. T. 1092–1097. The ICRW regulates whaling through the use of a Schedule which sets harvest limits for whale species. ICRW, Art. V, 62 Stat. 1718–1719. The CITES requires a two-thirds' majority vote to amend an Appendix to include an additional species. CITES, Art. XV, 27 U. S. T. 1110–1112. The ICRW requires a three-fourths' majority vote to amend the Schedule or to adopt regulations. ICRW, Art. III, 62 Stat. 1717. Both Conventions also contain analogous procedures for member nations to file timely objections to limitations imposed by the Convention. Compare CITES, Art. XV, 27 U. S. T. 1110–1112, with ICRW, Art. V, 62 Stat. 1719. See generally Recent Development, International Conservation—United States Enforcement of World Whaling Programs, 26 Va. J. Int'l L. 511, 531–532 (1986).

meanings in two adjoining paragraphs of the same subsection. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 488–489 (1985); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U. S. 624, 633 (1983). Congress' explanation of the scope of the Secretary's certification duty applies to both the original Pelly Amendment and the 1978 amendment: the Secretary is empowered to exercise his judgment in determining whether "the trade or taking [is] serious enough to warrant the finding that the effectiveness of the international program in question has been diminished." H. R. Rep. No. 95–1029, *supra*, at 15.

Enactment of the Packwood Amendment did not negate the Secretary's view that he is not required to certify every failure to abide by ICW's whaling limits. There were hearings on the proposal but no Committee Reports. It was enacted as a floor amendment. It is clear enough, however, that it was designed to remove executive discretion in imposing sanctions once certification had been made—as Senator Packwood put it, "to put real economic teeth into our whale conservation efforts," by requiring the Secretary of State to impose severe economic sanctions until the transgression is rectified. 125 Cong. Rec. 21742 (1979). But Congress specifically retained the identical certification standard of the Pelly Amendment, which requires a determination by the Secretary that the whaling operations at issue diminish the effectiveness of the ICRW. 16 U. S. C. § 1821(e)(2)(A)(i). See 125 Cong. Rec. 21743 (1979) (remarks of Sen. Magnuson); *id.*, at 22083 (remarks of Rep. Breaux); *id.*, at 22084 (remarks of Rep. Oberstar). We find no specific indication in this history that henceforth the certification standard would require the Secretary to certify each and every departure from ICW's whaling Schedules.[9]

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[9] Indeed, to the extent that the hearings on the Packwood Amendment are indicative of congressional intent, they support the Secretary's view of his duty and authority to certify whaling in excess of IWC limits. Hearings before the Subcommittee on Fisheries and Wildlife Conservation and

It may be that in the legislative history of these Amendments there are scattered statements hinting at the *per se* rule advocated by respondents, but read as a whole, we are quite unconvinced that this history clearly indicates, contrary to what we and the Secretary have concluded is a permissible reading of the statute, that all departures from IWC Schedules, regardless of the circumstances, call for immediate certification.[10]

V

We conclude that the Secretary's construction of the statutes neither contradicted the language of either Amendment, nor frustrated congressional intent. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S.,

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the Environment of the House Committee on Merchant Marine and Fisheries, 96 Cong., 1st Sess., 311–312, 317 (1979).

We note also that in 1984, Senator Packwood introduced a further amendment to the Packwood Amendment. This proposal required that "'[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission shall be deemed to be certified for the purposes of this [act].'" Quoted in Comment, The U. S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment, 19 Geo. Wash. J. Int'l L. & Econ. 577, 609, n. 220 (1986). Congress thus had the express opportunity to mandate that the Secretary certify any foreign nation which exceeds an IWC quota, but chose not to do so.

[10] The "diminish the effectiveness of" standard has been used in legislation other than the Pelly and Packwood Amendments. It first appeared in the 1962 amendment to the Tuna Convention Act of 1950, 64 Stat. 777, 16 U. S. C. § 951 *et seq.* It was also used in 1984 in the Eastern Pacific Tuna Licensing Act, 16 U. S. C. § 972 *et seq.* (1982 ed., Supp. III), which was enacted to implement the Eastern Pacific Ocean Tuna Fishing Agreement. Nothing has been called to our attention in the history of these Acts to indicate that this standard calls for automatic certification once the Secretary has discovered that foreign nationals are violating an international fishing convention or agreement. Indeed, to the extent they are relevant, they lend affirmative support to the position that Congress has employed the standard to vest a range of judgment in the Secretary as to whether a departure from an agreed limit diminishes the effectiveness of the international conservation effort and hence calls for certification.

at 842–843. In enacting these Amendments, Congress' primary goal was to protect and conserve whales and other endangered species. The Secretary furthered this objective by entering into the agreement with Japan, calling for that nation's acceptance of the worldwide moratorium on commercial whaling and the withdrawal of its objection to the IWC zero sperm whale quota, in exchange for a transition period of limited additional whaling. Given the lack of any express direction to the Secretary that he must certify a nation whose whale harvest exceeds an IWC quota, the Secretary reasonably could conclude, as he has, that, "a cessation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development." Affidavit of Malcolm Baldrige, Brief for Petitioners in No. 85–955, Addendum III, pp. 6A–7A.

We conclude, therefore, that the Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments. Congress granted the Secretary the authority to determine whether a foreign nation's whaling in excess of quotas diminishes the effectiveness of the IWC, and we find no reason to impose a mandatory obligation upon the Secretary to certify that every quota violation necessarily fails that standard. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join, dissenting.

Since 1971, Congress has sought to lead the world, through the repeated exercise of its power over foreign commerce, in preventing the extermination of whales and other threatened species of marine animals. I deeply regret that it will now

have to act again before the Executive Branch will finally be compelled to obey the law. I believe that the Court has misunderstood the question posed by the case before us, and has reached an erroneous conclusion on a matter of intense worldwide concern. I therefore dissent.

Congress began its efforts with the Pelly Amendment, which directs that "[w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President." 22 U. S. C. § 1978(a)(1). That Amendment, although apparently mandatory in its certification scheme, did not provide for a mandatory response from the President once the certification was made. Rather, the President was empowered, in his discretion, to impose sanctions on the certified nations or not to act at all. § 1978(a)(4).

This executive latitude in enforcement proved unsatisfactory. Between 1971 and 1978, every time that a nation exceeded international whaling quotas—on five occasions—the Secretary of Commerce duly certified to the President that the trespassing nation had exceeded whaling quotas set by the International Whaling Commission and had thus diminished the effectiveness of the conservation program. See App. 168, 177.* Although the offending nations had promised immediate compliance, the Secretary apparently believed that he was obliged to certify the past violations. Yet on the basis of those assurances, the President each time exercised his option under the Pelly Amendment to impose no sanctions on the violators. *Id.*, at 193, 195.

Unhappy with the President's failure to sanction clear violations of international whaling agreements, Congress re-

*Citations to "App." refer to the joint appendix filed by the parties in the Court of Appeals; the Solicitor General sought and was granted leave not to file a joint appendix in this Court. 475 U. S. 1007 (1986).

sponded in 1979 with the Packwood Amendment. That Amendment provides that if the Secretary of Commerce certifies that a country is diminishing the effectiveness of the International Convention for the Regulation of Whaling, the Secretary of State must reduce the fishing allocation of the offending nation by at least 50 percent. 16 U. S. C. § 1821(e)(2). It also provides certain time limits within which the Executive Branch must act in imposing the mandatory sanctions. The automatic imposition of sanctions, it seemed, would improve the effectiveness of the Pelly Amendment by providing a definite consequence for any nation disregarding whaling limits. See 125 Cong. Rec. 22084 (1979) (statement of Rep. Oberstar).

In 1984, the Secretary of Commerce for the first time declined to certify a case of intentional whaling in excess of established quotas. Rather than calling into play the Packwood Amendment's mandatory sanctions by certifying to the President Japan's persistence in conducting whaling operations, Secretary Baldrige set about to negotiate with Japan, using his power of certification under domestic law to obtain certain promises of reduced violations in future years. In the resulting compromise, the Secretary agreed not to certify Japan, provided that Japan would promise to reduce its whaling until 1988 and then withdraw its objection to the international whaling quotas. Arguing that the Secretary had no discretion to withhold certification, respondents sought review of the Secretary's action in federal court. Both the District Court, 604 F. Supp. 1398 (DC 1985), and the Court of Appeals, 247 U. S. App. D. C. 309, 768 F. 2d 426 (1985), found that Congress had not empowered the Secretary to decline to certify a clear violation of International Whaling Commission (IWC) quotas, and ordered the Secretary to make the statutory certification. This Court now renders illusory the mandatory language of the statutory scheme, and finds permissible exactly the result that Congress sought to

prevent in the Packwood Amendment: executive compromise of a national policy of whale conservation.

I

The Court devotes its opinion to the question whether the language of the Pelly or the Packwood Amendment leaves room for discretion in the Secretary to determine that a violation of the whaling quota need not be certified. Although framed in the same way by the Court of Appeals and by the parties before this Court, that issue is not the most direct approach to resolving the dispute before us. Indeed, by focusing entirely on this question, the Court fails to take into account the most significant aspect of these cases: that even the Secretary himself has not taken the position that Japan's past conduct is not the type of activity that diminishes the effectiveness of the whale conservation program, requiring his certification under the Pelly Amendment. In the face of an IWC determination that only a zero quota will protect the species, never has the Secretary concluded, nor could he conclude, that the intentional taking of large numbers of sperm whales does *not* diminish the effectiveness of the IWC program. Indeed, the Secretary has concluded just the opposite. Just four months before the execution of the bilateral agreement that spawned this litigation, Senator Packwood wrote to the Secretary as follows:

> "It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which continues commercial whaling after the IWC moratorium takes effect would definitely be certified. I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.
>
> "What I am asking, Mac, is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under

> Packwood-Magnuson." App. 197 (letter from Sen. Packwood to Secretary Baldrige, June 28, 1984).

The Secretary expressed his agreement:

> "You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC." *Id.*, at 198 (letter from Secretary Baldrige to Sen. Packwood, July 24, 1984).

It has not been disputed that Japan's whaling activities have been just as described in that correspondence. The Secretary's expressed view is borne out by his apparent belief, four months later, that he held sufficient power under domestic law to threaten certification in an effort to extract promises from Japan regarding its future violations. Presumably he would not threaten such certification without believing that the factual predicate for that action existed.

I cannot but conclude that the Secretary has determined in these cases, *not* that Japan's past violations are so negligible that they should not be understood to trigger the certification obligation, but that he would prefer to impose a *penalty* different from that which Congress prescribed in the Packwood Amendment. Significantly, the Secretary argues here that the agreement he negotiated with Japan will—in the future—protect the whaling ban more effectively than imposing sanctions now. Brief for Federal Petitioners 43. But the regulation of future conduct is irrelevant to the certification scheme, which affects future violations only by punishing past ones. The Secretary's manipulation of the certification process to affect punishment is thus an attempt to evade the statutory sanctions rather than a genuine judgment that the effectiveness of the quota has not been diminished.

The Secretary would rewrite the law. Congress removed from the Executive Branch any power over penalties when it passed the Packwood Amendment. Indeed, the Secretary's compromise in these cases is precisely the type of action, previously taken by the President, that led Congress to enact the mandatory sanctions of the Packwood Amendment: in 1978, five nations had been found to have exceeded quotas, but the President had withheld sanctions upon the promise of future compliance with international norms. Here, the future "compliance" is even less satisfactory than that exacted in the past instances: instead of immediate compliance, the Secretary has settled for continued violations until 1988. And in 1988 all that Japan has promised is to withdraw its formal objection to the IWC moratorium; I see no indication that Japan has pledged to "cease commercial whaling by 1988," *ante*, at 228, or to "dismantle its commercial whaling industry." Brief for Federal Petitioners 43. The important question here, however, is not whether the Secretary's choice of sanctions was wise or effective, but whether it was authorized. The Court does not deny that Congress intended the consequences of actions diminishing the effectiveness of a whaling ban to be governed exclusively by the sanctions enumerated in the Packwood Amendment, with the optional addition of those provided in the Pelly Amendment. Thus, when the Secretary's action here, well intentioned or no, is seen for what it really is—a substitute of his judgment for Congress' on the issue of how best to respond to a foreign nation's intentional past violation of quotas—there can be no question but that the Secretary has flouted the express will of Congress and exceeded his own authority. On that basis alone, I would affirm the judgment of the Court of Appeals.

II

A quite separate concern is raised by the majority's treatment of the issue that it does address. The Court peremptorily rejects the Court of Appeals' conclusion that Congress in-

tended the Pelly Amendment to impose a nondiscretionary duty on the Secretary of Commerce to certify whenever a nation has exceeded whaling quotas. Asserting that "we find nothing in the legislative history of either Amendment that addresses the nature of the Secretary's duty and requires him to certify every departure from the IWC's scheduled limits on whaling," *ante*, at 234, the Court has simply ignored the many specific citations put forth by respondents and the Court of Appeals to just such authority, and has offered nothing to contradict them.

The Court of Appeals devoted voluminous portions of its opinion to excerpts from legislative history establishing that Congress expected that substantial violations of whaling quotas would always result in certification. Illustrative of these are the following exchanges between Members of Congress and Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, discussing the meaning of the Pelly Amendment in preparation for the 1979 legislation:

> "Mr. McCLOSKEY. . . . Now, it seems to me the discretion then is left with the President and the Secretary of the Treasury, not with the Secretary of Commerce. If you have determined, as you in your testimony indicate, that Japan is importing non-IWC whale products, *I do not see where you have any discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change.* . . . [T]he certification is a mandatory act under the law. It is not a discretionary act.
>
> "Mr. FRANK. That is correct.
>
> . . . . .
>
> "Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing. But after he certi-

fies that there is a violation, and there is discretion on the part of the President to impose any import quotas, or the elimination of any imported fish products from that country and, the second part is the optional authority that the President has.

"Mr. FRANK. That is correct. The first one is mandatory on the Secretary of Commerce. The second is discretionary on the part of the President." Hearings on Whaling Policy and International Whaling Commission Oversight before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess., 301, 322–323 (1979) (emphasis added).

Representative Breaux summarized the administration's representations to Congress:

"Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the importation of whale meat [which involve discretion on the part of the Secretary]." *Id.*, at 359 (remarks of Rep. Breaux).

This and other legislative history relied on by the Court of Appeals demonstrate that Congress believed that, under the Pelly Amendment, when a nation clearly violated IWC quotas, the only discretion in the Executive Branch lay in the choice of sanction. The Packwood Amendment removed that discretion. The majority speculates that "it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits," *ante*, at 232. However, because everyone in the Congress and the Executive Branch appeared to share an understanding that quota violations would always be considered to diminish the

effectiveness of a conservation program, in accord with the consistent interpretations of past Secretaries of Commerce, there was no need to amend the statute. It was only when Secretary Baldrige became dissatisfied with the Packwood Amendment sanctions that the certification obligation was ever questioned.

The sole support that the Court offers for its position is the unobjectionable proposition, in a House Report, that "'[a]n isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.'" *Ante*, at 237 (quoting H. R. Rep. No. 95–1029, p. 15 (1978)). Petitioners indeed have a respectable argument that the Secretary was left with some inherent discretion to ignore violations of a *de minimis* nature. Such an argument, however, has no relevance to these cases. It is uncontested here that Japan's taking of whales has been flagrant, consistent, and substantial. Such gross disregard for international norms set for the benefit of the entire world represents the core of what Congress set about to punish and to deter with the weapon of reduced fishing rights in United States waters. The Court's decision today leaves Congress no closer to achieving that goal than it was in 1971, before either Amendment was passed.

III

I would affirm the judgment below on the ground that the Secretary has exceeded his authority by using his power of certification, not as a means for identifying serious whaling violations, but as a means for evading the constraints of the Packwood Amendment. Even focusing, as the Court does, upon the distinct question whether the statute prevents the Secretary from determining that the effectiveness of a conservation program is not diminished by a substantial transgression of whaling quotas, I find the Court's conclusion utterly unsupported. I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress'

pointed response to a question long pondered: "whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff." H. Melville, Moby Dick 436 (Signet ed. 1961).

ACOSTA *v.* LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL.

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

No. 85-1500. Decided June 30, 1986

After the District Court granted respondents' motion to dismiss petitioner's civil rights suit against respondents, and after petitioner abandoned his appeal, the District Court granted respondents' motion for an award of attorney's fees on the ground that petitioner had filed his action in bad faith. Petitioner then filed a motion, under Federal Rule of Civil Procedure 59(e), to alter or amend the judgment. After a hearing, the court denied the motion from the bench, and petitioner filed a notice of appeal that same afternoon. However, the District Court's order denying the Rule 59(e) motion was not entered on the docket until two days later, and petitioner did not file a new notice of appeal following the docket entry. Dismissing the appeal, the Court of Appeals ruled that the notice of appeal was premature under Federal Rule of Appellate Procedure 4(a)(4), which provides that, with regard to certain motions in the district court, including motions under Rule 59 to alter or amend the judgment, the time for appeal shall run from "the entry of the order . . . granting or denying" any such motion; that a notice of appeal filed before "the disposition" of any such motion shall have no effect; and that "[a] new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." The court concluded that petitioner's notice of appeal must be treated as a nullity, and thus the court had no jurisdiction over the appeal.

Held: The Court of Appeals' interpretation of Rule 4(a)(4) was correct. Such interpretation comports with the Rule's plain wording. Moreover, the plain import of Rule 4(a)(2)—which provides that, "*[e]xcept as provided in (a)(4) of this Rule 4*, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof" (emphasis added)—is that, with respect to the particular motions to which it applies, Rule 4(a)(4) constitutes an exception to the general rule that a notice of appeal filed after announcement of an order but before its entry in the docket will be deemed timely filed. Thus, a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59(e) motion or any of the other motions to which Rule 4(a)(4) applies.

Certiorari granted; 776 F. 2d 1046, affirmed.

PER CURIAM.

In 1981, petitioner filed a civil rights action against respondents. Respondents moved to dismiss, and the District Court dismissed the action in its entirety. Petitioner filed, and then abandoned, an appeal. Respondents then moved in the District Court for an award of attorney's fees on the ground that petitioner had filed his action in bad faith. The court granted the motion and awarded respondents fees amounting to some $19,000. Petitioner filed a timely motion to alter or amend the judgment, as authorized by Federal Rule of Civil Procedure 59(e). The District Court held a hearing on the motion and denied it from the bench. Petitioner filed a notice of appeal that same afternoon. Not until two days later, however, was the order denying the motion to alter or amend the judgment entered on the docket. Petitioner did not file a new notice of appeal following the docket entry.

The United States Court of Appeals for the Fifth Circuit dismissed petitioner's appeal, ruling that the notice of appeal was prematurely filed. 776 F. 2d 1046 (1985). The Court of Appeals relied on Federal Rule of Appellate Procedure 4(a)(4), which, in pertinent part, provides:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any . . . such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

The court concluded that because petitioner filed his notice of appeal before the order disposing of the Rule 59 motion, Rule

4(a)(4) required it to treat the notice as a "nullity" and thus deprived the court of jurisdiction over the appeal.

The Fifth Circuit's interpretation of Rule 4(a)(4) is directly contrary to that adopted by the Court of Appeals for the Ninth Circuit in *Calhoun* v. *United States*, 647 F. 2d 6 (1981). There, the court held that the Rule's command that "[a] notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect," did not render a notice of appeal filed after the announcement of the decision on the motion but before the entry of the order a nullity. Rather, the court concluded that the term "disposition" as used in the rule was synonymous with "announcement"; accordingly, a notice of appeal could be given effect as long as it was filed after the trial court's announcement of its ruling. The Ninth Circuit concluded that this interpretation of the Rule was justified by "the policy of 'exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon.'" *Id.*, at 10 (quoting *Williams* v. *Town of Okoboji*, 599 F. 2d 238, 239–240 (CA8 1979)). The court reasoned that if a notice filed before entry of the order were deemed defective, "valuable rights [might] be lost because an important, but ministerial, act was not performed when expected." 647 F. 2d, at 11.

Because such a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court, we grant the petition for a writ of certiorari.* Finding that the issue is not one that requires plenary consideration, we now affirm the judgment of the Court of Appeals.

Unlike the decision of the Ninth Circuit in *Calhoun*, the decision below comports with the plain wording of the Rules. Rule 4(a)(4) specifically states that a notice of appeal, to be effective, must be "filed within the prescribed time measured from the entry of the order disposing of the motion as pro-

*Accordingly, respondents' motion for an award of damages on the ground that the petition is frivolous is denied.

vided above." Further, Rule 4(a)(2) provides that, "*[e]xcept as provided in (a)(4) of this Rule 4*, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof" (emphasis added). The plain import of this language is that with respect to the particular motions to which it applies, Rule 4(a)(4) constitutes an exception to the general rule that a notice of appeal filed after announcement of an order but before its entry in the docket will be deemed timely filed. The Ninth Circuit's *Calhoun* rule essentially reads the first clause of subdivision (a)(2) out of Rule 4 by holding that Rule 4(a)(4) does *not* constitute such an exception. But if subdivision (a)(2) is taken seriously, it is untenable to read subdivision (a)(4) except as the Fifth Circuit has read it in this case: that is, as establishing the rule that a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BRENNAN would grant the petition for certiorari and set the case for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Allen* v. *Hardy*, *post*, p. 255; *City of Los Angeles* v. *Heller*, 475 U. S. 796 (1986); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).

ALLEN *v.* HARDY ET AL.

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

No. 85–6593. Decided June 30, 1986

At his Illinois state-court trial, which resulted in murder convictions, petitioner, a black man, moved unsuccessfully to discharge the jury on the ground that the prosecutor's use of peremptory challenges to strike black and Hispanic veniremen violated petitioner's right to an impartial jury selected from a cross section of the community. Affirming the convictions, the Illinois Appellate Court upheld the trial judge's refusal to discharge the jury, since the record did not establish systematic exclusion of minorities by prosecutors in the jurisdiction as required by *Swain* v. *Alabama*, 380 U. S. 202. Petitioner then filed federal habeas corpus proceedings, renewing his argument concerning the State's use of peremptory challenges. The District Court denied relief, and both the District Court and the Court of Appeals denied petitioner's request for a certificate of probable cause to appeal. In his petition for certiorari, petitioner argued that the Court of Appeals' refusal to issue a certificate of probable cause was erroneous in view of the fact that *Batson* v. *Kentucky*, 476 U. S. 79, was pending before this Court at the time of the Court of Appeals' decision, and that the *Batson* rule should be available to him as a ground for relief on remand. *Batson* overruled the portion of *Swain* which held that, although the use of peremptory challenges to strike black jurors on account of race violates the Equal Protection Clause, a defendant cannot establish such a violation solely on proof of the prosecutor's action at his own trial.

Held: The *Batson* rule should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced. A decision announcing a new constitutional rule of criminal procedure is almost automatically nonretroactive where the decision explicitly overrules past precedent. A traditional factor for consideration is the purpose to be served by the new rule, with retroactive effect being appropriate where the rule is designed to enhance the accuracy of criminal trials. The *Batson* rule may have some bearing on the truthfinding function of a criminal trial, but it also serves the purposes of ensuring that the States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race, and of strengthening public confidence in the administration of justice. The rule in *Batson* was designed to serve multiple ends, and it does not have such a funda-

mental impact on the integrity of factfinding as to compel retroactive application. Moreover, other traditional factors concerning law enforcement authorities' reliance on the old *(Swain)* rule and the effect of retroactive application of the new *(Batson)* rule on the administration of justice weigh heavily in favor of nonretroactive effect.

Certiorari granted; affirmed.

PER CURIAM.

In 1978, petitioner Earl Allen, a black man, was indicted for murdering his girlfriend and her brother. During selection of the petit jurors at petitioner's trial, the prosecutor exercised 9 of the State's 17 peremptory challenges to strike 7 black and 2 Hispanic veniremen. Defense counsel moved to discharge the jury on the ground that the "'State's use of peremptory challenges undercut [petitioner's] right to an impartial jury selected from a cross-section of the community by systematically excluding minorities from the petit jury.'" *People* v. *Allen*, 96 Ill. App. 3d 871, 875, 422 N. E. 2d 100, 104 (1981). The trial judge denied the motion. The jury convicted petitioner on both counts, and the judge sentenced him to two concurrent prison terms of from 100 to 300 years.

On appeal, petitioner repeated his argument concerning the State's exercise of peremptory challenges. Relying on *Swain* v. *Alabama*, 380 U. S. 202 (1965), and on Illinois case law decided under *Swain*, the Illinois Appellate Court rejected the argument. The court reasoned that in the absence of a showing that prosecutors in the jurisdiction systematically were using their challenges to strike members of a particular racial group, "a prosecutor's motives may not be inquired into when he excludes members of that group from sitting on a particular case by the use of peremptory challenges." 96 Ill. App. 3d, at 875, 422 N. E. 2d, at 104. The record in this case did not establish systematic exclusion as required by *Swain*. 96 Ill. App. 3d, at 876, 422 N. E. 2d, at 104. The court therefore affirmed petitioner's convictions. *Id.*, at 880, 422 N. E. 2d, at 107.

Petitioner then filed a petition for federal habeas corpus relief in the District Court for the Northern District of Illinois, on which he renewed his argument concerning the State's use of peremptory challenges. Construing this argument as alleging only that prosecutors in the jurisdiction systematically excluded minorities from juries, the District Court denied petitioner's motion for discovery to support the claim, and denied relief. *United States ex rel. Allen* v. *Hardy*, 577 F. Supp. 984 (1984). Petitioner's failure at trial "to make even an offer of proof" to satisfy the evidentiary standard of *Swain* constituted a procedural default for which petitioner had offered no excuse. *Id.*, at 986; see *United States ex rel. Allen* v. *Hardy*, 583 F. Supp. 562 (1984). In a subsequent opinion, the District Court also considered and rejected petitioner's contention that the State's exercise of its peremptory challenges at his trial violated the Sixth Amendment. *United States ex rel. Allen* v. *Hardy*, 586 F. Supp. 103, 104–106 (1984). Moreover, noting that the Court of Appeals for the Seventh Circuit had "twice within the past 60 days reconfirmed the continuing validity of *Swain*," the decision on which the orders in this case rested, the District Court declined to issue a certificate of probable cause.

Petitioner filed a notice of appeal, which the Court of Appeals for the Seventh Circuit construed as an application for a certificate of probable cause to appeal. Finding that petitioner failed to make a "substantial showing of the denial of a federal right" or that the questions he sought to raise "deserve[d] further proceedings," the court denied the request for a certificate of probable cause.

In his petition for certiorari, petitioner argues that the Court of Appeals' refusal to issue a certificate of probable cause was erroneous in view of the fact that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), was pending before us at the time of the Court of Appeals' decision. The thrust of petitioner's argument is that the rule in *Batson* should be available to him as a ground for relief on remand. We conclude that our deci-

sion in *Batson* should not be applied retroactively on collateral review of convictions that became final before our opinion was announced.[1] Accordingly, we grant petitioner's motion for leave to proceed *in forma pauperis*, grant the petition for a writ of certiorari, and affirm the judgment of the Court of Appeals.

In deciding the extent to which a decision announcing a new constitutional rule of criminal procedure should be given retroactive effect, the Court traditionally has weighed three factors. They are "'(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" *Solem* v. *Stumes*, 465 U. S. 638, 643 (1984) (quoting *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967)); see *Linkletter* v. *Walker*, 381 U. S. 618, 636 (1965). While a decision on retroactivity requires careful consideration of all three criteria, the Court has held that a decision announcing a new standard "is almost automatically nonretroactive" where the decision "has explicitly overruled past precedent." *Solem* v. *Stumes*, *supra*, at 646, 647. The rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent. In *Swain* v. *Alabama*, the Court held that, although the use of peremptory challenges to strike black jurors on account of race violated the Equal Protection Clause, a defendant could not establish such a violation solely on proof of the prosecutor's action at his own trial. 380 U. S., at 220–226. *Batson* overruled that portion of *Swain*, changing the standard for proving unconstitutional abuse of pe-

[1] "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in" *Batson* v. *Kentucky*. *Linkletter* v. *Walker*, 381 U. S. 618, 622, n. 5 (1965). We express no view on the question whether our decision in *Batson* should be applied to cases that were pending on direct appeal at the time our decision was announced. See *Griffith* v. *Kentucky*, No. 85–5221 (cert. granted, 476 U. S. 1157 (1986)), and *Brown* v. *United States*, No. 85–5731 (cert. granted, 476 U. S. 1157 (1986)).

remptory challenges. Against that background, we consider whether the standard announced in *Batson* should be available on habeas review of petitioner's murder convictions.

The first factor concerns the purpose to be served by the new rule. Retroactive effect is "appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials," *Solem* v. *Stumes*, 465 U. S., at 643, but the fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity. *Id.*, at 643–645. Instead, the purpose to be served by the new standard weighs in favor of retroactivity where the standard "goes to the heart of the truthfinding function." *Id.*, at 645. By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed "to serve multiple ends," only the first of which may have some impact on truthfinding. See *Brown* v. *Louisiana*, 447 U. S. 323, 329 (1980); see also *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 414 (1966). Significantly, the new rule joins other procedures that protect a defendant's interest in a neutral factfinder.[2] Those other mechanisms existed prior to our decision in *Batson*, creating a high probability that the individual jurors seated in a particular case were free from bias. Accordingly, we cannot say that the new rule has such a fundamental impact on the integrity of factfinding as to compel retroactive application.

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[2] *Voir dire* examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause. Moreover, the jury charge typically includes instructions emphasizing that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice.

Moreover, the factors concerning reliance on the old rule and the effect of retroactive application on the administration of justice weigh heavily in favor of nonretroactive effect. As noted above, *Batson* not only overruled the evidentiary standard of *Swain*, it also announced a new standard that significantly changes the burden of proof imposed on both defendant and prosecutor. There is no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain*.[3] Indeed, the decisions of the Illinois Appellate Court affirming petitioner's convictions and of the District Court denying habeas corpus relief clearly illustrate the reliance lower courts placed on *Swain*. Under these circumstances, the reliance interest of law enforcement officials is "compelling" and supports a decision that the new rule should not be retroactive. *Solem* v. *Stumes*, *supra*, at 650.

Similarly, retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice. Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercise of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be required to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in virtually every case since the prosecutor, relying on *Swain*, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with retrial "hampered by problems of lost evidence, faulty memory, and missing witnesses." *Solem* v.

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[3] The substantial reliance by lower courts on the standard in *Swain* has been fully documented elsewhere. See *Batson* v. *Kentucky*, 476 U. S. 79, 82, n. 1 (1986); *McCray* v. *Abrams*, 750 F. 2d 1113, 1120, n. 2 (CA2 1984), vacated and remanded, *post*, p. 1001.

Stumes, *supra*, at 650; see also *Linkletter* v. *Walker*, 381 U. S., at 637.

Our weighing of the pertinent criteria compels the conclusion that the rule in *Batson* should not be available to petitioner on federal habeas corpus review of his convictions. We therefore affirm the judgment of the Court of Appeals.[4]

Affirmed.

JUSTICE BLACKMUN would grant the petition for a writ of certiorari and set the case for oral argument.

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins, dissenting.

On all too many occasions in recent years, I have felt compelled to express my dissatisfaction with this Court's readiness to dispose summarily of petitions for certiorari on the merits without affording the parties prior notice or an opportunity to file briefs. See, *e. g.*, *Los Angeles* v. *Heller*, 475 U. S. 796, 800 (1986) (MARSHALL, J., dissenting); *Cuyahoga Valley R. Co.* v. *Transportation Union*, 474 U. S. 3, 8 (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting). "[B]y deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of render-

[4] In his petition for certiorari, petitioner also argues that the District Court erroneously denied him discovery on his claim that prosecutors systematically had excluded minorities from petit juries in the jurisdiction. In effect, the District Court held that, by making no offer of proof on this claim, petitioner's bare objection failed to preserve the claim for review. Since petitioner points to no Illinois authority casting doubt on the District Court's conclusion that, at the least, an offer of proof was necessary to preserve the issue, we have no reason to question the District Court's conclusion that the claim was waived. Similarly, the District Court properly determined that petitioner was required to, and did not, establish cause and prejudice excusing his default. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

ing erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances." *Harris* v. *Rivera*, 454 U. S. 339, 349 (1981) (MARSHALL, J., dissenting).

The circumstances are even less propitious in this case. Generally when this Court summarily disposes of a petition for certiorari, we have at least benefited from the tendency of both petitioners and respondents to focus excessively on the merits of the question they ask the Court to consider. Here, because the petition was filed prior to our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), petitioner never had the opportunity to address whether that decision should be applied retroactively to those seeking collateral review of their convictions, and respondent chose to devote but a single sentence to the issue. In addition, that issue has not been addressed by lower courts in this case or any other. See *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 271 (1982) (BLACKMUN, J., dissenting). We write on a clean slate in this case—a position we ordinarily take great pains to avoid.

I believe that the Court's opinion today reflects the unseemly haste with which the important question presented here has been resolved. Like the Court, *ante* at 258, I believe that the impact of a "new constitutional rule" on the accuracy of a trial should be a critical concern in any inquiry into whether that rule should be applied retroactively to cases pending on collateral review; indeed, I think that factor should generally be decisive. See *Williams* v. *United States*, 401 U. S. 646, 666 (1971) (MARSHALL, J., concurring in part and dissenting in part). However, I am not at all persuaded by the majority's conclusion that the rule announced in *Batson* lacks "such a fundamental impact on the integrity of factfinding as to compel retroactive application," *ante*, at 259. The Court is surely correct to note that the rule "serves other values" besides accurate factfinding.

Ibid. "The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces 'injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). A rule that targets such discriminatory practices will thus provide redress to citizens unconstitutionally struck from jury panels. That criminal defendants will not be the only beneficiaries of the rule, however, should hardly diminish our assessment of the rule's impact upon the ability of defendants to receive a fair and accurate trial. Moreover, I do not share the majority's confidence that "other procedures" in place prior to our decision in *Batson* "creat[e] a high probability that the individual jurors seated in a particular case were free from bias," *ante*, at 259. When the prosecution unconstitutionally uses its peremptory strikes to remove blacks and Hispanics from the jury, the threat to the truthfinding process is not cured by measures designed merely to ensure that white jurors permitted to serve satisfy the legal standard for impartiality.

> "When any large and identifiable segment of the community is excluded form jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, 407 U. S. 493, 503–504 (1972) (opinion of MARSHALL, J.).

Certainly, one need not assume that the exclusion of *any* distinctive group from the venire will affect the integrity of the factfinding process to believe, as I do, that where the prosecution uses its peremptory challenges to cull black and His-

panic jurors from the jury empaneled for the trial of a black defendant, the threat to the accuracy of the trial is significant and unacceptable. See *Batson*, *supra*, at 87, n. 8 ("For a jury to perform its intended function as a check on official power, it must be a body drawn from the community").

The other considerations that the Court finds to counsel against retroactivity here are similarly unpersuasive. While *Batson* overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965), by changing the burden of proof imposed upon both defendants and prosecutors, *ante*, at 260, the Court seriously overestimates the "reliance interest of law enforcement officials" in the old regime. This is not a case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on account of their race violated the Equal Protection Clause. All *Batson* did was give defendants a means of enforcing this prohibition. Even if the Court is willing to consider prosecutors to have relied on the effective unenforceability of the pronouncements in *Swain*, it should at least give some thought as to whether that reliance should be deemed legitimate.

Finally, the Court observes that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice." *Ante*, at 260. Perhaps this is true; perhaps it is not. Certainly, the papers before us in this case allow us no basis for making any estimate of how many defendants pursuing federal habeas relief have preserved a *Batson* claim in the state courts. In this inquiry, perhaps more than in any other aspect of the case, the need for further briefing, and perhaps the participation of interested *amici*, is compelling, and the majority's readiness to act on its own uninformed assumptions, disturbing.

I would grant the petition for certiorari and set the case for briefing on the merits and oral argument next Term.

PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

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

No. 85-499. Argued April 22, 1986—Decided July 1, 1986

Federal school land grants to Mississippi in the early 19th century did not apply to lands in northern Mississippi that were held by the Chickasaw Indian Nation, an area that came to be the northern 23 counties in the State. The Chickasaws thereafter ceded this area to the United States by a treaty under which the lands were sold, but no lands for public schools (Sixteenth Section lands) were reserved from sale. Congress then provided for the reservation of lands in lieu (Lieu Lands) of Sixteenth Section lands not reserved in the Chickasaw Cession and for vesting of the title to the Lieu Lands in the State for the use of schools within the Cession. These Lieu Lands were given to the State. The state legislature, however, sold the Chickasaw Cession Lieu Lands and invested the proceeds in loans to railroads that were later destroyed in the Civil War and never replaced. Under a current Mississippi statute, remaining Sixteenth Section and Lieu Lands "constitute property held in trust for the benefit of the public schools." Another state statute provides that all funds derived from Sixteenth Section or Lieu Lands shall be credited to the school districts of the township in which such Sixteenth Section lands are located or to which any Lieu Lands belong and shall not be expended except for the education of children of the school district to which the lands belong. Consequently, all proceeds from Sixteenth Section and Lieu Lands are allocated directly to the township in which the lands are located or to which the lands apply. With respect to the Chickasaw Cession counties, to which no lands now belong, the state legislature has paid "interest" on the lost principal acquired from the sale of those lands in the form of annual appropriations to the Chickasaw Cession schools. This dual treatment has resulted in a disparity in the level of school funds from the Sixteenth Section lands that are available to the Chickasaw Cession schools as compared to the schools in the rest of the State, the average Sixteenth Section income per pupil in the latter schools being much greater than the average income per pupil in the former schools. Petitioner local school officials and schoolchildren from the Chickasaw Cession filed suit in Federal District Court against respondent state officials, challenging the disparity in Sixteenth Section funds

and alleging (1) that the sale of the Chickasaw Cession school lands and the unwise investment of the proceeds had abrogated the State's trust obligation to hold those lands for the benefit of Chickasaw Cession schoolchildren in perpetuity and (2) that the disparity deprived those schoolchildren of a minimally adequate level of education and of the equal protection of the laws. Declaratory and other relief was sought. The District Court dismissed the complaint, holding the claims barred by, *inter alia*, the Eleventh Amendment. The Court of Appeals affirmed, holding that although the equal protection claim asserted a current ongoing and disparate distribution of state funds for the support of local schools, the remedy for which would not be barred by the Eleventh Amendment, dismissal of the complaint was proper since such differential funding was not unconstitutional under *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1.

Held:

1. Petitioners' trust claims are barred by the Eleventh Amendment, even if petitioners' characterization of the legal wrong as being a breach of a continuing obligation to comply with the trust obligations is accepted. There is no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by petitioners. *Edelman* v. *Jordan*, 415 U. S. 651. In both cases, the trustee is required, because of the past loss of the trust corpus, to use its own resources to take the place of the corpus or the lost income from the corpus. Thus, petitioners' trust claim, like the claim rejected in *Edelman*, may not be sustained. Pp. 279–281.

2. Petitioners' equal protection claim is not barred by the Eleventh Amendment. The alleged ongoing constitutional violation—the State's unequal distribution of the benefits of school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Ex parte Young*, 209 U. S. 123. The essence of the equal protection claim is the present disparity in the distribution of the benefits of state-held assets and not the State's past actions. Pp. 281–282.

3. The assertion in the complaint that petitioners are being deprived of a minimally adequate education is a legal conclusion rather than a factual allegation that must be accepted as true. Consequently, focusing only on the funding disparities properly pleaded, the Court of Appeals properly determined that *Rodriguez* dictates the applicable standard of review: The alleged differential treatment violates equal protection only if not rationally related to a legitimate state interest. The Court of Appeals incorrectly determined, however, that *Rodriguez* controlled this case. *Rodriguez* did not purport to validate all funding variations that might result from a State's public school funding decisions but held merely that the variations that resulted from allowing local control over

local property tax funding of the public schools were constitutionally permissible in that case. This case is different from *Rodriguez* because here the differential financing is attributable to a state decision to divide state resources unequally among school districts. Nevertheless, the question remains whether the variations in the benefits received by school districts from Sixteenth Section or Lieu Lands are, on the allegations in the complaint and as a matter of law, rationally related to a legitimate state interest, and this question should be resolved by the Court of Appeals on remand. A crucial consideration in resolving this question is whether federal law requires the State to allocate the economic benefits of school lands to schools in the townships in which those lands are located. If, as a matter of federal law, the State has no choice in the matter, whether the complaint states an equal protection claim depends on whether the federal policy is itself violative of the Equal Protection Clause. If it is, the State may be enjoined from implementing such policy. But if the federal law is valid and the State is bound by it, then it provides a rational reason for the funding disparity. Pp. 283–292.

756 F. 2d 1087, affirmed in part, vacated in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which O'CONNOR, J., joined; in Parts I and III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined; and in Part II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 292. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 293. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 295.

T. H. Freeland III argued the cause for petitioners. With him on the briefs were *T. H. Freeland IV* and *Orma R. Smith, Jr.*

R. Lloyd Arnold, Assistant Attorney General of Mississippi, argued the cause for respondents. With him on the brief for respondents Allain et al. were *Edwin Lloyd Pittman*, Attorney General, *pro se*, and *Robert E. Sanders*, Special Assistant Attorney General. *Constance Slaughter-Harvey* filed a brief for respondents Molpus et al.

JUSTICE WHITE delivered the opinion of the Court.

In this case, we consider the claims of school officials and schoolchildren in 23 northern Mississippi counties that they

are being unlawfully denied the economic benefits of public school lands granted by the United States to the State of Mississippi well over 100 years ago. Specifically, we must determine to what extent these claims are barred by the Eleventh Amendment and, with respect to those claims that are not barred, if any, whether the complaint is sufficient to withstand a motion to dismiss for failure to state a claim.

I

The history of public school lands in the United States stretches back over 200 years.[1] Even before the ratification of the Constitution, the Congress of the Confederation initiated a practice with regard to the Northwest Territory[2] which was followed with most other public lands that eventually became States and were admitted to the Union. In particular, the Land Ordinance of 1785, which provided for the survey and sale of the Northwest Territory, "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . ." 1 Laws of the United States 565 (1815).[3] In 1802, when the eastern portion of the

[1] Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record, such as documentation of the history of the Mississippi and other school lands grants. The historical facts recited here comprise in large part the factual allegations of the complaint and are not disputed by the parties; the parties disagree only on the legal significance of these facts.

[2] The Northwest Territory, obtained by the United States by virtue of cessions of western land claims from the original 13 States, included the land south of Canada, north of the Ohio River, east of the Mississippi River, and west of the original States. P. Gates, History of Public Land Law Development 72 (1968).

[3] The Land Ordinance of 1785 also initiated a land-surveying practice that was first applied to the Northwest Territory but that was applied to all territories acquired by the United States thereafter:

"At the point where the Ohio River crosses the Pennsylvania border, a north-south line—a principal meridian—was to be run and a base line westward—the geographer's line—was to be surveyed; parallel lines of longitude and latitude were to be surveyed, each to be 6 miles apart, making for

Northwest Territory became what is now the State of Ohio, Congress granted Ohio the lands that had been previously reserved under the 1785 Ordinance for the use of public schools in the State. 2 Stat. 175.[4]

Following the Ohio example of reserving lands for the maintenance of public schools, "'grants were made for common school purposes to each of the public-land States admitted to the Union. Between the years of 1802 and 1846 the grants were of every section sixteen, and, thereafter, of sections sixteen and thirty-six. In some instances, additional sections have been granted.'" *Andrus* v. *Utah*, 446 U. S. 500, 506–507, n. 7 (1980) (quoting *United States* v. *Morrison*, 240 U. S. 192, 198 (1916) (footnotes omitted)). Thus, the basic Ohio example has been followed with respect to all but a few of the States admitted since then. 446 U. S., at 522–523, n. 4 (POWELL, J., dissenting). In addition to the school lands designated in this manner, Congress made provision for townships in which the pertinent section or sections were not available for one reason or another. Thus, Congress generally indemnified States for the missing designated sections, allowing the States to select lands in an amount equal to and in lieu of the designated but unavailable lands. See, *e. g.*, ch. 83, 4 Stat. 179 (1826). See generally *Andrus* v. *Utah*, *supra*, at 507–508; *Morrison*, *supra*, at 200–202.

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townships of 36 square miles or 23,040 acres. . . . Each township was to be divided into lots of one mile square containing 640 acres." *Id.*, at 65.

Each of these 1-square-mile lots was called a "section," so the section numbered 16, reserved for the public schools, was the "Sixteenth Section."

[4]The precise reasons for this practice are somewhat unclear, but it seems likely that they were a combination of an overall practice of encouraging education, a congressional desire to accelerate the disposition of western lands at a higher price, and a policy of trying to put the public-lands States on some sort of a par with the original States in terms of taxable property since federal land, a large portion of the new States, was not taxable by them. See generally *Andrus* v. *Utah*, 446 U. S. 500, 522, 523 (1980) (POWELL, J., dissenting); P. Gates, *supra* n. 2, at 288–289; B. Hibbard, A History of the Public Land Policies 309–311 (1939).

Although the basic pattern of school lands grants was generally consistent from State to State in terms of the reservation and grant of the lands, the specific provisions of the grants varied by State and over time. See generally B. Hibbard, A History of the Public Land Policies 314–318 (1939). For example, in Indiana and Alabama, the school lands were expressly granted to the inhabitants of the townships directly. See 3 Stat. 290 (1816) (Indiana); 3 Stat. 491 (1819) (Alabama).[5] In most of the other grants before 1845, the school lands were given instead to the States but were explicitly designated to be for the use of the townships in which they lay. See, *e. g.*, 2 Stat. 233–234 (1803) (Mississippi); 3 Stat. 375 (1817) (same); 5 Stat. 58 (1836) (Arkansas). The Michigan grant in 1836, on the other hand, was simply "to the State for the use of schools." See 5 Stat. 59. After 1845, the type of grant used in Michigan, granting the lands to the State for the use of its schools generally, became the norm. See, *e. g.*, 9 Stat. 58 (1846) (Wisconsin); 11 Stat. 383 (1859) (Oregon). Finally, the most recent grants are phrased not as outright gifts to the States for a specific use but instead as express trusts. These grants also are stated to be to the States for the support of the schools in those States generally. In addition, though, under these grants the State is specifically designated a trustee, there are explicit restrictions on the management and disposition of the lands in trust, and the Federal Government expressly retains an ongoing oversight responsibility. See, *e. g.*, 36 Stat. 574 (1910) (Arizona and New Mexico).

The history of the school lands grants in Mississippi generally follows the pattern thus described. In 1798, Congress created the Mississippi Territory, which included what is now about the southern third of the States of Mississippi and Ala-

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[5] At least in Alabama, however, this technical grant of the lands to the inhabitants of each township was apparently interpreted as vesting legal title in the State itself. See, *e. g.*, *Alabama* v. *Schmidt*, 232 U. S. 168, 172 (1914).

bama. 1 Stat. 549. In 1803, Congress provided for the sale and survey of all Mississippi Territory lands to which Indian title had been extinguished but excepted "the section number sixteen, which shall be reserved in each township for the support of schools within the same." 2 Stat. 233–234. In 1804, the Mississippi Territory was extended northward to the southern boundary of Tennessee. 2 Stat. 305. Two years later, Congress authorized the selection of lands in lieu of unavailable Sixteenth Sections in the Territory. 2 Stat. 401 (1806). Eventually, in 1817, Mississippi was admitted as a State, and a further Land Sales Act provided for the survey and sale of those lands in the northern part of the new State that had not been covered by the 1803 Act. The 1817 Act provided that these lands were to be "surveyed and divided in the manner provided by law for the surveying of the other public lands of the United States in the Mississippi territory"; thus, the Act required that "the section No. 16 in each township . . . shall be reserved for the support of schools therein." 3 Stat. 375 (1817). The Sixteenth Section lands and lands selected in lieu thereof were granted to the State of Mississippi. See *Lambert* v. *State*, 211 Miss. 129, 137, 51 So. 2d 201, 203 (1951).

By their own terms, however, these Acts did not apply to the lands in northern Mississippi that were held by the Chickasaw Indian Nation, an area essentially comprising what came to be the northern 23 counties in the State. This land was held by the Chickasaws until 1832, when it was ceded to the United States by the Treaty of Pontitoc Creek. 7 Stat. 381. Although that Treaty provided that the land would be surveyed and sold "in the same manner and on the same terms and conditions as the other public lands," *id.*, at 382, no Sixteenth Section lands were reserved from sale. *City of Corinth* v. *Robertson*, 125 Miss. 31, 57, 87 So. 464, 465–466 (1921). In 1836, Congress attempted to remedy this oversight by providing for the reservation of lands in lieu of the Sixteenth Section lands and for the vesting of the title to

these lands "in the State of Mississippi, for the use of schools within [the Chickasaw Cession] in said State." 5 Stat. 116. These Chickasaw Cession Lieu Lands, some 174,555 acres, App. 36, were selected and given to the State. In 1856, however, with authority expressly given by Congress, 10 Stat. 6 (1852), the state legislature sold these lands and invested the proceeds, approximately $1,047,330, App. 36, in 8% loans to the State's railroads. 1856 Miss. Laws, ch. 56. These railroads and the State's investment in them, unfortunately, were subsequently destroyed during the Civil War and never replaced.

From these historical circumstances, the current practice in Mississippi with regard to Sixteenth Section lands has evolved directly. Under state law, these lands, which are still apparently held in large part by the State, "constitute property held in trust for the benefit of the public schools and must be treated as such." Miss. Code Ann. § 29–3–1(1) (Supp. 1985). In providing for the operation of these trusts, the legislature has retained the historical tie of these lands to particular townships in terms of both trust administration and beneficiary status. Thus, the State has delegated the management of this property to local school boards throughout the State: Where Sixteenth Section lands lie within a school district or where Lieu Lands were originally appropriated for a township that lies within a school district, the board of education of that district has "control and jurisdiction of said school trust lands and of all funds arising from any disposition thereof heretofore or hereafter made." *Ibid.* In this respect, the board of education is "under the general supervision of the state land commissioner." *Ibid.*[6] Further, the State has, by statute, set forth certain prescriptions for the management of these lands. See generally Miss. Code Ann. §§ 29–3–1 to 29–3–135 (1972 and Supp. 1985). Most im-

[6] Pursuant to Miss. Code Ann. § 7–11–4, effective January 1, 1980, the words "state land commissioner" mean "secretary of state." See note following Miss. Code Ann. § 29–3–1 (Supp. 1985).

portant for purposes of this case, however, is Miss. Code Ann. § 29–3–109 (Supp. 1985), which provides:

> "All expendable funds derived from sixteenth section or lieu lands shall be credited to the school districts of the township in which such sixteenth section lands may be located, or to which any sixteenth sections lieu lands may belong. Such funds shall not be expended except for the purpose of education of the educable children of the school district to which they belong, or as otherwise may be provided by law."

Consequently, all proceeds from Sixteenth Section and Lieu Lands are allocated directly to the specific township in which these lands are located or to which those lands apply. With respect to the Chickasaw Cession counties, to which no lands now belong, the state legislature has for over 100 years paid "interest" on the lost principal acquired from the sale of those lands in the form of annual appropriations to the Chickasaw Cession schools. Originally, the rate was 8%, but since 1890 the rate has been 6%. See Miss. Const., Art. 8, § 212. The annual amount until 1985 was $62,191. App. 37.

The result of this dual treatment has for many years been a disparity in the level of school funds from Sixteenth Section lands that are available to the Chickasaw Cession schools as compared to the schools in the remainder of the State. In 1984, for example, the legislative appropriation for the Chickasaw Cession resulted in an estimated average per pupil income relative to the Sixteenth Section substitute appropriation of $0.63 per pupil. The average Sixteenth Section income in the rest of the State, in comparison, was estimated to be $75.34 per pupil. *Id.*, at 44.[7] It is this disparity which gave rise to the present action.

[7] In 1985, while this case was pending in the Court of Appeals, the state legislature passed a statute providing for increased Sixteenth Section appropriations for the Chickasaw Cession schools. 1985 Miss. Laws, House Bill No. 6, ch. 23. Under this statute, $1 million was to be appropriated for this purpose in 1985, and this amount was to increase by $1 million each

In 1981, the petitioners, local school officials and schoolchildren from the Chickasaw Cession, filed suit in the United States District Court for the Northern District of Mississippi against the respondents, an assortment of state officials, challenging the disparity in Sixteenth Section funds. The petitioners' complaint traced the history of public school lands in Mississippi, characterizing as illegal several of the actions that resulted in there being now no Sixteenth Section lands in the Chickasaw Cession area. In particular, the petitioners asserted that the sale of the Chickasaw Cession school lands and unwise investment of the proceeds from that sale in the 1850's had abrogated the State's trust obligation to hold those lands for the benefit of Chickasaw Cession schoolchildren in perpetuity. The result of these actions, said the petitioners, was the disparity between the financial support available to the Chickasaw Cession schools and other schools in the State, which disparity in turn allegedly deprived the Chickasaw Cession schoolchildren of a minimally adequate level of education and of the equal protection of the laws.

Based on these allegations, the petitioners sought various forms of relief for breach of the trust regarding the Chickasaw Cession Sixteenth Section lands and for denial of equal protection.[8] Specifically, the complaint sought a declaration

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year until it reached a maximum of $5 million for the fiscal year 1989–1990 and thereafter. Even so, the offices of the Mississippi State Auditor and Secretary of State estimated in 1984 that additional funds of over $7 million would be required to bring the Chickasaw Cession funding to the level of the average Sixteenth Section funding in the rest of the State on a per-pupil basis. App. 38.

[8] The complaint also alleged a denial of due process, unconstitutional impairment of contractual obligations, a taking without just compensation, and a Ninth Amendment claim. Of these additional claims, the petitioners press only the contract-clause claim here. Since this claim is in all essential respects the same as the petitioners' trust claim for Eleventh Amendment purposes, our disposition of the trust claim, *infra*, at 276–281, governs this claim as well.

that the state legislation purporting to implement the sale of the Chickasaw Cession school lands was void and unenforceable; the establishment by legislative appropriation or otherwise of a fund in a suitable amount to be held in perpetual trust for the benefit of plaintiffs; or in the alternative making available to plaintiffs Lieu Lands of the same value as the original Chickasaw Cession Sixteenth Section lands.

The District Court dismissed the complaint, holding the claims barred by the applicable statute of limitations and by the Eleventh Amendment to the United States Constitution. The Court of Appeals for the Fifth Circuit affirmed, *Papasan* v. *United States*, 756 F. 2d 1087 (1985), agreeing that the relief requested in the complaint was barred by the Eleventh Amendment. Noting that a federal court should not dismiss a constitutional complaint because it "seeks one remedy rather than another plainly appropriate one," *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 65 (1978), however, the Court of Appeals deemed the equal protection claim to assert a current, ongoing, and disparate distribution of state funds for the support of local schools, the remedy for which would not be barred by the Eleventh Amendment. Even so, it found dismissal of the complaint to be proper since such differential funding was not unconstitutional under this Court's decision in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973).[9]

We granted certiorari, 474 U. S. 1004 (1985), and now vacate the judgment of the Court of Appeals and remand for further proceedings.

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[9] In their complaint, the petitioners also sought relief from various federal officials, alleging breach of a promise to fund the Chickasaw Cession trust and failure to keep the State of Mississippi from wasting the trust assets. The District Court dismissed these claims as barred by sovereign immunity, laches, and the statutes of limitations. The petitioners' appeal from this dismissal was itself dismissed by joint stipulation. Thus, no issues involving the federal defendants remain in the case.

II

We first consider whether the Eleventh Amendment bars the petitioners' claims and required dismissal of the complaint.

A

The Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This language expressly encompasses only suits brought against a State by citizens of another State, but this Court long ago held that the Amendment bars suits against a State by citizens of that same State as well. See *Hans* v. *Louisiana*, 134 U. S. 1 (1890). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 100 (1984).[10] This bar exists whether the relief sought is legal or equitable. *Id.*, at 100–101.

Where the State itself or one of its agencies or departments is not named as defendant and where a state official is named instead, the Eleventh Amendment status of the suit is less straightforward. *Ex parte Young*, 209 U. S. 123 (1908), held that a suit to enjoin as unconstitutional a state official's action was not barred by the Amendment. This holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity. As the Court explained in *Young* itself:

[10] A State may *consent* to be sued in federal court. *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883). Here, however, it is clear that Mississippi has expressly declined such consent. See 1984 Miss. Gen. Laws, ch. 495, § 3(4).

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159–160.

Thus, the official, although acting in his official capacity, may be sued in federal court. See also *Pennhurst*, *supra*, at 102, 105; *Hutto* v. *Finney*, 437 U. S. 678, 692 (1978).

Young, however, does not insulate from Eleventh Amendment challenge every suit in which a state official is the named defendant. In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal. See *Cory* v. *White*, 457 U. S. 85 (1982). And it does not foreclose an Eleventh Amendment challenge where the official action is asserted to be illegal as a matter of state law alone. See *Pennhurst*, *supra*, at 104–106. In such a case, federal supremacy is not implicated because the state official is acting contrary to state law only.

We have also described certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies. *Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, *supra*, at 105 (quoting *Young*, *supra*, at 160). Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which fed-

eral law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green* v. *Mansour*, 474 U. S. 64, 68 (1985) (citation omitted).

Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant.[11] This is true if the relief is expressly denominated as damages. See, *e. g.*, *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945). It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else. See, *e. g.*, *Green* v. *Mansour*, *supra*, at 69–70; *Edelman* v. *Jordan*, 415 U. S. 651, 664–668 (1974). On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury. See *Milliken* v. *Bradley*, 433 U. S. 267, 289–290 (1977); *Edelman*, *supra*, at 667–668.

For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct: "[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Edelman*, *supra*, at 667. Compare, *e. g.*, *Quern* v. *Jordan*, 440

[11] When a state official is sued and held liable in his *individual* capacity, however, even damages may be awarded. See *Scheuer* v. *Rhodes*, 416 U. S. 232, 237–238 (1974).

U. S. 332 (1979), with *Green* v. *Mansour*, *supra*. In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, see, *e. g.*, *Edelman*, *supra*, at 668, and will be guided by the policies underlying the decision in *Ex parte Young*.

B

The petitioners claim that the federal grants of school lands to the State of Mississippi created a perpetual trust, with the State as trustee, for the benefit of the public schools. Relying on *Alamo Land & Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976), and *Lassen* v. *Arizona ex rel. Arizona Highway Dept.*, 385 U. S. 458 (1967), the petitioners contend that "[s]chool lands trusts impose specific burdens and obligations on the states, as well as the state officials who act as trustees, which include preserving the corpus, maximizing income, and, where the corpus is lost or converted wrongfully, continuing the payment of appropriate income indefinitely." Brief for Petitioners 13. The idea that this last obligation exists is gleaned not from any prior judicial construction of school lands grants but instead from alleged federal common-law rules that purportedly govern such trusts. The petitioners rely on this asserted continuing obligation in contending that they seek only a prospective, injunctive remedy, permissible under *Ex parte Young*, requiring state officials to meet that continuing federal obligation by providing the Chickasaw Cession schools with appropriate trust income.

To begin with, it is not at all clear that the school lands grants to Mississippi created a binding trust. The respondents, in fact, contend that the school lands were given to the State in fee simple absolute and that no binding federal obligation was imposed. See *Alabama* v. *Schmidt*, 232 U. S. 168 (1914); *Cooper* v. *Roberts*, 18 How. 173 (1856).[12] But even

[12] Even if there was a binding trust, the petitioners point to no authority relating specifically to school lands trusts in support of their contention that the obligation to pay income continues even though the trust corpus has been lost. See Brief for Petitioners 24–28. In addition, even their assertion that such an obligation should be imposed as a matter of common

if the petitioners' legal characterization is accepted, their trust claims are barred by the Eleventh Amendment. The distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort we rejected in *Edelman*. There, the Court of Appeals had upheld an award of "equitable restitution" against the state official, requiring the payment to the plaintiff class of "all AABD benefits wrongfully withheld." 415 U. S., at 656. We found, to the contrary, that the "retroactive award of monetary relief . . . is in practical effect indistinguishable in many aspects from an award of damages against the State." *Id.*, at 668.

The characterization in that case of the legal wrong as the continuing withholding of accrued benefits is very similar to the petitioners' characterization of the legal wrong here as the breach of a continuing obligation to comply with the trust

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law is unsupported. It may be true that a trust beneficiary is not normally time barred from suing a trustee for breach of trust and loss of the corpus until such time as the trustee expressly repudiates the trust. See, *e. g.*, *Benedict* v. *New York City*, 250 U. S. 321, 327 (1919). But this does not mean that there is a continuing affirmative obligation on the part of the trustee with respect to the trust corpus and income as opposed to merely liability for a past breach of trust that may still be acted upon.

The Restatement, for example, seems to adopt the latter view:

"If a trust is created and the whole of the trust property ceases to exist, the trustee no longer holds anything in trust. In such a case the trustee is under a personal liability to the beneficiary if he committed a breach of trust in causing or allowing the trust property to cease to exist, or if he sold the trust property to himself or lent trust funds to himself, being permitted to do so by the terms of the trust. In such a case if the trustee should be insolvent the beneficiary is not entitled to priority over the general creditors of the trustee. This does not mean, however, that he owes no duties to the beneficiary except the duties which a debtor owes to his creditor, or a tortfeasor to the person he has wronged. He is still in a fiduciary relation to the beneficiary. He cannot properly purchase the interest of the beneficiary without making full disclosure of all circumstances known to him affecting the transaction, and the transaction must be fair, or the beneficiary can set it aside." Restatement (Second) of Trusts § 74, Comment *c*, p. 194 (1959) (citations omitted).

obligations. We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners. In both cases, the trustee is required, because of the past loss of the trust corpus, to use its own resources to take the place of the corpus or the lost income from the corpus. Even if the petitioners here were seeking only the payment of an amount equal to the income from the lost corpus,[13] such payment would be merely a substitute for the return of the trust corpus itself. That is, continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself: It is in substance the award, as continuing income rather than as a lump sum, of "'an *accrued* monetary liability.'" *Milliken* v. *Bradley*, 433 U. S., at 289 (quoting *Edelman*, 415 U. S., at 664). Thus, we hold that the petitioners' trust claim, like the claim we rejected in *Edelman*, may not be sustained.

C

The Court of Appeals held, however, that the petitioners' equal protection claim was not barred by the Eleventh Amendment. We agree with that ruling. The complaint asserted:

> "By their aforesaid past, present and future deprivations of and to Plaintiffs and the Plaintiff class of the use and benefits of their Sixteenth Section Lands, while at the same time granting to and securing to all other school districts and school children in the State of Mississippi in perpetuity the use and benefit of their Sixteenth Section Lands, the State Defendants have deliberately, intentionally, purposefully, and with design denied to Plaintiffs and the Plaintiff class the equal protection of

[13] In fact, the petitioners sought not merely such income but also restoration of the trust corpus and the award of past income not received and interest on that income. App. 28–29.

> the laws in violation of their rights secured by the Fourteenth Amendment to the Constitution of the United States." App. 20.

The petitioners also alleged that these same actions denied them "their rights to an interest in a minimally adequate level of education, or reasonable opportunity therefor," *id.*, at 21, while assuring such right to the other schoolchildren in the State. Thus the complaint alleged a present disparity in the distribution of the benefits from the State's Sixteenth Section lands.

This alleged ongoing constitutional violation—the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*. It may be that the current disparity results directly from the same actions in the past that are the subject of the petitioners' trust claims, but the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure "'compliance *in the future* with a substantive federal-question determination'" rather than bestow an award for accrued monetary liability. *Milliken*, *supra*, at 289 (quoting *Edelman*, *supra*, at 668). This claim is, in fact, in all essential respects the same as the equal protection claim for which relief was approved in *Milliken*. Consequently, we agree with the Court of Appeals that the Eleventh Amendment would not bar relief necessary to correct a current violation of the Equal Protection Clause and that this claim may not properly be dismissed on this basis.[14]

[14] The respondents further contend that the petitioners have not sued any state officials who could grant the relief requested, see Brief for Respondents Allain et al. 17–19. We note, however, that the respondent Secretary of State is, by state statute, responsible for "general supervision" of the administration by the local school officials of the Sixteenth

III

The question remains whether the petitioners' equal protection claim, although not barred by the Eleventh Amendment, is legally insufficient and was properly dismissed for failure to state a claim. See Fed. Rule Civ. Proc. 12(b)(6). We are bound for the purposes of this review to take the well-pleaded factual allegations in the complaint as true. *Miree* v. *DeKalb County*, 433 U. S. 25 (1977); *Kugler* v. *Helfant*, 421 U. S. 117 (1975); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Gardner* v. *Toilet Goods Assn.*, 387 U. S. 167 (1957). Construing these facts and relevant facts obtained from the public record in the light most favorable to the petitioners, we must ascertain whether they state a claim on which relief could be granted.

A

In *Rodriguez*, the Court upheld against an equal protection challenge Texas' system of financing its public schools, under which funds for the public schools were derived from two main sources. Approximately half of the funds came from the Texas Minimum Foundation School Program, a state program aimed at guaranteeing a certain level of minimum education for all children in the State. 411 U. S., at 9. Most of the remainder of the funds came from local sources—in particular local property taxes. *Id.*, at 9, n. 21. As a result of this dual funding system, most specifically as a result of differences in amounts collected from local property taxes, "substantial interdistrict disparities in school expenditures [were] found . . . in varying degrees throughout the State." *Id.*, at 15.

In examining the equal protection status of these disparities, the Court declined to apply any heightened scrutiny

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Section and Lieu Lands. See Miss. Code Ann. § 29–3–1(1) (Supp. 1985). To the extent that the respondent Secretary of State is acting in a manner that violates the Equal Protection Clause, such actions may be enjoined under *Ex parte Young*, 209 U. S. 123 (1908).

based either on wealth as a suspect classification or on education as a fundamental right. As to the latter, the Court recognized the importance of public education but noted that education "is not among the rights afforded explicit protection under our Federal Constitution." *Id.*, at 35. The Court did not, however, foreclose the possibility "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]." *Id.*, at 36.[15] Given the absence of such radical denial of educational opportunity, it was concluded that the State's school financing scheme would be constitutional if it bore "some rational relationship to a legitimate state purpose." *Id.*, at 44.

Applying this standard, the dual Texas system was deemed reasonably structured to accommodate two separate forces:

> "'[T]he desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.'
>
> ". . . While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level." *Id.*, at 49 (quoting J. Coleman, Fore-

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[15] Instead, the Court noted:

"[W]e have no indication that the present levels of educational expenditures in Texas provide an education that falls short [of such a hypothesized constitutional prerequisite]. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U. S., at 36–37.

word to G. Strayer & R. Haig, The Financing of Education in the State of New York vii (1923)).

Given this rational basis, the Court concluded that the mere "happenstance" that the quality of education might vary from district to district because of varying property values within the districts did not render the system "so irrational as to be invidiously discriminatory." 411 U. S., at 55. In particular, the Court found that "any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary." *Id.*, at 53–54.

Almost 10 years later, the Court again considered the equal protection status of the administration of the Texas public schools—this time in relation to the State's decision not to expend any state funds on the education of children who were not "legally admitted" to the United States. *Plyler* v. *Doe*, 457 U. S. 202 (1982). The Court did not, however, measurably change the approach articulated in *Rodriguez*. It reiterated that education is not a fundamental right and concluded that undocumented aliens were not a suspect class. 457 U. S., at 223–224. Nevertheless, it concluded that the justifications for the discrimination offered by the State were "wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.*, at 230.

B

The complaint in this case asserted not simply that the petitioners had been denied their right to a minimally adequate education but also that such a right was fundamental and that because that right had been infringed the State's action here should be reviewed under strict scrutiny. App. 20. As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.

Nor does this case require resolution of these issues. Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. See, *e. g.*, *Briscoe* v. *LaHue*, 663 F. 2d 713, 723 (CA7 1981), aff'd on other grounds, 460 U. S. 325 (1983). See generally 2A J. Moore & J. Lucas, Moore's Federal Practice ¶12.07, p. 12–64, and n. 6 (1985). The petitioners' allegation that, by reason of the funding disparities relating to the Sixteenth Section lands, they have been deprived of a minimally adequate education is just such an allegation. The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.

Concentrating instead on the disparities in terms of Sixteenth Section lands benefits that the complaint in fact alleged and that are documented in the public record, we are persuaded that the Court of Appeals properly determined that *Rodriguez* dictates the applicable standard of review. The differential treatment alleged here constitutes an equal protection violation only if it is not rationally related to a legitimate state interest.

Applying this test, the Court of Appeals concluded that, historical roots aside, the essence of the petitioners' claim was an attack on Mississippi's system of financing public education. And it reasoned that the inevitability of disparities in income derived from real estate managed and administered locally, as in *Rodriguez*, supplied a rationale for the disparities alleged. To begin with, we disagree with the Court of Appeals' apparent understanding of the crux of the petitioners' claim. As we read their complaint, the petitioners do

not challenge the overall organization of the Mississippi public school financing program. Instead, their challenge is restricted to one aspect of that program: The Sixteenth Section and Lieu Lands funding. All of the allegations in the complaint center around disparities in the distribution of these particular benefits, and no allegations concerning disparities in other public school funding programs are included.

Consequently, this is a very different claim than the claim made in *Rodriguez*. In *Rodriguez*, the contention was that the State's overall system of funding was unconstitutionally discriminatory. There, the Court examined the basic structure of that system and concluded that it was rationally related to a legitimate state purpose. In reaching that conclusion, the Court necessarily found that funding disparities resulting from differences in local taxes were acceptable because related to the state goal of allowing a measure of effective local control over school funding levels. *Rodriguez* did not, however, purport to validate all funding variations that might result from a State's public school funding decisions. It held merely that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case.[16]

Here, the petitioners' claim goes neither to the overall funding system nor to the local ad valorem component of that system. Instead, it goes solely to the Sixteenth Section and Lieu Lands portion of the State's public school funding. And, as to this claim, we are unpersuaded that *Rodriguez* resolves the equal protection question in favor of the State. The allegations of the complaint are that the State is distrib-

[16] JUSTICE POWELL contends that the fact that the overall system of school financing here is similar to that approved by the Court in *Rodriguez* provides "another reason" to dismiss the petitioners' claims. *Post*, at 301–302, n. 6. *Rodriguez*, however, merely upheld the overall structure of Texas' public school financing and the component of that system allowing for variations in fundings due to local taxation. We do not read *Rodriguez* as validating all disparities that might occur in a system that has an overall structure similar to that approved in that case.

uting the income from Sixteenth Section lands or from Lieu Lands or funds unequally among the school districts, to the detriment of the Chickasaw Cession schools and their students. The Sixteenth Section and Lieu Lands in Mississippi were granted to and held by the State itself. Under state law, these lands "constitute property held in trust for the benefit of the public schools and must be treated as such," Miss. Code Ann. § 29–3–1(1) (Supp. 1985), but in carrying out the trust, the State has vested the management of these lands in the local school boards throughout the State, under the supervision of the Secretary of State, and has credited the income from these lands to the "school districts of the township in which such sixteenth section lands may be located, or to which any sixteenth section lieu lands may belong," such income to be used for the purpose of educating the children of the school district or as otherwise may be provided by law. Miss. Code Ann. § 29–3–109 (Supp. 1985). This case is therefore very different from *Rodriguez*, where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez*, therefore, which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding, does not settle the constitutionality of disparities alleged in this case, and we differ with the Court of Appeals in this respect.[17]

[17] JUSTICE POWELL asserts that any discrepancies in Sixteenth Section and Lieu Lands funding cannot be unconstitutional because "the Sixteenth Section payments . . . are an insignificant part of the total payments from all sources made to Mississippi's school districts." *Post*, at 299. Thus, JUSTICE POWELL seems to envision that some sort of threshold level of effect in terms of overall school revenues is necessary before the Equal Protection Clause's strictures become binding. The petitioners, however, have limited themselves to challenging discrimination in the Sixteenth Section and Lieu Lands funding program. This program is in fact separated from other sources of public school funding by the State itself in adminis-

Nevertheless, the question remains whether the variations in the benefits received by school districts from Sixteenth Section or Lieu Lands are, on the allegations in the complaint and as a matter of law, rationally related to a legitimate state interest. We believe, however, that we should not pursue this issue here but should instead remand the case for further proceedings. Neither the Court of Appeals nor the parties have addressed the equal protection issue as we think it is posed by this case: Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?

A crucial consideration in resolving this issue is whether the federal law requires the State to allocate the economic benefits of school lands to schools in the townships in which those lands are located. If, as a matter of federal law, the State has no choice in the matter, whether the complaint states an equal protection claim depends on whether the federal policy is itself violative of the Clause. If it is, the State may properly be enjoined from implementing such policy. Contrariwise, if the federal law is valid and the State is bound by it, then it provides a rational reason for the funding disparity. Neither the courts below nor the parties have addressed the equal protection issue in these terms.[18] Another

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tration, see Miss. Code Ann. § 29–3–1 *et seq.* (1972 and Supp. 1985), and for accounting purposes, see, *e. g.*, Mississippi State Department of Education, 1986 Annual Report of the State Superintendent of Public Education 48 (1986). Nor is there any indication that the levels of benefits received from the school lands are in any manner correlated to funds received from other sources. See, *e. g.*, Miss. Code Ann. § 37–19–1 *et seq.* (Supp. 1985). Cf. *post*, at 300–301, n. 5. In this situation, we decline the dissent's invitation to look at school receipts overall. We also decline to append to the general requirements of an equal protection cause of action an additional threshold effects requirement.

[18] As to this question, we make only the following observations. The starting point of any consideration of this question must be the federal

possible consideration in resolving the equal protection issue is that school lands require management and that the State has assigned this task to the individual districts in which the

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grants themselves, for it is clear that the interest transferred to the State depends on the federal laws that transferred that interest. See *California ex rel. State Lands Comm'n* v. *United States*, 457 U. S. 273, 279 (1982) (citing *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935)). If the federal law provided for the transfer of an absolute fee interest, the lands are owned outright by the State. On the other hand, if the federal law created a trust with the State as trustee, the State is bound to comply with the terms of that trust.

Each of these possible conclusions finds some support in this Court's prior cases. In *Cooper* v. *Roberts*, 18 How. 173, 181–182 (1856), for example, the Court approved the sale of school lands granted to the State of Michigan even where Congress had not expressly authorized such a sale, stating that "the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith." The Court adopted this same reasoning in *Alabama* v. *Schmidt*, 232 U. S. 168 (1914), in which the Court approved the application of Alabama's adverse possession laws to school lands against an argument that the State's interest could not be extinguished in that manner under the terms of the grant and that when the lands were no longer used for the support of the schools title would revert to the United States. Relying on *Cooper*, the Court concluded that "[t]he gift to the State is absolute, although, no doubt, as said in *Cooper*, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary . . . ." 232 U. S., at 173–174 (citations omitted). See also *Stuart* v. *Easton*, 170 U. S. 383, 394 (1898) (cited by the Court in *Schmidt*, *supra*, at 174) ("'the mere expression of a purpose will not of and by itself debase a fee'") (quoting *Kerlin* v. *Campbell*, 15 Pa. St. 500 (1850)). Thus, the Court's interpretations of some of the earlier grants conceived of those grants as conveying a fee interest to the States. See also *Brooks* v. *Koonce*, 275 U. S. 486 (1927) *(per curiam)*, aff'g *Sloan* v. *Blytheville Special School Dist. No. 5*, 169 Ark. 77, 273 S. W. 397 (1925) (relying on *Cooper* and *Schmidt* to dismiss challenge by local school board to use of proceeds from local Sixteenth Section lands for the benefit of the State at large).

On the other hand, cases interpreting more recent grants have found an explicit trust obligation, although it is worth noting that none of these grants included a provision similar to that at issue here; they provided for lands for the general benefit of the schools in the State. However, in *Ervien* v. *United States*, 251 U. S. 41 (1919), for example, the Court up-

lands are located, subject to supervision by the State. The significance, if any, in equal protection terms of this allocation of duties in justifying assigning the income exclusively to those who perform the management function and none of it to

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held a lower court decision enjoining as a breach of trust any use by the New Mexico Public Lands Commissioner of Sixteenth Section proceeds for a purpose other than one of the purposes enumerated in the grant. Thus, the Court held that under these circumstances the phrase "breach of trust" meant "that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions." *Id.*, at 48. More recently, the Court in *Lassen* v. *Arizona ex rel. Arizona Highway Dept.*, 385 U. S. 458, 460–461 (1967), interpreted and enforced the terms of the Arizona school lands grant, noting that "[t]he grant involved here . . . expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms." See also *Alamo Land & Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976).

Thus, the Court has indicated that some school lands grants did not create express trusts and has held that other grants did create such trusts, although it has never enforced a provision such as the provision at issue here. The Court has never discussed the relationship between these two sets of cases, but it is possible that any variation in results stems from the facts that the terms of the grants have varied over time. See *Lassen*, *supra*, at 460. Thus, it could be that the earlier grants did give the grantee States absolute fee interests, while the later grants created actual enforceable trusts. On the other hand, it may be that the petitioners are correct in asserting that the substance of all of these grants is the same. See S. Rep. No. 454, 61st Cong., 2d Sess., 18–20 (1910) (referring to express trust provisions in New Mexico and Arizona Enabling Act as "nothing new in principle," and noting that "[f]or many years it has been the custom to specify the purposes for which grants of lands are made to incoming states and to place express restrictions upon the mode of disposing of them"). Or perhaps they are all properly viewed as being in the nature of "a 'solemn agreement' which in some ways may be analogized to a contract between private parties." *Andrus* v. *Utah*, 446 U. S., at 507. Perhaps, then, the conditions of the grants are still enforceable by the United States, although possibly not by third parties. This may be the case even though the federal defendants disavowed this position below, arguing that *Cooper* and *Schmidt* control and that our recent cases are distinguishable because they involve express trusts. See, *e. g.*, Reply Brief for Federal Defendants in No. 81–90 (ND Miss.), pp. 60–62.

those districts that have no lands to manage is a matter that is best addressed by the lower courts in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed insofar as it affirmed the dismissal of petitioners' breach of trust and related claims. With respect to the affirmance of the District Court's dismissal of the equal protection claim, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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

Although I join Parts I and III of the Court's opinion and agree with the result in Part II–C, I do not join Parts II–A and II–B for the reasons stated in my dissent in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 258–302 (1985) (BRENNAN, J., dissenting).

The Court makes a valiant effort to set forth the principles that determine whether a particular claim is or is not barred by the Eleventh Amendment. See *ante*, at 276–279. To my mind, the Court's restatement simply underscores the implausibility of the entire venture, for it clearly demonstrates that the Court's Eleventh Amendment jurisprudence consists of little more than a number of ad hoc and unmanageable rules bearing little or no relation to one another or to any coherent framework; indeed, the Court's best efforts to impose order on the cases in this area has produced only the conclusion that "[f]or Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct," *ante*, at 278. This hodgepodge produces no positive benefits to society. Its only effect is to impair or prevent effective enforcement of federal law. It is highly unlikely that, having created a system in which federal law was to be supreme, the Framers of the Constitution or of the Elev-

enth Amendment nonetheless intended for that law to be unenforceable in the broad class of cases now barred by this Court's precedents. In fact, as I demonstrated last Term in *Atascadero*, the Framers intended no such thing.

The magnitude of the Court's mistake has only been increased by changes that have taken place in our law and our society since *Hans* v. *Louisiana*, 134 U. S. 1 (1890), took the first step down this ill-advised path, for the National Government and federal law play a much more important role in protecting the rights of individuals today. Only *stare decisis* can support the Court's continued adherence to this unfortunate doctrine. *Stare decisis* is indeed a force to be reckoned with—although the Court has not felt itself particularly constrained by *stare decisis* in *expanding* the protective mantle of sovereign immunity, see *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89, 165–166, n. 50 (1984) (STEVENS, J., dissenting); *Atascadero State Hospital* v. *Scanlon*, *supra*, at 304 (STEVENS, J., dissenting). However, as Chief Justice Taney observed, the authority of the Court's construction of the Constitution ultimately "depend[s] altogether on the force of the reasoning by which it is supported." *Passenger Cases*, 7 How. 283, 470 (1849) (dissenting opinion). The Court's Eleventh Amendment jurisprudence is not supported by history or by sound legal reasoning; it is simply bad law. In matters of such great institutional importance as this, *stare decisis* must yield.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today holds that petitioners' breach of trust claims are barred by the Eleventh Amendment. I cannot agree. Petitioners claim that Mississippi breached legal obligations placed on it by federal law. I agree with JUSTICE BRENNAN that the Eleventh Amendment was never intended to bar such suits. *Ante*, at 292–293 (BRENNAN, J., concurring in part, concurring in judgment in part, and dissenting in part). But even if the Eleventh Amendment normally would

bar suits against a State by its citizens, I believe that, when a State willingly accepts a substantial benefit from the Federal Government, it waives its immunity under the Eleventh Amendment and consents to suit by the intended beneficiaries of that federal assistance. See, *e. g.*, *Green* v. *Mansour*, 474 U. S. 64, 81 (1985) (BLACKMUN, J., dissenting); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 304 (1985) (BLACKMUN, J., dissenting); *Edelman* v. *Jordan*, 415 U. S. 651, 688–696 (1974) (MARSHALL, J., dissenting).

The very Enabling Act that gave Mississippi the benefits of statehood, including the protections afforded by the Eleventh Amendment, expressly incorporated the Northwest Ordinance of 1789, which required the reservation of Sixteenth-Section lands for the benefit of public education. See Act of Mar. 1, 1817, 3 Stat. 348, 349. And the Act giving Mississippi the Chickasaw Cession Lieu Lands expressly provided that those lands be held "upon the same terms and conditions, in all respects, as the said State now holds the lands heretofore reserved for the use of schools in said State." Act of July 4, 1836, § 2, 5 Stat. 116.

Neither the District Court nor the Court of Appeals addressed the nature of the conditions the Federal Government placed upon Mississippi's use of the Lieu Lands. But, as the Court notes in discussing petitioners' equal protection claims, the Federal Government may have intended to bind Mississippi to use the lands solely to benefit the schoolchildren of the particular township to which the school lands were originally attached. *Ante*, at 287–289, and n. 16. Moreover, Mississippi apparently has concluded, as a matter of state law, that school lands "constitute property held in trust for the benefit of the public schools and must be treated as such." Miss. Code Ann. § 29–3–1(1) (Supp. 1985). Thus, a fuller consideration of the actual terms on which the Federal Government conveyed the Lieu Lands to Mississippi might reveal that the State waived its immunity from suit.

Absent an Eleventh Amendment bar, the complaint should survive a motion to dismiss. Petitioners have made several allegations which, read fairly, suggest that Mississippi did not use the Lieu Lands solely for the benefit of Chickasaw Cession schoolchildren. They claim that the State leased the Lieu Lands for a minimal sum, converted the leaseholds into outright ownership without the payment of additional consideration, invested the entire proceeds generated by disposition of the Lieu Lands in railroad stock, and then decided to pay only 6% interest on the hypothetical fund created to replace the lost Lieu Lands proceeds. I believe these assertions, which must be taken as true at this stage in the proceedings, sufficiently articulate a claim that the state legislature acted to aid the interests of land speculators, railroads, and the economic development of the entire State at the expense of the Chickasaw Cession children, in violation of its trust obligation.

If the Federal Government intended to impress a trust upon the Lieu Lands with the State as trustee and the Chickasaw Cession schoolchildren as the beneficiaries, those children should have a right of action against the State for breach of its fiduciary duty. As the Court recognizes, damages are the proper remedy for a breach of fiduciary duty when the corpus of a trust has been entirely lost. See *ante*, at 280–281. Thus, for the reasons expressed by JUSTICE MARSHALL in *Edelman* v. *Jordan*, 415 U. S., at 691–692, I believe that petitioners would be entitled to damages if they proved at trial the breach of trust they have alleged. I therefore would reverse the Court of Appeals' dismissal of petitioners' trust-based claims and remand this issue for fuller consideration.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

The public record refutes petitioners' equal protection claims that the disparities in funding from various school lands detrimentally affects students and schools in school dis-

tricts within the Chickasaw Cession. Statistics from Mississippi's State Department of Education show the statewide ranking of school districts in terms of expenditures per pupil. In this ranking, the Chickasaw Cession districts are scattered widely among the State's 154 school districts. Moreover, far from being a "critical element of school funding in Mississippi," as alleged by petitioners, the Sixteenth Section lands account for only 1½% of overall funds provided for schools.[1] I therefore find no basis for the assumption that petitioners can prove that students in Chickasaw Cession districts have been detrimentally affected by this differential, and I do not believe that petitioners have asserted an equal protection claim that can survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[2]

I

A brief procedural history is helpful in putting this litigation in perspective. Petitioners include a group of county school boards, superintendents of education, and individual schoolchildren, all residing in the Chickasaw Cession counties in north Mississippi. In June 1981, petitioners sued numerous federal and state officials, attacking the difference between, on the one hand, payments from Sixteenth Section lands in other school districts (the Chocktaw area) and, on the other hand, payments from the State of Mississippi's trust fund to school districts within the Chickasaw Cession in place of income from the Chickasaw school lands.

The complaint recounted alleged "illegalities" as far back as the Northwest Territory Ordinance of 1785. It sought to have various federal statutes that "purport to authorize, validate or confirm" sales of the Sixteenth Section lands declared

[1] Mississippi State Department of Education, 1986 Annual Report of the State Superintendent of Public Education (1986). Tables A and B, *infra*, are taken from this Report, pp. 144–146 and 48, respectively.

[2] I agree with the Court that most of petitioners' claims are barred by the Eleventh Amendment, and therefore join Part II of the Court's opinion.

"unlawful, void and unenforceable, including but not limited to (a) the Act of July 4, 1936; (b) the Act of May 19, 1852; (c) the Act of March 3, 1857; (d) any other acts of Congress having said effect." App. 16 (citations omitted).

The complaint also alleged that both the federal and state defendants had breached perpetual and binding obligations of "an express/constructive trust": the federal defendants by permitting the State to breach the trust through various statutes (*e. g.*, the Northwest Territory Ordinance), and the state defendants by unlawfully selling the relevant properties and by ill-advisedly investing the proceeds of that sale. The complaint further alleged violations of due process by denial of "free appropriate public education" and—of relevance to the case as it stands before this Court—violations of equal protection by disparate distribution of certain funds and by infringement upon the "fundamental rights" of "a suspect class" to "a minimally adequate level of education." Finally, the complaint alleged impairment of obligation of contract and taking without just compensation.

Petitioners sought wide-ranging relief, including conveyance to them of properties or money of a value equivalent to that of the relevant school lands and compensation for the income from 1832 to present that petitioners "would have received . . . if such lands had been subjected to such prudent use and reasonable management." Petitioners also sought to obtain new lands as substitution for those lost, "which may include offshore oil, gas and other mineral rights." Petitioners additionally sought to "enjoin" and "direct" the defendants to establish "a fund or funds of such value" as was necessary to provide "hereafter" and "in perpetuity" annual income to Chickasaw Cession school districts. Finally, petitioners demanded that the defendants take other steps to "eliminate and compensate and for the future guarantee and protect Plaintiffs and the Plaintiff class against . . . denials

and deprivations of their rights to due process of law and to the equal protection of the laws."[3]

The District Court held that the claims against the Federal Government were barred by sovereign immunity, laches, and statutes of limitations. This order was not appealed. In a separate order, the District Court held that any monetary remedy was barred by the Eleventh Amendment—a holding affirmed by the Court of Appeals and by this Court today. I agree with this disposition. I also would not reach the issues raised by allegations of the denial of a "fundamental right" to "a minimally adequate education." See *ante*, at 285. I do not, however, agree with the Court's holding that petitioners' equal protection allegations regarding the disparate distribution of funds present a claim of sufficient substance to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

II

The Court begins the discussion of petitioners' equal protection claim, *ante*, at 283–292, by acknowledging that it is appropriate for the Court to take notice of "relevant facts obtained from the public record in the light most favorable to the petitioners." *Ante*, at 283. The most recent figures available

[3] One rarely sees a complaint that is as sweeping in its allegations and as duplicative in its requests for relief. Apparently, no question was raised by respondents or the District Court as to whether in signing this complaint, counsel for petitioners complied with Rule 11 of the Federal Rules of Civil Procedure. That Rule reads in pertinent part: "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Despite the wide-ranging complaint, the *only* alleged denial of equal protection is with respect to the funding in the Chickasaw Cession school districts. As noted *supra*, at 296, these funds are only 1½% of overall funding for elementary and secondary schools within the State.

from the State Department of Education of Mississippi, read in such a light, fatally undercut petitioners' equal protection claims.

It is alleged—and here accepted as true—that there is a disparity between the payments from the Sixteenth Section lands in the Chocktaw districts and the payments from the State of Mississippi's trust fund to Chickasaw districts.[4] The complaint characterizes this disparity as an "unjust, inequitable and unconstitutional deprivation of the rights of the children of the Chickasaw Cession counties." App. 2. The Court reads the complaint as alleging that this unequal distribution of such funds acts "to the detriment of the Chickasaw Cession schools and their students," *ante*, at 288. The complaint, however, contains no factual assertions other than this disparity to support these conclusory allegations, nor is there any basis for believing a detriment could ever be proved. As shown in Table A, the various per pupil expenditures in petitioners' school districts are comparable to, and in some cases higher than, the average for districts within the Chocktaw area. And the Sixteenth Section payments—as the figures in Table B demonstrate beyond argument—are an insignificant part of the total payments from all sources made to Mississippi's school districts.

The Court does not question these data. It instead states that petitioners "have limited themselves to challenging discrimination in the Sixteenth Section" program, and, relying on that limitation, "decline[s] the dissent's invitation to look at school receipts overall." *Ante*, at 288–289, n. 17. The Court thereby ignores the undisputed facts concerning the

[4] The Court states that this disparity is $75.34 *versus* $0.63. The Court of Appeals and the petition for certiorari give the relevant figures as $31.25 and $0.80. *Papasan* v. *United States*, 756 F. 2d, 1087, 1091 (CA5 1985); Pet. for Cert. 4. The former figures are derived from an unaudited aggregation of reports by individual school districts presented in a November 1984 report on the Chickasaw Cession districts from the State Auditor and the Secretary of State. App. 35. As this case arose from a Rule 12(b)(6) motion, I use the disparity most favorable to the plaintiffs: $74.71.

funding of public education in the State of Mississippi, and instead bases its equal protection analysis on 1½% of the overall funds provided for public secondary and elementary schools in the State. The Equal Protection Clause, at least in the context of a state funding of schools, is concerned with *substance*, not with the *de minimis* variations of funding among the districts.

Table A in the Appendix to this opinion, "School Finances," shows that Chickasaw Cession school districts are in fact distributed throughout a financial ranking of all the State's school districts, whether the measure used is "Current Expenditure per Pupil," "Current Expenditure per Pupil for Instruction Cost," or "Current Expenditure per Pupil . . . Less Transportation." Specifically, the Table shows that the statewide average per pupil expenditure was $1965.78, of which $1,261.09 went towards "instructional cost." All but 6 of the 39 school districts within the Chickasaw Cession districts spent within $300 of the per pupil average expenditure; all but two spent within $200 of the average per pupil instructional expenditure. The per pupil expenditure was over $1,400 in the Chickasaw district with the lowest per pupil expenditure, and over $2,400 in the Chickasaw district with the highest expenditure. In the light of these figures of expenditures per pupil, I cannot believe that $74.71—the alleged difference between the average per pupil payment from Sixteenth Section lands and the average per pupil payment from the State's trust fund in place of the Chickasaw school lands—creates a "detriment" to the students and schools within the Chickasaw Cession and thereby gives rise to a violation of equal protection under the rational-relation standard.[5]

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[5] The State distributes its funds equally throughout Mississippi's school districts on the basis of "teacher unit[s]." See Miss. Code Ann. §§ 37–19–3 and 37–19–5 (Supp. 1985); Tr. Oral Arg. 32. As in many States, total funding among districts in Mississippi varies depending upon local ad valorem taxes and other district sources. See Table B; see also *San Antonio*

Although the figures of expenditures per pupil are fatal to petitioners' claims, a second set of statistics provides an additional reason to conclude that an equal protection claim concerning alleged disparities in Sixteenth Section lands should not survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). As shown in Table B, "Receipts for Public Schools," payments received from Sixteenth Section lands in 1984–1985, $16,272,925, accounted for less than 1½% of total "Receipts for Public Schools" throughout the State. These Sixteenth Section payments are dwarfed by income from state and federal funds of over $752 million (totaling 74% of "Receipts for Public Schools"). Variations among school districts of such a small part of the total receipts cannot support a claim of a violation of the Equal Protection Clause in the provision of education for the children of the Chickasaw Cession districts.[6]

Independent School Dist. v. *Rodriguez*, 411 U. S. 1, 49 (1973). Discrepancies from Sixteenth Section lands are frequently offset in part or entirely by ad valorem taxes, and the variations in local funding from sources other than Sixteenth Section lands are almost always greater than the alleged "disparity" relied on in this case. See Annual Report, *supra* n. 1, at 94–98 (listing revenue receipts by local sources).

[6] There is another reason to dismiss petitioner's claims. The system of financing Mississippi's public schools bears a substantial similarity to the financing arrangement in the State of Texas upheld by this Court. *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*. In *Rodriguez*, almost half of the revenues for funding elementary and secondary schools came from a large state-funded program designed to provide a basic minimal education in every school. Each school district then would supplement state and federal funds through an ad valorem tax on property within its jurisdiction. Similarly, Mississippi provides each district with funds to support a "minimum program of education." See Miss. Code Ann. § 37–19–1 *et seq.* (1972 and Supp. 1985). These funds constitute over half of the receipts for public schools; federal funds constitute another 18%. Of the remaining receipts for Mississippi's school districts, ad valorem taxes, which are levied by, and vary among, the local school districts, account for over two-thirds. See Table B, *infra*. Mississippi's financing system, like that of Texas, "[w]hile assuring a basic education for every child in the State, . . . permits and encourages a large measure of participation and

III

Petitioners' equal protection claims cannot survive a motion under Federal Rule Civil Procedure 12(b)(6) in the light of the distribution of Chickasaw Cession districts throughout the statewide rankings of various expenditures per pupil and the insignificance of the Sixteenth Section funds relative to the total receipts for education. Accordingly, I dissent.

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control of each district's schools at the local level." *Rodriguez*, *supra*, at 49.

I also note that Mississippi has taken numerous steps to ensure the adequacy of the most important single factor in education: the quality of the teachers. The State has established a Commission on Teacher and Administrator Education to oversee the training, certification, and evaluation of public school teachers throughout Mississippi. Miss. Code Ann. § 37–3–2 (Supp. 1985). There is a guaranteed minimum for teachers' salaries that may be augmented by the local districts, §§ 37–19–7 and 37–19–15, a scale of pay increases based on tenure and merit, § 37–19–7, a guarantee of no reduction in any local supplements to salary, § 37–19–11, a set of minimum standards for teachers' competency, § 37–19–9, and a requirement that all teachers employed after July 1, 1975, take the "national teachers examination," § 37–19–13.

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APPENDIX TO OPINION OF POWELL, J.

TABLE A

SCHOOL FINANCES†

District	Average Current Expenditure per Pupil in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil for Instruction Cost in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil in ADA Less Transportation (1984–1985) Amount	Rank
Natchez Adams	2,131.22	33	1,253.67	73	2,018.70	31
Alcorn	*1,694.89*	*132*	*1,270.49*	*63*	*1,585.03*	*129*
Corinth	*1,947.49*	*64*	*1,274.92*	*61*	*1,862.16*	*53*
Amite	2,331.43	11	1,454.17	18	2,057.52	28
Attala	2,109.59	36	1,298.66	48	1,936.06	40
Kosciusko	1,877.64	88	1,104.12	139	1,727.96	90
Benton	*2,121.78*	*35*	*1,338.89*	*38*	*1,952.98*	*38*
Bolivar #1	* 2,082.64	39	1,339.85	36	2,012.20	34
Bolivar #2	* 2,769.62	4	1,804.24	2	2,699.23	3
Bolivar #3	* 1,943.55	66	1,264.60	68	1,873.11	51
Bolivar #4	* 1,793.43	110	1,182.67	106	1,722.98	91
Bolivar #5	* 2,027.20	45	1,309.88	45	1,956.74	37
Bolivar #6	* 1,657.08	136	1,173.85	116	1,586.61	128
Calhoun	*1,770.32*	*115*	*1,199.18*	*95*	*1,656.17*	*111*
Carroll	2,014.44	51	1,295.68	49	1,821.73	69
Chickasaw	*2,158.73*	*29*	*1,438.50*	*21*	*1,901.76*	*47*
Houston	*1,797.93*	*108*	*1,233.84*	*80*	*1,681.46*	*105*
Okolona	*1,635.52*	*143*	*1,106.77*	*137*	*1,565.18*	*132*
Choctaw	1,935.99	70	1,309.67	46	1,787.92	77
Claiborne	4,085.75	1	2,066.37	1	3,799.88	1
Enterprise	* 1,729.02	123	1,143.75	128	1,538.66	136
Quitman Cons.	* 1,813.05	106	1,129.16	133	1,622.30	120
Clay	*2,307.56*	*13*	*1,482.73*	*13*	*2,161.68*	*13*
West Point	1,844.88	97	1,198.97	96	1,733.96	89
Coahoma Cty.	*2,414.77*	*10*	*1,514.98*	*6*	*2,236.92*	*10*
Clarksdale	*1,918.05*	*77*	*1,255.92*	*72*	*1,891.53*	*49*
Copiah	2,168.89	28	1,162.03	122	2,064.60	25
Hazlehurst	1,771.68	114	1,190.21	99	1,660.59	110
Covington	1,912.97	79	1,290.85	50	1,782.63	79
Desoto	*1,565.04*	*148*	*1,021.31*	*150*	*1,467.48*	*146*

SCHOOL FINANCES—Continued

District	Average Current Expenditure per Pupil in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil for Instruction Cost in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil in ADA Less Transportation (1984–1985) Amount	Rank
Forrest	2,019.63	48	1,352.53	34	1,841.33	60
Hattiesburg	2,215.47	25	1,465.32	15	2,145.72	14
Petal	1,701.54	129	1,182.13	108	1,595.90	124
Franklin	2,298.67	15	1,514.75	7	2,121.11	21
George	1,474.78	153	982.08	152	1,341.92	154
Greene	2,056.05	42	1,278.69	58	1,834.67	65
Grenada	1,764.73	116	1,175.11	114	1,644.66	114
Hancock	1,750.66	119	1,011.95	151	1,566.13	131
Bay St. Louis	1,981.82	56	1,165.33	119	1,905.05	46
Harrison	1,860.89	92	1,264.10	69	1,758.84	83
Biloxi	2,251.56	18	1,411.45	24	2,163.00	12
Gulfport	2,496.19	8	1,457.45	17	2,433.81	7
Long Beach	1,920.58	74	1,257.30	71	1,843.01	59
Pass Christian	2,965.97	2	1,628.06	3	2,874.13	2
Hinds	1,918.64	76	1,215.27	87	1,796.81	73
Jackson	2,429.77	9	1,422.73	22	2,293.98	9
Clinton	1,813.93	105	1,178.70	110	1,702.73	101
Holmes	1,854.79	95	1,223.53	85	1,713.49	94
Durant	1,553.46	151	1,155.74	125	1,553.37	133
Humphreys	2,132.20	32	1,193.35	97	1,959.88	36
Itawamba	*1,905.92*	*80*	*1,156.48*	*124*	*1,749.66*	*85*
Jackson	2,243.31	20	1,364.81	33	2,113.99	23
Moss Point	1,878.90	87	1,249.54	75	1,796.95	71
Ocean Springs	1,920.67	73	1,269.80	64	1,852.01	58
Pascagoula	2,538.68	6	1,494.00	11	2,458.17	5
East Jasper	* 2,010.43	52	1,265.89	66	1,836.99	64
West Jasper	* 1,866.24	89	1,244.61	79	1,693.61	103
Jefferson	2,066.22	41	1,351.06	35	1,861.66	54
Jefferson Davis	1,928.49	72	1,275.72	60	1,749.29	86
Jones	1,719.42	125	1,170.06	117	1,551.87	134
Laurel	2,639.67	5	1,590.71	4	2,581.89	4
Kemper	2,096.15	38	1,339.34	37	1,868.72	52
Lafayette	*1,698.47*	*130*	*1,109.42*	*136*	*1,530.26*	*137*
Oxford	*2,226.94*	*24*	*1,514.00*	*8*	*2,118.55*	*22*

265 Appendix to opinion of POWELL, J.

SCHOOL FINANCES—Continued

District	Average Current Expenditure per Pupil in ADA (1984-1985) Amount	Rank	Average Current Expenditure per Pupil for Instruction Cost in ADA (1984-1985) Amount	Rank	Average Current Expenditure per Pupil in ADA Less Transportation (1984-1985) Amount	Rank
Lamar	1,506.98	152	971.37	153	1,382.92	153
Lumberton Line	* 1,601.57	145	1,182.43	107	1,601.07	122
Lauderdale	1,641.60	138	1,084.88	143	1,485.10	143
Meridian	2,136.57	31	1,398.45	26	2,064.38	26
Lawrence	1,980.57	57	1,193.35	98	1,840.85	62
Leake	1,720.38	124	1,132.06	132	1,574.13	130
Lee	*1,694.48*	*133*	*1,162.81*	*120*	*1,587.20*	*127*
Nettleton Line	* *1,457.55*	*154*	*1,097.67*	*141*	*1,444.60*	*149*
Tupelo	2,199.64	27	1,337.87	39	2,137.07	16
Leflore	2,148.73	30	1,384.79	29	2,022.71	30
Greenwood	2,245.93	19	1,459.97	16	2,215.51	11
Lincoln	1,590.44	146	1,076.05	145	1,441.20	150
Brookhaven	2,031.92	44	1,416.07	23	1,920.57	43
Lowndes	1,640.09	140	1,060.41	147	1,517.19	140
Columbus	2,106.33	37	1,383.49	30	2,018.05	33
Madison	2,125.62	34	1,301.47	47	1,912.65	45
Canton	1,697.55	131	1,213.84	90	1,639.48	117
Ridgeland	1,814.86	103	1,150.59	127	1,704.57	100
Marion	2,272.92	16	1,494.76	10	2,061.49	27
Columbia	2,240.43	23	1,448.23	19	2,132.43	18
Marshall	*1,684.23*	*134*	*1,201.21*	*94*	*1,524.60*	*139*
Holly Springs	*1,975.64*	*59*	*1,232.12*	*82*	*1,860.84*	*55*
Monroe	*1,706.16*	*127*	*1,112.07*	*135*	*1,546.87*	*135*
Aberdeen	*1,890.98*	*83*	*1,245.80*	*78*	*1,796.93*	*72*
Amory	*1,840.11*	*98*	*1,283.43*	*53*	*1,764.71*	*81*
Montgomery	2,022.40	47	1,213.96	89	1,856.00	57
Winona	2,005.07	53	1,401.42	25	1,945.24	39
Neshoba	1,638.19	141	1,162.39	121	1,502.41	141
Philadelphia	1,913.78	78	1,319.95	42	1,832.34	67
Newton	1,920.07	75	1,185.90	105	1,719.76	93
Newton Sep.	1,945.74	65	1,249.46	76	1,831.42	68
Union Sep.	1,740.87	121	1,143.63	129	1,646.80	113
Noxubee	1,939.99	69	1,289.94	51	1,749.23	87
Oktibbeha	1,897.03	82	1,337.68	40	1,759.97	82

SCHOOL FINANCES—Continued

District	Average Current Expenditure per Pupil in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil for Instruction Cost in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil in ADA Less Transportation (1984–1985) Amount	Rank
Starkville	1,965.92	62	1,252.02	74	1,879.25	50
North Panola	* *1,864.61*	*90*	*1,215.43*	*86*	*1,705.72*	*99*
South Panola	* *1,637.45*	*142*	*1,100.87*	*140*	*1,478.59*	*145*
Pearl River	1,562.46	149	966.38	154	1,418.22	152
Picayune	1,752.85	118	1,190.01	101	1,672.13	106
Poplarville	1,862.97	91	1,190.15	100	1,707.74	96
Perry	2,311.91	12	1,371.84	31	2,111.50	24
Richton	1,886.43	85	1,174.43	115	1,719.79	92
North Pike	* 1,630.22	144	1,114.71	134	1,480.55	144
South Pike	* 1,858.62	94	1,265.60	67	1,707.35	98
McComb	1,941.21	68	1,223.67	84	1,858.82	56
Pontotoc	*1,775.64*	*113*	*1,134.82*	*131*	*1,630.30*	*118*
Pontotoc Sep.	*1,643.80*	*137*	*1,064.43*	*146*	*1,461.72*	*147*
Prentiss	*1,884.35*	*86*	*1,316.58*	*43*	*1,756.40*	*84*
Baldwyn	*1,859.39*	*93*	*1,206.28*	*92*	*1,783.64*	*78*
Booneville	*1,887.23*	*84*	*1,282.05*	*55*	*1,792.72*	*74*
Quitman	*1,988.47*	*55*	*1,335.45*	*41*	*1,893.71*	*48*
Rankin	1,556.15	150	1,043.08	148	1,427.91	151
Pearl	1,711.80	126	1,151.38	126	1,594.58	125
Scott	1,737.36	122	1,213.54	91	1,600.68	123
Forest	1,827.34	101	1,287.52	52	1,711.70	95
Anguilla Line	* 2,018.96	49	1,187.61	103	1,921.95	42
Sharkey Issaquena	* 2,016.35	50	1,246.07	77	1,841.20	61
Simpson	1,819.91	102	1,260.84	70	1,698.56	102
Smith	1,941.22	67	1,232.87	81	1,739.71	88
Stone	1,989.77	54	1,215.14	88	1,833.56	66
Sunflower	1,978.77	58	1,283.18	54	1,840.10	63
Drew	2,039.51	43	1,385.51	28	1,933.45	41
Indianola	1,640.99	139	1,178.18	111	1,589.70	126
E. Tallahatchie	* 1,928.67	71	1,273.27	62	1,788.65	76
W. Tallahatchie	* 1,847.13	96	1,269.31	65	1,707.58	97
Tate	*1,786.61*	*112*	*1,176.14*	*112*	*1,648.01*	*112*
Senatobia	*1,743.53*	*120*	*1,189.10*	*102*	*1,671.48*	*107*

SCHOOL FINANCES—Continued

District	Average Current Expenditure per Pupil in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil for Instruction Cost in ADA (1984–1985) Amount	Rank	Average Current Expenditure per Pupil in ADA Less Transportation (1984–1985) Amount	Rank
North Tippah	* *1,829.20*	*100*	*1,175.58*	*113*	*1,671.22*	*108*
South Tippah	* *1,757.42*	*117*	*1,185.98*	*104*	*1,612.25*	*121*
Tishomingo	*1,968.02*	*61*	*1,157.67*	*123*	*1,819.53*	*70*
Iuka	1,577.18	147	1,078.86	144	1,456.91	148
Tunica	*1,809.43*	*107*	*1,092.64*	*142*	*1,661.67*	*109*
Union	*1,658.56*	*135*	*1,104.20*	*138*	*1,527.78*	*138*
New Albany	2,073.07	40	1,367.04	32	1,985.33	35
Walthall	1,797.02	109	1,279.93	56	1,622.85	119
Warren	1,951.95	63	1,166.91	118	1,791.93	75
Vicksburg	2,209.59	26	1,388.60	27	2,128.96	19
Hollandale	* 1.898.37	81	1,313.56	44	1,778.27	80
Leland	* 2,261.80	17	1,498.17	9	2,141.71	15
Western Line	* 2,243.11	21	1,472.29	14	2,123.03	20
Greenville	1,974.31	60	1,279.45	57	1,918.06	44
Wayne	1,790.77	111	1,135.49	130	1,642.63	115
Webster	*1,834.83*	*99*	*1,225.69*	*83*	*1,688.89*	*104*
Wilkinson	2,304.75	14	1,442.19	20	2,137.07	17
Louisville	1,814.22	104	1,181.68	109	1,639.88	116
Coffeeville	* *2,241.05*	*22*	*1,278.55*	*59*	*2,028.25*	*29*
Water Valley	* *1,705.38*	*128*	*1,040.79*	*149*	*1,492.57*	*142*
Yazoo	2,845.92	3	1,490.19	12	2,333.34	8
Holly Bluff	* 2,500.03	7	1,524.17	5	2,448.57	6
Yazoo City	2,023.38	46	1,205.28	93	2,018.31	32
Statewide Average	1,965.78		1,261.09		1,842.94	
Chickasaw Average	1,853.52		1,218.82		1,722.82	
Chocktaw Average	1,992.92		1,268.17		1,879.67	

* County Office receipts/expenditures prorated to consolidated districts by ADA.
† All school districts within the Chickasaw Cession are denoted by italic typeface. School districts that are partially within the Chickasaw Cession are also in italic type.

SOURCE: Mississippi State Board of Education, 1986 Annual Report of the State Superintendent of Public Education 144–146 (1986).

TABLE B
RECEIPTS FOR PUBLIC SCHOOLS
1984–1985

Source of State Funds:		
State Dept. of Ed.	$ 9,005,760	
Per Capita & Minimum Program	490,568,205	
Vocational Ed.	16,269,064	
Chickasaw	61,454	
Homestead Exemption	30,916,541	
EFC Payments	2,898,692	
Severance Tax	10,290,972	
Driver Penalty Funds	555,963	
Textbook	6,110,596	
School Lunch	574,624	
Adult Ed.	35,619	
Educable Children	511,070	
Ed. Reform Act	985,796	
Other	153,766	
Total State Funds	$ 568,938,122	56.1%
Source of Federal Funds:		
State Dept. Ed.	$ 6,293,149	
Vocational Ed.	3,540,422	
National Forest	3,247,726	
TVA	643,509	
P. L. 874	2,657,490	
ECIA Ch. 1	64,896,618	
ECIA Ch. 2	4,388,330	
ESEA Other	107,118	
OEO	151,860	
Soc. Sec. Tit. XX & CETA (Emp. Sec. Comm.)	1,677,019	
School Lunch & Sp. Milk & Nonfood Asst.	67,638,280	
School Lunch, Commodities, Food	12,660,094	
Adult Ed.	745,079	
Education Handicapped Act	11,347,044	
Other (*e.g.*, CETA Governor's Office)	3,403,978	
Total Federal Funds	$ 183,397,716	18.1%

RECEIPTS FOR PUBLIC SCHOOLS—Continued
1984–1985

Source of Local Funds:		
Ad Valorem Tax	$ 165,985,203	
Mineral Lease Tax	86,276	
Tuition from Patrons	1,991,041	
Transp. Fees from Patrons	222,585	
Sixteen Section Income	16,272,925	
Interest on Investments	12,800,202	
Intermediate Source	816,620	
Bond & Int. Fund Receipts	25,405,580	
School Lunch	24,668,351	
Student Activity	7,063,639	
Other	5,809,634	
Total Local Sources	$ 261,122,056	25.8%
TOTAL REVENUE RECEIPTS	$1,013,457,894	100.0%
Nonrevenue Receipts:		
Sale of Bonds	$ 33,393,809	
Sale of Assets	1,603,699	
Insurance Loss Recovery	3,383,380	
Loans	10,357,549	
TOTAL NONREVENUE RECEIPTS	$ 48,738,437	
TOTAL REVENUE & NONREVENUE RECEIPTS	$1,062,196,331	

SOURCE: Mississippi State Board of Education, 1986 Annual Report of the State Superintendent of Public Education 48 (1986).

LIBRARY OF CONGRESS ET AL. *v.* SHAW

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

No. 85–54. Argued February 24, 1986—Decided July 1, 1986

After petitioner Library of Congress had rejected respondent black employee's complaints alleging job-related racial discrimination, respondent's counsel pursued administrative relief and settlement negotiations, and eventually reached a settlement with the Library. The latter agreed to promote respondent retroactively with backpay if the Comptroller General determined that the Library was authorized to do so in the absence of a specific finding of racial discrimination. The Comptroller General ruled that the Library, under the Back Pay Act, lacked such authority. Respondent then filed suit in Federal District Court, alleging that Title VII of the Civil Rights Act of 1964 authorized the relief. The court agreed, and therefore authorized the Library to promote respondent with backpay, and to pay a reasonable attorney's fee and costs pursuant to § 706(k) of the Act, which provides that in any Title VII action the court may allow the prevailing party a "reasonable attorney's fee as part of the costs" and that "the United States shall be liable for costs the same as a private person." In calculating the attorney's fee, the District Court increased the lodestar amount by 30 percent to compensate counsel for the delay in receiving payment for his services. The Court of Appeals affirmed, holding that although the no-interest rule—under which no recovery can be had against the Government for interest in the absence of an express waiver of sovereign immunity from an award of interest—applied since compensation for delay is functionally equivalent to interest, Congress waived the Government's immunity from interest by making it liable "the same as a private person."

Held: The no-interest rule applies here so as to preclude the award of increased compensation to respondent's counsel for the delay in receiving payment for his services. Pp. 314–323.

(a) Section 706(k)'s provision making the United States liable "the same as a private person" waives the Government's immunity from attorney's fees, but not interest. The statute, as well as its history, contains no reference to interest, and thus precludes reading it as the requisite waiver of the Government's immunity from interest. Pp. 318–320.

(b) Nor is that requisite waiver found in § 706(k)'s requirement of awarding "reasonable" attorney's fees. There is no basis for reading the term "reasonable" as the embodiment of a specific congressional choice

to include interest as a component of attorney's fees. And any congressional policy permitting recovery of a *reasonable* attorney's fee, no matter how compelling, is insufficient, standing alone, to waive the Government's immunity from interest. Pp. 320–321.

(c) Section 706(k)'s provision making the United States liable for "costs," including a reasonable attorney's fee, does not provide the clear affirmative intent of Congress to waive the Government's immunity from interest. Prejudgment interest is considered as damages, not a component of "costs." P. 321.

(d) The no-interest rule cannot be avoided by characterizing what is functionally equivalent to interest as compensation for delay. Both interest and a delay factor are designed to compensate for the belated receipt of money. Pp. 321–323.

241 U. S. App. D. C. 355, 747 F. 2d 1469, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 323.

Charles A. Rothfeld argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, and *Deputy Solicitor General Geller*.

Charles Stephen Ralston argued the cause for respondent. With him on the brief was *Julius LeVonne Chambers*.

JUSTICE BLACKMUN delivered the opinion of the Court.

The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest. In this case, attorney's fees as well as interest on those fees were awarded to a plaintiff who prevailed against petitioner Library of Congress in a suit brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* We therefore must decide whether Congress, in enacting Title VII, expressly waived the Government's immunity from interest.

I

Respondent Tommy Shaw is an employee of the Library of Congress. He is black. During 1976 and 1977, he filed three complaints with the Library's Equal Employment Office alleging job-related racial discrimination. Following an investigation, Library officials rejected his complaints. Thereafter, respondent's counsel pursued administrative relief and settlement negotiations, and eventually reached a settlement with the Library. The latter agreed to promote Shaw retroactively with backpay provided that the Comptroller General first determined that the Library had authority to do so in the absence of a specific finding of racial discrimination. The Comptroller General ruled that the Library, under the Back Pay Act, 5 U. S. C. §§ 5595, 5596, lacked that power; he did not address whether such relief was authorized under Title VII.

Respondent then filed suit in the United States District Court for the District of Columbia, contending that Title VII authorized the Library to accord the relief specified in the settlement agreement. On cross-motions for summary judgment, the court agreed with respondent that the Library had the power under Title VII to settle his claim by awarding him a retroactive promotion with backpay without a formal finding of discrimination. 479 F. Supp. 945 (1979). The Library therefore was authorized to promote Shaw with backpay, and to pay a reasonable attorney's fee and costs pursuant to § 706(k) of the Civil Rights Act, 42 U. S. C. § 2000e–5(k). 479 F. Supp., at 949–950.

In a separate opinion calculating the attorney's fee, the District Court began with a lodestar of $8,435,[1] based on 99 hours of work at $85 per hour. App. to Pet. for Cert. 57a, 62a–66a. The court then reduced the lodestar by 20 percent to reflect the quality of counsel's representation. *Id.*, at

[1] The lodestar component of an attorney's fee is the product of "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983).

66a–67a. Finally, and significantly for present purposes, the court increased the adjusted lodestar by 30 percent to compensate counsel for the delay in receiving payment for the legal services rendered. *Id.*, at 68a. The District Court, relying on *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 403, 641 F. 2d 880, 893 (1980) (en banc), indicated that increasing an attorney's fee award for delay is appropriate because the hourly rates used for the lodestar represent the prevailing rate for clients who typically pay their legal bills promptly, whereas court-awarded fees are normally received long after the legal services are rendered. An increase for delay is designed to compensate the attorney for the money he could have earned had he been paid earlier and invested the funds. The District Court concluded that the period of delay ran from the time the case should have ended, which it viewed as the latter part of 1978, until just after judgment.

The Court of Appeals for the District of Columbia Circuit affirmed. 241 U. S. App. D. C. 355, 747 F. 2d 1469 (1984). The court determined that, even though the adjustment was termed compensation for delay rather than interest, the no-interest rule applied because the two adjustments were functionally equivalent. The court went on to examine whether the Government expressly had waived its immunity from interest in Title VII. Section 706(k) of Title VII, 42 U. S. C. § 2000e–5(k), provides in relevant part:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee as part of the costs, and the [EEOC] and *the United States shall be liable for costs the same as a private person.*" (Emphasis added.)

The Court of Appeals noted that in a Title VII suit against a private employer, interest on attorney's fees may be recovered. 241 U. S. App. D. C., at 361, 747 F. 2d, at 1475. See, *e. g.*, *Chrapliwy* v. *Uniroyal, Inc.*, 670 F. 2d 760 (CA7 1982), cert. denied, 461 U. S. 956 (1983). Therefore, the

Court of Appeals reasoned, in making the United States liable "the same as a private person," Congress waived the United States' immunity from interest. In the alternative, the Court of Appeals held that even if the "same as a private person" provision was not an express waiver, the District Court's adjustment was proper; when a statute measures the liability of the United States by that of a private person, the "traditional rigor of the sovereign-immunity doctrine" is relaxed. 241 U. S. App. D. C., at 365, 747 F. 2d, at 1479.

Judge Ginsburg dissented. *Id.*, at 371, 747 F. 2d, at 1485. She found no express waiver of immunity from interest, and declined to join what she considered to be a judicial termination of the no-interest rule. She viewed the increase for delay in this case as an award of interest, based on the manner and timing of its computation. She indicated, however, that use of current rather than historical hourly rates in order to compensate for delay, or use of historical rates that were based on expected delay, see *Murray* v. *Weinberger*, 239 U. S. App. D. C. 264, 741 F. 2d 1423 (1984), would not run afoul of the no-interest rule.

We granted certiorari to address the question whether the Court of Appeals' decision conflicts with this Court's repeated holdings that interest may not be awarded against the Government in the absence of express statutory or contractual consent. 474 U. S. 815 (1985).

II

In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. This requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim. C. McCormick, Law of Damages § 50, p. 205 (1935). Because interest was generally presumed not to be within the contemplation of the parties, common-law courts in England allowed interest by way of

damages only when founded upon agreement of the parties.[2] See *De Havilland* v. *Bowerbank*, 1 Camp. 50, 51, 170 Eng. Rep. 872, 873 (N. P. 1807); *Calton* v. *Bragg*, 15 East. 223, 226–227, 104 Eng. Rep. 828, 830 (K. B. 1812); H. McGregor, Mayne and McGregor On Damages 281 (1961). In turn, the agreement-basis of interest was adopted by American courts. See *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 393 (N. Y. 1824) (reviewing treatment of interest in state courts); C. McCormick, Law of Damages § 51, p. 208 (1935). Gradually, in suits between private parties, the necessity of an agreement faded. See *id.*, at 210.

The agreement requirement assumed special force when applied to claims for interest against the United States. As sovereign, the United States, in the absence of its consent, is immune from suit. See *United States* v. *Sherwood*, 312 U. S. 584 (1941). This basic rule of sovereign immunity, in conjunction with the requirement of an agreement to pay interest, gave rise to the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress. See, *e. g.*, *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260 (1888) ("The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect"). The purpose of the rule is to permit the Government to "occupy an apparently favored position," *United*

[2] The institution of interest originated under Roman law as a penalty due from a debtor who delayed or defaulted in repayment of a loan. See Leadam, Interest and Usury, in 2 Palgrave's Dictionary of Political Economy 432 (H. Higgs ed. 1925). The measure of the penalty due for the default or delay was *id quod interest*—that which is between—the difference between the creditor's current position and what it would have been if the loan had been timely and fully repaid. See also W. Ashley, An Introduction to English Economic History and Theory 196 (1966); C. McCormick, Law of Damages § 51, pp. 207–208 (1935). Because interest was conceived of as a penalty, it was generally presumed not to be within the contemplation of the parties.

States v. *Verdier*, 164 U. S. 213, 219 (1896), by protecting it from claims for interest that would prevail against private parties. See 4 Op. Atty. Gen. 136, 137 (1842).

For well over a century, this Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result. The no-interest rule is expressly described as early as 1819, in an opinion letter from Attorney General William Wirt to the Secretary of the Treasury.[3] Congress had enacted a private Act to reimburse a citizen for unspecified injuries. When the citizen sought interest, in addition to the damages authorized by Congress, Attorney General Wirt stated that there is "no reason . . . to depart from the usual practice of the Treasury Department" of denying interest, and directed the citizen to seek relief from Congress. 1 Op. Atty. Gen. 268.[4]

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[3] Prior to the creation of the Court of Claims, a citizen's only means of obtaining recompense from the Government was by requesting individually tailored waivers of sovereign immunity, through private Acts of Congress. The administrative responsibility of hearing many of the claims was assigned to the Treasury Department. See W. Cowen, P. Nichols, & M. Bennett, The United States Court of Claims, Part II, p. 4 (1978). Accordingly, the earliest statements of the no-interest rule appear in opinion letters of Attorneys General in response to questions posed by the Comptroller of the Treasury concerning payment of interest where a private Act of Congress authorized the Treasury Department to pay damages, with no mention of interest on the damages. See generally Wiecek, The Origin of the United States Court of Claims, 20 Admin. L. Rev. 387 (1967).

[4] Subsequent Attorneys General consistently reiterated the no-interest rule. See, *e. g.*, 2 Op. Atty. Gen. 390, 392 (1830) ("[C]laims against the government . . . are not payable until demanded—and then without interest"); 3 Op. Atty. Gen. 635, 639 (1841) ("It is confidently believed, that in all the numerous acts of Congress for the liquidation and settlement of claims against the government, there is no instance in which interest has ever been allowed, except only where those acts have expressly directed or authorized its allowance"); 4 Op. Atty. Gen. 14, 15–16 (1842) ("I have no objection to admit, that as between individuals, the claim for interest in such a case would be an equitable and reasonable one. . . . But nothing is bet-

In creating the Court of Claims, Congress retained the Government's immunity from awards of interest, permitting it only where expressly agreed to under contract or statute. Court of Claims Act, § 7, 12 Stat. 766 (current version at 28 U. S. C. § 2516(a)). Although the Act, by its terms, addresses only those cases brought in the Court of Claims, this Court repeatedly has made clear that the Act merely codifies the traditional legal rule regarding the immunity of the United States from interest. See, *e. g.*, *Tillson* v. *United States*, 100 U. S. 43, 47 (1879); *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 658 (1947); *United States* v. *Tillamooks*, 341 U. S. 48, 49 (1951). In cases not in the Court of Claims, this Court has reaffirmed the notion: "Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U. S. 253, 264–265 (1980), quoting *Smyth* v. *United States*, 302 U. S. 329, 353 (1937).[5] See *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 387, n. 17 (1980).

III

Respondent acknowledges the longstanding no-interest rule, but argues that Congress, by § 706(k), waived the Gov-

ter established as a general rule than that the government is not to pay damages [in the form of interest] in such cases: a stern but necessary rule, adopted everywhere in the practice of government"); 4 Op. Atty. Gen. 286, 294 (1843) ("[U]nder the established usage of the Treasury Department, over and over again sanctioned by the opinions of the law officers of the government, the Secretary has no authority to allow [interest]").

[5] The "constitutional requirement" arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, "just compensation" includes a payment for interest. See, *e. g.*, *Smyth* v. *United States*, 302 U. S., at 353–354; *Albrecht* v. *United States*, 329 U. S. 599, 605 (1947). The no-interest rule is similarly inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise. See, *e. g.*, *Standard Oil Co.* v. *United States*, 267 U. S. 76, 79 (1925).

ernment's immunity from interest in making the United States liable "the same as a private person" for "costs," including "a reasonable attorney's fee."

In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, see *McMahon* v. *United States*, 342 U. S. 25, 27 (1951), and not enlarge the waiver "'beyond what the language requires,'" *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686 (1983), quoting *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686 (1927). The no-interest rule provides an added gloss of strictness upon these usual rules.

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S., at 659.

A

When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly;[6]

[6] See, *e. g.*, 28 U. S. C. § 2411 (expressly authorizing prejudgment and postjudgment interest payable by the United States in tax-refund cases); 31 U. S. C. § 1304 (appropriating funds for interest on certain district court judgments); 26 U. S. C. § 7426(g) (providing for interest in cases of wrongful levy by Internal Revenue Service). In other statutes, Congress has reiterated the general rule that interest cannot be allowed against the United States absent express waiver. See, *e. g.*, 28 U. S. C. § 2516(a) (interest available in the Claims Court only under contract or by statute expressly providing for payment thereof). Title 28 U. S. C. § 2674 provides that the United States is not liable for prejudgment interest on claims under the Federal Tort Claims Act. This unusual statutory exclusion was necessitated by the Federal Tort Claims Act's specific reference to state

thus, waivers of sovereign immunity to suit must be read against the backdrop of the no-interest rule. Yet respondent contends that by equating the United States' liability to that of a private party, Congress waived the Government's immunity from interest. We do not agree. See *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41 (1928).

Title VII's provision making the United States liable "the same as a private person" waives the Government's immunity from attorney's fees, but not interest. The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest.

When Congress enacted Title VII in 1964, and provided in § 706(k), 42 U. S. C. § 2000e–5(k), that the Government should be liable for attorney's fees "the same as a private person," it rendered the United States subject to liability only as a *plaintiff* for the fees of certain prevailing defendants. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978). At its inception, thus, the provision was at most a very limited waiver of sovereign immunity, establishing that the United States is liable for the fees of prevailing defendants in the same circumstances as are private plaintiffs. It was not until 1972 that Congress waived the Government's immunity under Title VII as a defendant, affording federal employees a right of action against the Government for its discriminatory acts as an employer. See § 717, 42 U. S. C. § 2000e–16(d). That § 706(k) already contained language equating the liability of the United States for attorney's fees to that of a private person does not represent the requisite affirmative congressional choice to waive the no-interest rule; see also n. 5, *supra*.

Other statutes placing the United States in the same position as a private party also have been read narrowly to pre-

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law for the rules of decision, in order to make clear that the United States' immunity from interest does not turn on state law.

serve certain immunities that the United States has enjoyed historically. In *Laird* v. *Nelms*, 406 U. S. 797 (1972), for example, the Court held that, although the Federal Tort Claims Act made the United States liable for the "negligent or wrongful act or omission of any employee of the Government . . . , if a private person, would be liable to the claimant," 28 U. S. C. § 1346(b), the United States nonetheless was not liable for the entire range of conduct classified as tortious under state law. Cf. *Lehman* v. *Nakshian*, 453 U. S. 156 (1981) (jury trials are available to private, but not to Government, employees under the Age Discrimination in Employment Act).

B

Nor do we find the requisite waiver of immunity from interest in the statutory requirement of awarding "reasonable" attorney's fees. There is no basis for reading the term "reasonable" as the embodiment of a specific congressional choice to include interest as a component of attorney's fees, particularly where the legislative history is silent. The Court consistently has refused to impute an intent to waive immunity from interest into the ambiguous use of a particular word or phrase in a statute. For example, interest has been ruled unavailable under statutes or contracts directing the United States to pay the "amount equitably due." See *Tillson* v. *United States*, 100 U. S., at 46. And the United States is not liable for interest under statutes and contracts requiring the payment of "just compensation," *United States* v. *Tillamooks*, 341 U. S., at 49; *United States* v. *Goltra*, 312 U. S. 203 (1941), even though it long has been understood that the United States is required to pay interest where the Constitution mandates payment under the Just Compensation Clause. See *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299 (1923).

Respondent argues, however, that the policy reasons that motivated Congress to permit recovery of a *reasonable* attorney's fee require reading the statute as a waiver of immunity

from interest. But policy, no matter how compelling, is insufficient, standing alone, to waive this immunity:

> "[T]he immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S., at 663.

C

Finally, we note that the provision makes the United States liable for "costs," and includes as an element of "costs" a reasonable attorney's fee. Prejudgment interest, however, is considered as damages, not a component of "costs." See 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2664, pp. 159–160 (2d ed. 1983); 2 A. Sedgwick & G. Van Nest, Sedgwick on Damages 157–158 (7th ed. 1880). Indeed, the term "costs" has never been understood to include any interest component. See 28 U. S. C. § 1920; see also Wright, Miller, & Kane, *supra*, §§ 2666 and 2670. A statute allowing costs, and within that category, attorney's fees, does not provide the clear affirmative intent of Congress to waive the sovereign's immunity.

IV

In the alternative, respondent argues that the no-interest rule does not prohibit the award of compensation for delay. But the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution:

> "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *United States* v. *Mescalero Apache Tribe*, 207 Ct. Cl. 369, 389, 518 F. 2d 1309, 1322 (1975), cert. denied, 425 U. S. 911 (1976).

Respondent claims, however, that interest and delay represent more than mere semantic variations. Interest and a delay factor, according to respondent, have distinct purposes: the former compensates for loss in the use of money, while the latter compensates for loss in the value of money. See Tr. of Oral Arg. 30.

We are not persuaded. Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay. See *United States* v. *Sherman*, 98 U. S. 565, 568 (1879). Thus, whether the loss to be compensated by an increase in a fee award stems from an opportunity cost or from the effects of inflation, the increase is prohibited by the no-interest rule.[7] See *Saunders* v. *Clayton*, 629 F. 2d 596, 598 (CA9 1980) ("In essence, the inflation factor adjustment is a disguised interest award"), cert. denied, 450 U. S. 980 (1981); *Blake* v. *Califano*, 200 U. S. App. D. C. 27, 31, and n. 9, 626 F. 2d 891, 895, and n. 9 (1980) (as a matter of economic theory, there may be a distinction between interest and a delay factor, but both are nonetheless prohibited by the no-interest rule); D. Dobbs, Remedies § 3.5, p. 174 (1973) (prejudgment interest represents delay damages).

That interest and compensation for delay are functionally equivalent also is supported by Title VII decisions concerning private employers. Private-sector decisions, when they adjust for the time of payment, grant interest or a delay factor, but not both. See, *e. g.*, *Brown* v. *Gillette Co.*, 536 F. Supp.

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[7] When interest is awarded, as it was in this case, it is computed by multiplying a particular rate of interest by the amount of the award. An interest rate reflects not only the real opportunity cost of capital, but also the inflation rate. See R. Posner, Economic Analysis of Law 180 (3d ed. 1986). Thus, loss of value due to delay is an element of an interest adjustment.

113 (Mass. 1982); *Black Gold, Ltd.* v. *Rockwool Industries, Inc.*, 529 F. Supp. 272 (Colo. 1981); *Kennelly* v. *Lemoi*, 529 F. Supp. 140 (RI 1981).

V

In making the Government liable as a defendant under Title VII, Congress effected a waiver of the Government's immunity from suit, and from costs including reasonable attorney's fees. Congress did not waive the Government's traditional immunity from interest. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court today applies the rules for construing waivers of sovereign immunity in a wooden and archaic fashion to conclude that the United States has not waived its immunity to interest on attorney's fee awards. Because the result reached by the Court frustrates the clear intention of Congress, I respectfully dissent.

The so-called "no-interest rule" is, as the Court suggests, one of considerable antiquity.[1] *Ante*, at 316–317. It is a corollary of the ancient principle that the sovereign is immune from suit and from liability for damages in the absence of an express waiver of immunity. And, as a corollary of the general sovereign immunity doctrine, the no-interest rule logically should be governed by the same canons of construction we employ to interpret waivers of sovereign immunity for suits for damages. Just two Terms ago, we explained

[1] While the "no-interest rule" is an old one, we have not always treated it as an absolute prohibition against the award of interest against the United States in the absence of an express waiver of the rule. In both *Standard Oil Co.* v. *United States*, 267 U. S. 76 (1925) (Holmes, J.), and *United States* v. *The Thekla*, 266 U. S. 328 (1924) (Holmes, J.), the Court authorized just such awards with little explanation or analysis.

that "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board of California* v. *United States Postal Service*, 467 U. S. 512, 521 (1984) (internal citation omitted). Applying this standard here, I would hold that Congress has waived immunity from prejudgment interest on attorney's fees in all situations where a private individual would be liable for such interest.

I begin with the relevant language of § 706(k) of Title VII, 42 U. S. C. § 2000e–5(k): "[T]he court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee as a part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person." By this language, Congress indisputably authorized the award of reasonable attorney's fees to prevailing parties against any losing party, including the United States. Since, in appropriate circumstances, § 706(k) permits the award of prejudgment interest (or a delay adjustment) on attorney's fees awarded against losing parties other than the Federal Government,[2]

[2] See, *e. g.*, *Johnson* v. *University College of University of Alabama*, 706 F. 2d 1205 (CA11) (holding that in calculating attorney's fees, district courts should take into account inflation and interest), cert. denied, 464 U. S. 994 (1983); *Louisville Black Police Officers Org., Inc.* v. *Louisville*, 700 F. 2d 268 (CA6 1983) (declining to award a delay adjustment because the attorneys had been adequately compensated, but recognizing the availability of delay adjustments in appropriate cases); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F. 2d 760 (CA7 1982) (upholding the employment of a delay adjustment), cert. denied, 461 U. S. 956 (1983); *Laffey* v. *Northwest Airlines, Inc.*, 572 F. Supp. 354 (DC 1983) (awarding delay adjustment), aff'd in part and remanded in part on other grounds, 241 U. S. App. D. C. 11, 746 F. 2d 4 (1984), cert. denied, 472 U. S. 1021 (1985); *Brown* v. *Gillette Co.*, 536 F. Supp. 113 (Mass. 1982) (awarding delay adjustment); *Lockheed Minority Solidarity Coalition* v. *Lockheed Missiles & Space Co.*, 406 F. Supp. 828 (ND Cal. 1976) (awarding delay adjustment). Cf. *Gates* v. *Collier*, 616 F. 2d 1268, 1278–1279 (CA5 1980); *Johnson* v. *Summer*, 488 F. Supp. 83, 85–88 (ND Miss. 1980) (both supporting the award of prejudgment interest

§ 706(k) *by its terms* authorizes the award of prejudgment interest against the Federal Government under like circumstances and thus constitutes an express waiver of sovereign immunity.

The "underlying congressional policy," *Franchise Tax Board, supra*, at 521, also supports this conclusion. The Senate Report relevant to the Equal Employment Act of 1972—the legislation that amended Title VII, *inter alia*, to protect federal employees against employment discrimination—indicates that Congress intended that federal employees enjoy the same access to courts and the same judicial remedies that are available to other Title VII plaintiffs. S. Rep. No. 92–415 (1971). The Report states:

> "[T]he committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U. S. Government defense of sovereign immunity or failure to exhaust administrative remedies . . . . Moreover, the remedial authority of the . . . courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants . . . . *Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII.*" *Id.*, at 16 (emphasis added).

See also *Chandler* v. *Roudebush*, 425 U. S. 840, 841 (1976).

The legislative history of the 1972 amendments thus demonstrates that Congress intended that federal employees enjoy the same rights and remedies in the courts as private litigants. It therefore follows that Congress intended that in situations where private sector Title VII litigants may re-

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on attorney's fees awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988).

cover prejudgment interest on their attorney's fees awards, so may federal employees.[3]

It is true, as the Court points out, that the legislative history of the 1972 amendments to Title VII seems devoid of explicit reference to the availability of prejudgment interest on attorney's fees awarded against the Federal Government. But, only under a highly formalistic, "ritualistic," *Franchise Tax Board*, *supra*, at 521, canon of construction that ignores unmistakable congressional intent and that requires Congress to adhere to a talismanic formula in order to waive immunity can the absence of the words "interest on attorney's fees" from the congressional Committee Reports limit the waiver of sovereign immunity to the attorney's fees themselves and bar the award of interest on those fees. Such an antiquated canon of construction is unacceptable, both because it is unnecessary to protect the Government from liability to which it has not consented and because it frustrates the intention of Congress that federal employees enjoy the same rights and remedies in the courts as do individuals in the private sector.

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[3] The Court contends that the fact that § 706(k) contains language equating the liability of the United States for attorney's fees to that of a private person "does not represent the requisite affirmative congressional choice to waive the no-interest rule," *ante*, at 319, because § 706(k) was drafted in 1964 and was intended at that time to waive sovereign immunity for attorney's fees and costs against the Federal Government only where the Federal Government had been the plaintiff in a Title VII case. The Court also observes that other statutes placing the United States in the same position as a private party have been narrowly construed to preserve the historic immunities that the Federal Government has enjoyed. The Court ignores, however, the relevance of the legislative history of the 1972 amendments to Title VII. As the legislative history makes clear, these amendments, by waiving the United States' sovereign immunity as a defendant, changed the scope of § 706(k)'s waiver of immunity in order to provide federal employees with the same rights and remedies in court proceedings as litigants in the private sector enjoyed under Title VII. It is this broad waiver of immunity that distinguishes § 706(k) from the other statutes cited by the Court.

In my view, the Court of Appeals correctly held that Congress, in stating that the Federal Government is liable for attorney's fees to the same extent as other losing parties, waived sovereign immunity for both fees and prejudgment interest thereon.[4] I therefore dissent and would affirm the judgment below.

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[4] In dismissing respondent's argument that Congress, by equating the United States' liability to that of a private party, waived the Government's immunity from prejudgment interest on attorney's fees awards, the Court cites *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41 (1928), without elaboration or explanation. *Ante*, at 319. *Boston Sand* concerned a "private Act" of Congress that empowered the District Court to hear a case arising from a collision between a United States warship and a private craft, and to award "'the amount of legal damages sustained by reason of said collision . . . against the United States, upon the same principle and measure of liability . . . as in like cases in admiralty between private parties.'" 278 U. S., at 46. There, the Court rejected the argument that Congress had placed the Federal Government in all respects on the same footing as a private person, noting that many similar private Acts had been understood to preclude the award of interest and suggesting that Congress might have passed the Act in question with that fact in mind.

In sharp contrast to *Boston Sand*, we know here from the legislative history of the 1972 amendments to Title VII that Congress intended that federal employees enjoy precisely the same rights and remedies in federal court as do litigants from the private sector. See *supra*, at 325. Consequently, *Boston Sand* is inapposite to the instant case.

POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

No. 84–1903. Argued April 28, 1986—Decided July 1, 1986

Puerto Rico's Games of Chance Act of 1948 (Act) legalizes certain forms of casino gambling in licensed places in order to promote the development of tourism, but also provides that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." Implementing regulations prohibit the advertising of gambling parlors to the public in Puerto Rico but permit restricted advertising through publicity media outside Puerto Rico. Appellant, a partnership franchised to operate a casino in Puerto Rico, was fined by appellee public corporation, which is authorized to administer the Act, for violating the advertising restrictions in the Act and the regulations. Appellant then filed suit against appellee in the Puerto Rico Superior Court, seeking a declaratory judgment that the Act and regulations, both facially and as applied by appellee, impermissibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the Federal Constitution. The court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct, but the court then adopted a narrowing construction of the Act and regulations, declaring that they prohibited local advertising addressed to inviting residents of Puerto Rico to visit casinos, but not certain local advertising addressed to tourists even though it might incidentally reach the attention of residents. The court then held that, based on its construction of the laws, the statute and regulations were facially constitutional. The Puerto Rico Supreme Court dismissed appellant's appeal on the ground that it "d[id] not present a substantial constitutional question."

Held:

1. This Court has jurisdiction to review the Puerto Rico Supreme Court's decision pursuant to 28 U. S. C. § 1258(2), which authorizes an appeal to this Court from a decision of the Puerto Rico Supreme Court that is in favor of the validity of a Puerto Rico statute challenged as being repugnant to the Federal Constitution. Appellant's federal constitutional claims were adequately raised at every stage of the proceedings below, and under Puerto Rico law appellant had the right to appeal the Superior Court's decision to the Puerto Rico Supreme Court on the

ground that the case involved or decided a substantial constitutional question under the Federal Constitution. Thus, the Puerto Rico Supreme Court's dismissal of the appeal for want of a substantial constitutional question constituted a decision on the merits in favor of the validity of the challenged statute and regulations. This Court's jurisdiction is not affected by appellant's late filing, under Puerto Rico's Rules of Civil Procedure, of its notice of appeal to the Puerto Rico Supreme Court, since that court has held the filing requirement to be nonjurisdictional, and its failure to dismiss on timeliness grounds must be viewed as a waiver of the requirement. Pp. 337–339.

2. In reviewing the facial constitutionality of the Act and regulations, this Court must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Puerto Rico Supreme Court. This would be the rule in a case originating in one of the 50 States, and Puerto Rico's status as a Commonwealth dictates application of the same rule. P. 339.

3. The Act and regulations, as construed by the Superior Court, do not facially violate the First Amendment. The advertising restrictions pass muster under the four-pronged test of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557. First, the particular kind of commercial speech at issue concerns a lawful activity and is not misleading or fraudulent, at least in the abstract, and thus is entitled to a limited form of First Amendment protection. Second, Puerto Rico's interest in restricting advertising to reduce the demand for casino gambling by Puerto Rico's residents and thus protect their health, safety, and welfare, constitutes a "substantial" governmental interest. Third, the restrictions on commercial speech "directly advance" the government's asserted interest, and are not underinclusive simply because other kinds of gambling may be advertised to Puerto Rico residents. And fourth, the restrictions are no more extensive than necessary to serve the government's interest since, as construed by the Superior Court, they do not affect advertising aimed at tourists, but apply only to advertising aimed at Puerto Rico residents. *Carey* v. *Population Services International*, 431 U. S. 678; and *Bigelow* v. *Virginia*, 421 U. S. 809, distinguished. There is no merit to appellant's argument that, having chosen to legalize casino gambling for Puerto Rico residents, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. Pp. 340–347.

4. The Puerto Rico Supreme Court properly concluded that, as construed by the Superior Court, the Act and regulations do not facially violate the due process or equal protection guarantees of the Constitution. Even assuming that appellant's argument that the advertising restric-

tions are unconstitutionally vague, in violation of due process requirements, has merit with respect to the bare statutory language, nevertheless this Court is bound by the Superior Court's narrowing construction of the statute. Viewed in that light, and particularly with the interpretive assistance of the regulations as modified by the Superior Court, the statute is not unconstitutionally vague. Pp. 347–348.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., *post*, p. 348, and STEVENS, J., *post*, p. 359, filed dissenting opinions, in which MARSHALL and BLACKMUN, JJ., joined.

Maria Milagros Soto argued the cause and filed briefs for appellant.

Lino J. Saldana argued the cause and filed a brief for appellee.*

JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we address the facial constitutionality of a Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico. Appellant Posadas de Puerto Rico Associates, doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino, filed suit against appellee Tourism Company of Puerto Rico in the Superior Court of Puerto Rico, San Juan Section. Ap-

*Briefs of *amici curiae* urging reversal were filed for the American Association of Advertising Agencies, Inc., by *David S. Versfelt* and *C. Evan Stewart;* for the American Broadcasting Companies, Inc., et al. by *Carl R. Ramey, Timothy B. Dyk, Sally Katzen, Valerie G. Schulte,* and *L. Stanley Paige;* for the American Civil Liberties Union by *M. Margaret McKeown, Burt Neuborne,* and *Charles S. Sims;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg, Peter O. Shinevar,* and *Laurence Gold;* for the American Newspaper Publishers Association by *P. Cameron DeVore, Marshall J. Nelson,* and *W. Terry Maguire;* and for the National Broadcasting Co., Inc., by *Floyd Abrams, Dean Ringel, Corydon B. Dunham,* and *Howard Monderer.*

Briefs of *amici curiae* were filed for the Atlantic City Casino Association by *Herbert J. Miller, Jr.*, and *David O. Stewart;* and for the Association of National Advertisers, Inc., by *Gilbert H. Weil.*

pellant sought a declaratory judgment that the statute and regulations, both facially and as applied by the Tourism Company, impermissibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the United States Constitution.[1] The Superior Court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct. But the court adopted a narrowing construction of the statute and regulations and held that, based on such a construction, both were facially constitutional. The Supreme Court of Puerto Rico dismissed an appeal on the ground that it "d[id] not present a substantial constitutional question." We postponed consideration of the question of jurisdiction until the hearing on the merits. 474 U. S. 917 (1985). We now hold that we have jurisdiction to hear the appeal, and we affirm the decision of the Supreme Court of Puerto Rico with respect to the facial constitutionality of the advertising restrictions.

In 1948, the Puerto Rico Legislature legalized certain forms of casino gambling. The Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act), authorized the playing of roulette, dice, and card games in licensed "gambling rooms." § 2, codified, as amended, at P. R. Laws Ann., Tit. 15, § 71 (1972). Bingo and slot machines were later added to the list of authorized games of chance under the Act. See Act of June 7, 1948, No. 21, § 1 (bingo); Act of July 30, 1974, No. 2, pt. 2, § 2 (slot machines). The legislature's intent was set forth in the Act's Statement of Motives:

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[1] We have held that Puerto Rico is subject to the First Amendment Speech Clause, *Balzac* v. *Porto Rico*, 258 U. S. 298, 314 (1922), the Due Process Clause of either the Fifth or the Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668–669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976). See generally *Torres* v. *Puerto Rico*, 442 U. S. 465, 468–471 (1979).

> "The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act No. 221 of May 15, 1948, § 1.

The Act also provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." § 8, codified, as amended, at P. R. Laws Ann., Tit. 15, § 77 (1972).

The Act authorized the Economic Development Administration of Puerto Rico to issue and enforce regulations implementing the various provisions of the Act. See § 7(a), codified, as amended, at P. R. Laws Ann., Tit. 15, § 76a (1972). Appellee Tourism Company of Puerto Rico, a public corporation, assumed the regulatory powers of the Economic Development Administration under the Act in 1970. See Act of June 18, 1970, No. 10, § 17, codified at P. R. Laws Ann., Tit. 23, § 671p (Supp. 1983). The two regulations at issue in this case were originally issued in 1957 for the purpose of implementing the advertising restrictions contained in § 8 of the Act. Regulation 76–218 basically reiterates the language of § 8. See 15 R. & R. P. R. § 76–218 (1972). Regulation 76a–1(7), as amended in 1971, provides in pertinent part:

> "No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by

> the Tourism Development Company of the advertisement to be submitted in draft to the Company." 15 R. & R. P. R. § 76a–1(7) (1972).

In 1975, appellant Posadas de Puerto Rico Associates, a partnership organized under the laws of Texas, obtained a franchise to operate a gambling casino and began doing business under the name Condado Holiday Inn Hotel and Sands Casino.[2] In 1978, appellant was twice fined by the Tourism Company for violating the advertising restrictions in the Act and implementing regulations. Appellant protested the fines in a series of letters to the Tourism Company. On February 16, 1979, the Tourism Company issued to all casino franchise holders a memorandum setting forth the following interpretation of the advertising restrictions:

> "This prohibition includes the use of the word 'casino' in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico." App. 7a.

Pursuant to this administrative interpretation, the Tourism Company assessed additional fines against appellant. The Tourism Company ordered appellant to pay the outstanding total of $1,500 in fines by March 18, 1979, or its gambling franchise would not be renewed. Appellant continued to protest the fines, but ultimately paid them without seeking judicial review of the decision of the Tourism Company. In July 1981, appellant was again fined for violating the advertising restrictions. Faced with another threatened non-

[2] The hotel was purchased in 1983 by Williams Electronics Corporation, is now organized as a public corporation under Delaware law as Posadas de Puerto Rico Associates, Inc., and does business in Puerto Rico as Condado Plaza Hotel and Casino.

renewal of its gambling franchise, appellant paid the $500 fine under protest.[3]

Appellant then filed a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico, San Juan Section, seeking a declaration that the Act and implementing regulations, both facially and as applied by the Tourism Company, violated appellant's commercial speech rights under the United States Constitution. The Puerto Rico Secretary of Justice appeared for the purpose of defending the constitutionality of the statute and regulations. After a trial, the Superior Court held that "[t]he administrative interpretation and application has *[sic]* been capricious, arbitrary, erroneous and unreasonable, and has *[sic]* produced absurd results which are contrary to law." App. to Juris. Statement 29b. The court therefore determined that it must "override the regulatory deficiency to save the constitutionality of the statute." The court reviewed the history of casino gambling in Puerto Rico and concluded:

> ". . . We assume that the legislator was worried about the participation of the residents of Puerto Rico on what on that date constituted an experiment . . . . Therefore, he prohibited the gaming rooms from announcing themselves or offering themselves to the public—which we reasonably infer are the *bona fide* residents of Puerto Rico. . . . [W]hat the legislator foresaw and prohibited was the invitation to play at the casinos through publicity campaigns or advertising in Puerto Rico addressed to the resident of Puerto Rico. He wanted to protect him." *Id.*, at 32b.

Based on this view of the legislature's intent, the court issued a narrowing construction of the statute, declaring that "the

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[3] News of the Tourism Company's decision to levy the fine against appellant reached the New Jersey Gaming Commission, and caused the Commission to consider denying a petition filed by appellant's parent company for a franchise to operate a casino in that State.

only advertisement prohibited by the law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." *Id.*, at 33b–34b. The court also issued the following narrowing construction of Regulation 76a–1(7):

> ". . . Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.
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> . . . . . .
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> "We hereby allow, within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illustrative purposes only, advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted areas to travelers only in the international airport and the docks where tourist cruise ships arrive since the principal objective of said announcements is to make the tourist in transit through Puerto Rico aware of the availability of the games of chance as a tourist amenity; the ads of casinos in magazines for distribution primarily in Puerto Rico to the tourist, including the official guide of the Tourism Company 'Que Pasa in Puerto Rico' and any other tourist facility guide in Puerto Rico, even though said magazines may be available to the residents and in movies, television, radio, newspapers and trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist.

"We hereby authorize advertising in the mass communication media of the country, where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. Among the announcements allowed, by way of illustration, are the use of the trade name with which the hotel is identified for the promotion of special vacation packages and activities at the hotel, in invitations, 'billboards,' bulletins and programs or activities sponsored by the hotel. The use of the trade name, including the reference to the casino is also allowed in the hotel's facade, provided the word 'casino' does not exceed in proportion the size of the rest of the name, and the utilization of lights and colors will be allowed if the rest of the laws regarding this application are complied with; and in the menus, napkins, glasses, tableware, glassware and other items used within the hotel, as well as in calling cards, envelopes and letterheads of the hotel and any other use which constitutes a means of identification.

"The direct promotion of the casinos within the premises of the hotels is allowed. In-house guests and clients may receive any type of information and promotion regarding the location of the casino, its schedule and the procedure of the games as well as magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards and similar items used by the tourism centers of the world.

"Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny." *Id.*, at 38b–40b.

The court entered judgment declaring that appellant's constitutional rights had been violated by the Tourism Company's past application of the advertising restrictions, but that

the restrictions were not facially unconstitutional and could be sustained, as "modified by the guidelines issued by this Court on this date."[4] *Id.*, at 42b.

The Supreme Court of Puerto Rico dismissed appellant's appeal of the Superior Court's decision on the ground that it "d[id] not present a substantial constitutional question." *Id.*, at 1a. See P. R. Laws Ann., Tit. 4, § 37(a) (1978). Treating appellant's submission as a petition for a writ of review, see §§ 37(b), (g), the Supreme Court denied the petition. One judge dissented.

We hold that we have jurisdiction to review the decision of the Supreme Court of Puerto Rico. A federal statute, 28 U. S. C. § 1258(2), specifically authorizes an appeal to this Court from a decision of the Supreme Court of Puerto Rico "where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity." A careful review of the record in this case reveals that appellant's federal constitutional claims were adequately raised at every stage of the proceedings below. In a letter to the Tourism Company on February 24, 1982, prior to filing suit, appellant warned that, absent a reinterpretation of the advertising restrictions by the Tourism Company, "we have no choice but to challenge in Court the constitutionality and or validity of the advertising prohibition of the Act and Regulations." App. to Juris. Statement 6h. In its complaint, appellant claimed that the advertising restrictions "violat[ed] the constitutional rights of petitioner protected by the First Amend-

[4] In addition to its decision concerning the advertising restrictions, the Superior Court declared unconstitutional a regulation, 15 R. & R. P. R. § 76a–4(e) (1972), that required male casino patrons to wear dinner jackets while in the casino. The court described the dinner jacket requirement as "basically a condition of sex" and found that the legislature "has no reasonable interest which would warrant a dissimilar classification" based on sex. See App. to Juris. Statement 35b–36b.

ment to the Constitution of the United States . . . [,] the constitutional guarantee of equal protection of the laws protected by the Constitution of the United States . . . [and] the constitutional guarantee of due process of law . . . ." *Id.*, at 4i. And in the bill of appeal to the Supreme Court of Puerto Rico, appellant claimed that the advertising restrictions violated "the First Amendment of the United States Constitution," *id.*, at 5c, along with "due process of law guaranteed by the Constitution" and "the equal protection of the laws," *id.*, at 6c.

Under Puerto Rico law, appellant had the right to appeal the Superior Court's decision to the Supreme Court of Puerto Rico on the ground that that case "involv[ed] or decid[ed] a substantial constitutional question under the Constitution of the United States." P. R. Laws Ann., Tit. 4, § 37(a) (1978). The Supreme Court's dismissal of appellant's appeal for want of "a substantial constitutional question" therefore constituted a decision on the merits in favor of the validity of the challenged statute and regulations. See *Tumey* v. *Ohio*, 273 U. S. 510, 515 (1927). In such a situation, we have jurisdiction to review the decision of the Supreme Court pursuant to 28 U. S. C. § 1258(2).

The Tourism Company argues, however, that appellant's notice of appeal was not timely filed with the Clerk of the Supreme Court of Puerto Rico,[5] in violation of Rule 53.1 of the Puerto Rico Rules of Civil Procedure. According to the Tourism Company, this flaw is fatal to appellant's right to seek review in this Court. We do not agree. The requirement under Rule 53.1 that a notice of appeal be timely filed with the clerk of the reviewing court has been held by the

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[5] Under Puerto Rico law, the notice of appeal apparently was due in the Clerk's Office by 5 p.m. on the 30th day following the docketing of the Superior Court's judgment. Supreme Court of Puerto Rico Rule 48(a). The certificate of the Acting Chief Clerk of the Supreme Court of Puerto Rico indicates that appellant's notice of appeal was filed at 5:06 p.m. on the 30th day.

Supreme Court of Puerto Rico to be nonjurisdictional. See *Morales* v. *Mendez Mas*, 109 P. R. R. 1136 (1980). In this case, the Supreme Court did not dismiss appellant's appeal on timeliness grounds, so we can only assume that the court waived the timeliness requirement, as it had the power to do. Appellant's late filing of the notice of appeal does not affect our jurisdiction.

Before turning to the merits of appellant's First Amendment claim, we must address an additional preliminary matter. Although we have not heretofore squarely addressed the issue in the context of a case originating in Puerto Rico, we think it obvious that, in reviewing the facial constitutionality of the challenged statute and regulations, we must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of Puerto Rico. This would certainly be the rule in a case originating in one of the 50 States. See *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684, 688 (1959). And we believe that Puerto Rico's status as a Commonwealth dictates application of the same rule. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 672–673 (1974) (noting with approval decisions of lower federal courts holding that Puerto Rico is to be deemed "sovereign over matters not ruled by the Constitution"); *Wackenhut Corp.* v. *Aponte*, 266 F. Supp. 401, 405 (PR 1966) (Puerto Rico "should have the primary opportunity through its courts to determine the intended scope of its own legislation"), aff'd, 386 U. S. 268 (1967).[6]

[6] A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. See *Diaz* v. *Gonzalez*, 261 U. S. 102, 105–106 (1923) (Holmes, J.) ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here").

Because this case involves the restriction of pure commercial speech which does "no more than propose a commercial transaction," *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976),[7] our First Amendment analysis is guided by the general principles identified in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980). See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 637–638 (1985). Under *Central Hudson*, commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. 447 U. S., at 566.

The particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not

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[7] The narrowing construction of the statute and regulations announced by the Superior Court effectively ensures that the advertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 637–638, n. 7 (1985) (noting that Ohio's ban on advertising of legal services in Dalkon Shield cases "has placed no general restrictions on appellant's right to publish facts or express opinions regarding Dalkon Shield litigation"); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 391 (1973) (emphasizing that "nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment"); Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 35, n. 125 (1979) (such "'political' dialogue is at the core of . . . the first amendment").

misleading or fraudulent, at least in the abstract. We must therefore proceed to the three remaining steps of the *Central Hudson* analysis in order to determine whether Puerto Rico's advertising restrictions run afoul of the First Amendment. The first of these three steps involves an assessment of the strength of the government's interest in restricting the speech. The interest at stake in this case, as determined by the Superior Court, is the reduction of demand for casino gambling by the residents of Puerto Rico. Appellant acknowledged the existence of this interest in its February 24, 1982, letter to the Tourism Company. See App. to Juris. Statement 2h ("The legislators wanted the tourists to flock to the casinos to gamble, but not our own people"). The Tourism Company's brief before this Court explains the legislature's belief that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." Brief for Appellees 37. These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 54 (1986) (city has substantial interest in "preserving the quality of life in the community at large").

The last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question is clearly "yes." The Puerto Rico Legislature obvi-

ously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See *Central Hudson*, *supra*, at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales"); cf. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 509 (1981) (plurality opinion of WHITE, J.) (finding third prong of *Central Hudson* test satisfied where legislative judgment "not manifestly unreasonable").

Appellant argues, however, that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling "directly advance" the legislature's interest in reducing demand for games of chance. See *id.*, at 511 (plurality opinion of WHITE, J.) ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising"). Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. According to the Superior Court, horse racing, cockfighting, "picas," or small games of chance at fiestas, and the lottery "have been traditionally part of the Puerto Rican's roots," so that "the legislator could have been more flexible than in authorizing more sophisticated games

which are not so widely sponsored by the people." App. to Juris. Statement 35b. In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.[8] In our view, the legislature's separate classification of casino gambling, for purposes of the advertising ban, satisfies the third step of the *Central Hudson* analysis.

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest. The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico. See also n. 7, *infra;* cf. *Oklahoma Telecasters*

[8] The history of legalized gambling in Puerto Rico supports the Superior Court's view of the legislature's intent. Casino gambling was prohibited in Puerto Rico for most of the first half of this century. See Puerto Rico Penal Code, § 299, Rev. Stats. and Codes of Porto Rico (1902). The Puerto Rico Penal Code of 1937 made it a misdemeanor to deal, play, carry on, open, or conduct "any game of faro, monte, roulette, fantan, poker, seven and a half, twenty one, hoky-poky, or any game of chance played with cards, dice or any device for money, checks, credit, or other representative of value." See P. R. Laws Ann., Tit. 33, § 1241 (1983). This longstanding prohibition of casino gambling stood in stark contrast to the Puerto Rico Legislature's early legalization of horse racing, see Act of Mar. 10, 1910, No. 23, repealed, Act of Apr. 13, 1916, No. 28, see P. R. Laws Ann., Tit. 15, §§ 181–197 (1972 and Supp. 1985); "picas," see Act of Apr. 23, 1927, No. 25, § 1, codified, as amended, at P. R. Laws Ann., Tit. 15, § 80 (1972); dog racing, see Act of Apr. 20, 1936, No. 35, repealed, Act of June 4, 1957, No. 10, § 1, see P. R. Laws Ann., Tit. 15, § 231 (1972) (prohibiting dog racing); cockfighting, see Act of Aug. 12, 1933, No. 1, repealed, Act of May 12, 1942, No. 236, see P. R. Laws Ann., Tit. 15, §§ 292–299 (1972); and the Puerto Rico lottery, see J. R. No. 37, May 14, 1934, repealed, Act of May 15, 1938, No. 212, see P. R. Laws Ann., Tit. 15, §§ 111–128 (1972 and Supp. 1985).

Assn. v. *Crisp*, 699 F. 2d 490, 501 (CA10 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984). Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 585 (DC 1971) (three-judge court) ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking"), summarily aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972); *Dunagin* v. *City of Oxford, Miss.*, 718 F. 2d 738, 751 (CA5 1983) (en banc) ("We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers"), cert. denied, 467 U. S. 1259 (1984).

In short, we conclude that the statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim.[9]

[9] It should be apparent from our discussion of the First Amendment issue, and particularly the third and fourth prongs of the *Central Hudson*

Appellant argues, however, that the challenged advertising restrictions are constitutionally defective under our decisions in *Carey* v. *Population Services International*, 431 U. S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). In *Carey*, this Court struck down a ban on any "advertisement or display" of contraceptives, 431 U. S., at 700–702, and in *Bigelow*, we reversed a criminal conviction based on the advertisement of an abortion clinic. We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions and the instant case. In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to

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test, that appellant can fare no better under the equal protection guarantee of the Constitution. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 55, n. 4 (1986). If there is a sufficient "fit" between the legislature's means and ends to satisfy the concerns of the First Amendment, the same "fit" is surely adequate under the applicable "rational basis" equal protection analysis. See *Dunagin* v. *City of Oxford, Miss.*, 718 F. 2d 738, 752–753 (CA5 1983) (en banc), cert. denied, 467 U. S. 1259 (1984).

JUSTICE STEVENS, in dissent, asserts the additional equal protection claim, not raised by appellant either below or in this Court, that the Puerto Rico statute and regulations impermissibly discriminate between different kinds of publications. *Post*, at 359–360. JUSTICE STEVENS misunderstands the nature of the Superior Court's limiting construction of the statute and regulations. According to the Superior Court, "[i]f the object of [an] advertisement is the tourist, it passes legal scrutiny." See App. to Juris. Statement 40b. It is clear from the court's opinion that this basic test applies *regardless of whether the advertisement appears in a local or nonlocal publication*. Of course, the likelihood that a casino advertisement appearing in the New York Times will be primarily addressed to tourists, and not Puerto Rico residents, is far greater than would be the case for a similar advertisement appearing in the San Juan Star. But it is simply the demographics of the two newspapers' readerships, and not any form of "discrimination" on the part of the Puerto Rico Legislature or the Superior Court, which produces this result.

completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, see, *e. g.*, Cal. Penal Code Ann. § 647(b) (West Supp. 1986) (prohibiting soliciting or engaging in act of prostitution), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand, see, *e. g.*, Nev. Rev. Stat. §§ 244.345(1), (8) (1986) (authorizing licensing of houses of prostitution except in counties with more than 250,000 population), §§ 201.430, 201.440 (prohibiting advertising of houses of prostitution "[i]n any public theater, on the public streets of any city or town, or on any public high-

way," or "in [a] place of business").[10] To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Appellant's final argument in opposition to the advertising restrictions is that they are unconstitutionally vague. In particular, appellant argues that the statutory language, "to advertise or otherwise offer their facilities," and "the public of Puerto Rico," are not sufficiently defined to satisfy the requirements of due process. Appellant also claims that the term "anunciarse," which appears in the controlling Spanish version of the statute, is actually broader than the English term "to advertise," and could be construed to mean simply "to make known." Even assuming that appellant's argument has merit with respect to the bare statutory language, however, we have already noted that we are bound by the Superior Court's narrowing construction of the statute. Viewed in light of that construction, and particularly with the interpretive assistance of the implementing regulations as

[10] See also 15 U. S. C. § 1335 (prohibiting cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission"), upheld in *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (DC 1971), summarily aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972); Fla. Stat. § 561.42(10)–(12) (1985) (prohibiting all signs except for one sign per product in liquor store windows); Mass. Gen. Laws § 138:24 (1974) (authorizing Alcoholic Beverages Control Commission to regulate liquor advertising); Miss. Code Ann. § 67–1–85 (Supp. 1985) (prohibiting most forms of liquor sign advertising), upheld in *Dunagin* v. *City of Oxford, Miss.*, *supra;* Ohio Rev. Code Ann. §§ 4301.03(E), 4301.211 (1982) (authorizing Liquor Control Commission to regulate liquor advertising and prohibiting off-premises advertising of beer prices), upheld in *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N. E. 2d 138, appeal dism'd for want of a substantial federal question, 459 U. S. 807 (1982); Okla. Const., Art. 27, § 5, and Okla. Stat., Tit. 37, § 516 (1981) (prohibiting all liquor advertising except for one storefront sign), upheld in *Oklahoma Telecasters Assn.* v. *Crisp*, 699 F. 2d 490 (CA10 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984); Utah Code Ann. §§ 32–7–26 to 32–7–28 (1974) (repealed 1985) (prohibiting all liquor advertising except for one storefront sign).

modified by the Superior Court, we do not find the statute unconstitutionally vague.

For the foregoing reasons, the decision of the Supreme Court of Puerto Rico that, as construed by the Superior Court, § 8 of the Games of Chance Act of 1948 and the implementing regulations do not facially violate the First Amendment or the due process or equal protection guarantees of the Constitution, is affirmed.[11]

It is so ordered.

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

The Puerto Rico Games of Chance Act of 1948, Act No. 221 of May 15, 1948, legalizes certain forms of casino gambling in Puerto Rico. Section 8 of the Act nevertheless prohibits gambling casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico." § 8, codified, as amended, at P. R. Laws Ann., Tit. 15, § 77 (1972). Because neither the language of § 8 nor the applicable regulations define what constitutes "advertis[ing] or otherwise offer[ing gambling] facilities to the public of Puerto Rico," appellee Tourism Company was found to have applied the Act in an arbitrary and confusing manner. To ameliorate this problem, the Puerto Rico Superior Court, to avoid a declaration of the unconstitutionality of § 8, construed it to ban only advertisements or offerings directed to the residents of Puerto Rico, and listed examples of the kinds of advertisements that the court considered permissible under the Act. I doubt that this interpretation will assure that arbitrary and unrea-

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[11] JUSTICE STEVENS claims that the Superior Court's narrowing construction creates an impermissible "prior restraint" on protected speech, because that court required the submission of certain casino advertising to appellee for its prior approval. See *post*, at 361. This argument was not raised by appellant either below or in this Court, and we therefore express no view on the constitutionality of the particular portion of the Superior Court's narrowing construction cited by JUSTICE STEVENS.

sonable applications of § 8 will no longer occur.[1] However, even assuming that appellee will now enforce § 8 in a nonarbitrary manner, I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity.

I

It is well settled that the First Amendment protects commercial speech from unwarranted governmental regulation. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761–762 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 561–562 (1980). Our decisions have recognized, however, "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). We have therefore held that the Constitution "accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 64–65 (1983). Thus, while the First Amendment ordinarily prohibits regulation of speech

[1] Beyond the specific areas addressed by the Superior Court's "guidelines," § 8 must still be applied on a case-by-case basis; a casino advertisement "passes legal scrutiny" if "the object of the advertisement is the tourist." App. to Juris. Statement 40b. Appellee continues to insist that a newspaper photograph of appellant's slot machines constituted an impermissible "advertisement," even though it was taken at a press conference called to protest legislative action. See Brief for Appellees 48. Thus, even under the narrowing construction made by the Superior Court, appellee would interpret § 8 to prohibit casino owners from criticizing governmental policy concerning casino gambling if such speech is directed to the Puerto Rico residents who elect government officials, rather than to tourists.

based on the content of the communicated message, the government may regulate the content of commercial speech in order to prevent the dissemination of information that is false, deceptive, or misleading, see *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 638 (1985); *Friedman* v. *Rogers*, 440 U. S. 1, 14–15 (1979); *Ohralik*, *supra*, at 462, or that proposes an illegal transaction, see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973). We have, however, consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale. See *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer's services); *Carey* v. *Population Services International*, 431 U. S. 678, 700–702 (1977) (contraceptives); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (housing); *Virginia Pharmacy Board*, *supra* (pharmaceuticals); *Bigelow* v. *Virginia*, 421 U. S. 809 (1975) (abortions).

I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity. Commercial speech is considered to be different from other kinds of protected expression because advertisers are particularly well suited to evaluate "the accuracy of their messages and the lawfulness of the underlying activity," *Central Hudson*, 447 U. S., at 564, n. 6, and because "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Ibid.* (quoting *Bates*, *supra*, at 381); see also *Friedman*, *supra*, at 10; *Virginia Pharmacy Board*, *supra*, at 772, n. 24. These differences, we have held, "justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent 'chilling' of protected speech are inapplicable to commercial

speech." *Central Hudson, supra,* at 578 (BLACKMUN, J., concurring in judgment); see *Linmark Associates, Inc., supra,* at 98; *Virginia Pharmacy Board, supra,* at 772, n. 24. However, no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities.

> "Even though 'commercial' speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them." *Central Hudson, supra,* at 574–575 (BLACKMUN, J., concurring in judgment).

See also Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 750 (1982) ("Regulation of commercial speech designed to influence behavior by depriving citizens of information . . . violates basic [First Amendment] principles of viewpoint- and public-agenda-neutrality"). Accordingly, I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.

II

The Court, rather than applying strict scrutiny, evaluates Puerto Rico's advertising ban under the relaxed standards normally used to test government regulation of commercial speech. Even under these standards, however, I do not

believe that Puerto Rico constitutionally may suppress all casino advertising directed to its residents. The Court correctly recognizes that "[t]he particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent." *Ante*, at 340–341. Under our commercial speech precedents, Puerto Rico constitutionally may restrict truthful speech concerning lawful activity only if its interest in doing so is substantial, if the restrictions directly advance the Commonwealth's asserted interest, and if the restrictions are no more extensive than necessary to advance that interest. See *Zauderer*, *supra*, at 638; *In re R. M. J.*, 455 U. S. 191, 203 (1982); *Central Hudson*, *supra*, at 564. While tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's Legislature that a ban on casino advertising aimed at residents is reasonable. The Court totally ignores the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally protected expression.

A

The Court asserts that the Commonwealth has a legitimate and substantial interest in discouraging its residents from engaging in casino gambling. According to the Court, the legislature believed that "'[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.'" *Ante*, at 341 (quoting Brief for Appellees 37). Neither the statute on its face nor the legislative history indicates that the Puerto Rico Legislature thought that serious harm would result if residents were allowed to engage in

casino gambling;[2] indeed, the available evidence suggests exactly the opposite. Puerto Rico has legalized gambling casinos, and permits its residents to patronize them. Thus, the Puerto Rico Legislature has determined that permitting residents to engage in casino gambling will not produce the "serious harmful effects" that have led a majority of States to ban such activity. Residents of Puerto Rico are also permitted to engage in a variety of other gambling activities—including horse racing, "picas," cockfighting, and the Puerto Rico lottery—all of which are allowed to advertise freely to residents.[3] Indeed, it is surely not farfetched to suppose

[2] The Act's Statement of Motives says only that "[t]he purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance . . . and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act No. 221 of May 15, 1948, § 1. There is no suggestion that discouraging residents from patronizing gambling casinos would further Puerto Rico's interests in developing tourism, ensuring safeguards for tourists, or producing additional revenue.

[3] The Court seeks to justify Puerto Rico's selective prohibition of casino advertising by asserting that "the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico." *Ante*, at 343. Nothing in the record suggests that the legislature believed this to be the case. Appellee has failed to show that casino gambling presents risks different from those associated with other gambling activities, such that Puerto Rico might, consistently with the First Amendment, choose to suppress only casino advertising directed to its residents. Cf. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 534, n. 12 (1981) (BRENNAN, J., concurring in judgment) (The First Amendment "demands more than a rational basis for preferring one kind of commercial speech over another"); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 73 (1981) ("The [government] has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems . . . more significant that those associated with various permitted uses"). For this reason, I believe that Puerto Rico's selective advertising ban also violates appellant's rights under the Equal Protection Clause. In rejecting appellant's equal protection claim, the Court erroneously uses a "rational basis"

that the legislature chose to restrict casino advertising not because of the "evils" of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery. In any event, in light of the legislature's determination that serious harm will *not* result if residents are permitted and *encouraged* to gamble, I do not see how Puerto Rico's interest in discouraging its residents from engaging in casino gambling can be characterized as "substantial," even if the legislature had actually asserted such an interest which, of course, it has not. Cf. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 715 (1984) (Oklahoma's selective regulation of liquor advertising "suggests limits on the substantiality of the interests it asserts"); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 532 (1981) (BRENNAN, J., concurring in judgment) ("[I]f billboards alone are banned and no further steps are contemplated or likely, the commitment of the city to improving its physical environment is placed in doubt").

The Court nevertheless sustains Puerto Rico's advertising ban because the legislature *could* have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens. *Ante*, at 344.[4] This

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analysis, thereby ignoring the important First Amendment interests implicated by this case. Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

[4]The Court reasons that because Puerto Rico could legitimately decide to prohibit casino gambling entirely, it may also take the "less intrusive step" of legalizing casino gambling but restricting speech. *Ante*, at 346. According to the Court, it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban [casino gambling] but deny to the legislature the authority to forbid the stimulation of demand for [casino gambling]" by banning advertising. *Ibid.* I do not agree that a ban on casino advertising is "less intrusive" than an outright prohibition of such activity. A majority of States have chosen not to legalize casino gambling, and we have never suggested that this might be unconstitutional. However, having decided to legalize casino gambling, Puerto Rico's decision to ban truthful speech concerning entirely lawful activity raises serious First Amendment problems. Thus,

reasoning is contrary to this Court's long-established First Amendment jurisprudence. When the government seeks to place restrictions upon commercial speech, a court may not, as the Court implies today, simply speculate about valid reasons that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden of justifying the challenged regulation, and it is incumbent upon the government to *prove* that the interests it seeks to further are real and substantial. See *Zauderer*, 471 U. S., at 641; *In re R. M. J.*, 455 U. S., at 205–206; *Friedman*, 440 U. S., at 15. In this case, appellee has not shown that "serious harmful effects" will result if Puerto Rico residents gamble in casinos, and the legislature's decision to legalize such activity suggests that it believed the opposite to be true. In short, appellees have failed to show that a substantial government interest supports Puerto Rico's ban on protected expression.

B

Even assuming that appellee could show that the challenged restrictions are supported by a substantial governmental interest, this would not end the inquiry into their constitutionality. See *Linmark Associates*, 431 U. S., at 94; *Virginia Pharmacy Board*, 425 U. S., at 766. Appellee must still demonstrate that the challenged advertising ban directly advances Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling. *Central Hudson*, 447 U. S., at 564. The Court proclaims that Puerto Rico's legislature "obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Ante*, at 341–342. However, even assuming that an advertising ban would effectively reduce resi-

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the "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment.

dents' patronage of gambling casinos,[5] it is not clear how it would directly advance Puerto Rico's interest in controlling the "serious harmful effects" the Court associates with casino gambling. In particular, it is unclear whether banning casino advertising aimed at residents would affect local crime, prostitution, the development of corruption, or the infiltration of organized crime. Because Puerto Rico actively promotes its casinos to tourists, these problems are likely to persist whether or not residents are also encouraged to gamble. Absent some showing that a ban on advertising aimed only at residents will directly advance Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling, Puerto Rico may not constitutionally restrict protected expression in that way.

C

Finally, appellees have failed to show that Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling "cannot be protected adequately by more limited regulation of appellant's commercial expression." *Central Hudson*, *supra*, at 570. Rather than suppressing constitutionally protected expression, Puerto Rico could seek directly to address the specific harms thought to be associated with casino gambling. Thus, Puerto Rico could continue carefully to monitor casino operations to guard against "the development of corruption, and the infiltration of organized crime." *Ante*, at 341. It could vigorously enforce its criminal statutes to combat "the increase in local crime [and] the fostering of prostitution." *Ibid.* It could establish limits on the level of permissible betting, or promulgate addi-

[5] Unlike the Court, I do not read the fact that appellant has chosen to litigate the case here to necessarily indicate that appellant itself believes that Puerto Rico residents would respond to casino advertising. In light of appellees' arbitrary and capricious application of § 8, appellant could justifiably have believed that, notwithstanding the Superior Court's "narrowing" constuction, its First Amendment rights could be safeguarded effectively only if the Act was invalidated on its face.

tional speech designed to discourage casino gambling among residents, in order to avoid the "disruption of moral and cultural patterns," *ibid.*, that might result if residents were to engage in excessive casino gambling. Such measures would directly address the problems appellee associates with casino gambling, while avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech.

The Court fails even to acknowledge the wide range of effective alternatives available to Puerto Rico, and addresses only appellant's claim that Puerto Rico's legislature might choose to reduce the demand for casino gambling among residents by "promulgating additional speech designed to *discourage* it." *Ante*, at 344. The Court rejects this alternative, asserting that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Ibid.* This reasoning ignores the commands of the First Amendment. Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, "up to the legislature" to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to *prove* that more limited means are not sufficient to protect its interests, and for a *court* to decide whether or not the government has sustained this burden. See *In re R. M. J.*, *supra*, at 206; *Central Hudson*, *supra*, at 571. In this case, nothing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression. More importantly, there has been no showing that alternative measures would inadequately safeguard the Commonwealth's interest in controlling the harmful effects allegedly associated with casino gambling. Under

these circumstances, Puerto Rico's ban on advertising clearly violates the First Amendment.[6]

The Court believes that Puerto Rico constitutionally may prevent its residents from obtaining truthful commercial speech concerning otherwise lawful activity because of the effect it fears this information will have. However, "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Pharmacy Board*, 425 U. S., at 770. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First National Bank* v. *Bellotti*, 435 U. S. 765, 791 (1978). The First Amendment presupposes that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them." *Virginia Pharmacy Board*, *supra*, at 770. "[I]f there be any danger that the people cannot evaluate . . . information . . . it is a danger contemplated by the Framers of the First Amendment." *Bellotti*, *supra*, at 792; see also *Central Hudson*, 447 U. S., at 562 ("[T]he First Amendment presumes that some accurate information is better than no information at all"). Accordingly, I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant. The Court, however, would allow Puerto Rico to do just that, thus dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to

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[6]The Court seeks to buttress its holding by noting that some States have regulated other "harmful" products, such as cigarettes, alcoholic beverages, and legalized prostitution, by restricting advertising. While I believe that Puerto Rico may not prohibit all casino advertising directed to its residents, I reserve judgment as to the constitutionality of the variety of advertising restrictions adopted by other jurisdictions.

eviscerate constitutionally protected expression. I respectfully dissent.

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

The Court concludes that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Ante*, at 345–346. Whether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment.

Puerto Rico does not simply "ban advertising of casino gambling." Rather, Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed. Moreover, the prohibitions, as now construed by the Puerto Rico courts, establish a regime of prior restraint and articulate a standard that is hopelessly vague and unpredictable.

With respect to the publisher, in stark, unabashed language, the Superior Court's construction favors certain identifiable publications and disfavors others. If the publication (or medium) is from outside Puerto Rico, it is very favored indeed. "Within the ads of casinos allowed by this regulation figure . . . movies, television, radio, newspapers, and trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist." App. to Juris. Statement 38b–39b. If the publication is native to Puerto Rico, however—the San Juan Star, for instance—it is subject to a far more rigid system of

restraints and controls regarding the manner in which a certain form of speech (casino ads) may be carried in its pages. Unless the Court is prepared to uphold an Illinois regulation of speech that subjects the New York Times to one standard and the Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to the New York Times and another to the San Juan Star.

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be "addressed to tourists." *Id.*, at 38b. It must not "invite the residents of Puerto Rico to visit the casino." *Ibid.* The regulation thus poses what might be viewed as a reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans.[1] But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination. I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising "addressed" to Illinois residents while allowing the same advertiser to communicate his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising "addressed" to Puerto Rico residents.

With respect to the message, the regulations now take one word of the English language—"casino"—and give it a special opprobrium. Use of that suspicious six-letter word is permitted only "where the trade name of the hotel is used even though it may contain a reference to the casino." *Id.*, at 39b. The regulations explicitly include an important provision—

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[1] Perhaps, since Puerto Rico somewhat ambivalently regards a gambling casino as a good thing for the local proprietor and an evil for the local patrons, the ban on local advertising might be viewed as a form of protection against the poison that Puerto Rico uses to attract strangers into its web. If too much speech about the poison were permitted, local residents might not only partake of it but also decide to prohibit it.

"that the word casino is never used alone nor specified." *Ibid.* (The meaning of "specified"—perhaps italicization, or boldface, or all capital letters—is presumably left to subsequent case-by-case adjudication.) Singling out the use of a particular word for official sanctions raises grave First Amendment concerns, and Puerto Rico has utterly failed to justify the disfavor in which that particular six-letter word is held.

With respect to prior restraint, the Superior Court's opinion establishes a regime of censorship. In a section of the opinion that the majority fails to include, *ante*, at 335, the court explained:

> "We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of [chance] in the exterior *with the previous approval of the Tourism Company* regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs, or pictures may be approval of the Company." App. to Juris. Statement 38b (emphasis added).

A more obvious form of prior restraint is difficult to imagine.

With respect to vagueness, the Superior Court's construction yields no certain or predictable standards for Puerto Rico's suppression of particular kinds of speech. Part of the problem lies in the delineation of permitted speech in terms of the audience to which it is addressed. The Puerto Rico court stated that casino ads within Puerto Rico are permissible "provided they do not invite the residents of Puerto Rico to visit the casino, even though such announcements may incidentally reach the hands of a resident." *Id.*, at 38b. At oral argument, Puerto Rico's counsel stated that a casino advertisement in a publication with 95% local circulation—perhaps the San Juan Star—might actually be permissible, so

long as the advertisement "is addressed to tourists and not to residents." Tr. of Oral Arg. 26. Then again, maybe not. Maybe such an ad would not be permissible, and maybe there would be considerable uncertainty about the nature of the required "address." For the Puerto Rico court was not particularly concerned with the precise limits of the oddly selective ban on public speech that it was announcing. The court noted: "Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism." App. to Juris. Statement 40b. And in a passage that should chill, not only would-be speakers, but reviewing courts as well, the Superior Court expressly noted that there was nothing immutable about its supposedly limiting and saving construction of the restraints on speech: "These guide-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein." *Id.*, at 42b.[2]

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[2] The unpredictable character of the censorship envisioned by the Superior Court is perhaps illustrated by its decision, apparently *sua sponte*, Tr. of Oral Arg. 43, to invalidate a regulation that required male patrons of casinos to wear dinner jackets. See *ante*, at 337, n. 4. The Superior Court explained:

"The classification that we do find suspicious, and which came to our attention during the course of this cause of action, *ACAA* v. *Enrique Bird Pinero*, C. A. 1984 Number 46, is the one made in section 4(e) of the Gaming Regulation (15 R. R. P. R. Sec. 76–a4[e]) requiring that the male tourist wear a jacket within the casino. On one hand, Puerto Rico is a tropical country. Adequate informal wear, such as the guayabera, is in tune with our climate and allows the tourist to enjoy himself without extreme, and in our judgment unconstitutional, restrictions on his stay on the Island. On the other hand, said requirement does not improve at all the elegant atmosphere that prevails in our casinos, since the male player may be forced to wear a horribly sewn jacket, so prepared to prevent people from taking them, which to a certain point is degrading for the man and discriminatory, since women are allowed into the casino without any type of requirement for formal wear. The Honorable Supreme Court in *Figueroa Ferrer*,

The general proposition advanced by the majority today—that a State may prohibit the advertising of permitted conduct if it may prohibit the conduct altogether—bears little resemblance to the grotesquely flawed regulation of speech advanced by Puerto Rico in this case.[3] The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazardous as the roll of dice in a casino.

I respectfully dissent.

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supra, stated: 'parliaments are not the only necessary agents of social change' and 'when you try to maintain a constitutional scheme alive, to preserve it in harmony with the realities of a country, the court's principal duty is to legislate towards that end, with the tranquility and circumspection which its role within our governmental system demands, without exceeding the framework of its jurisdiction.' To save the constitutionality of the Law under our consideration, we must bend the requirement of formal wear since this is basically a condition of sex and the State has no reasonable interest which would warrant a dissimilar classification." App. to Juris. Statement 35b–36b.

Apparently, the Superior Court felt that Puerto Rico's unique brand of local censorship, like the guayabera, was "in tune" with Puerto Rico's climate; it is the obligation of this Court, however, to evaluate the regulations from a more universal perspective.

[3] Moreover, the Court has relied on an inappropriate major premise. The fact that Puerto Rico might prohibit all casino gambling does not necessarily mean that it could prohibit residents from patronizing casinos that are open to tourists. Even under the Court's reasoning, discriminatory censorship cannot be justified as a less restrictive form of economic regulation unless discriminatory regulation is itself permissible.

ALLEN *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85–5404. Argued April 30, 1986—Decided July 1, 1986

Petitioner was charged in an Illinois Circuit Court with committing the crimes of unlawful restraint and deviate sexual assault, and the State filed a petition to have him declared a sexually dangerous person within the meaning of the Illinois Sexually Dangerous Persons Act (Act). Pursuant to the Act, the court ordered petitioner to submit to two psychiatric examinations. At the bench trial on the petition, the State presented the examining psychiatrists' testimony, over petitioner's objection that they had elicited information from him in violation of his privilege against self-incrimination. Based on that testimony, as well as that of the victim of the sexual assault, the court found petitioner to be a sexually dangerous person under the Act. The Illinois Appellate Court reversed, holding that the trial court had improperly relied on testimony in violation of petitioner's privilege against self-incrimination. The Illinois Supreme Court reversed, holding that that privilege was not available in sexually-dangerous-person proceedings because they are "essentially civil in nature."

Held:

1. Proceedings under the Act are not "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. The Act's aim is to provide treatment, not punishment, for persons adjudged sexually dangerous. That the State cannot file a sexually-dangerous-person petition under the Act unless it has already filed criminal charges against the person in question, and thus has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous, does not transform a civil proceeding into a criminal one. The State must prove more than just the commission of a sexual assault. It must prove the existence of a mental disorder for more than one year and a propensity to commit sexual assaults, in addition to showing that propensity through sexual assault. The fact that the Act provides some of the safeguards applicable in criminal proceedings—rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the requirement that sexual dangerousness be proved beyond a reasonable doubt—cannot itself turn the proceedings under the Act into criminal proceedings requiring the full panoply of rights applicable there. And the fact that a person adjudged sexually dangerous under the Act is committed to a maximum-security institution that also

houses convicts needing psychiatric care does not make the conditions of that person's confinement amount to "punishment" and thus render "criminal" the proceedings that led to confinement. *In re Gault*, 387 U. S. 1, distinguished. Pp. 368–374.

2. The Fourteenth Amendment's guarantee of due process does not require application of the Fifth Amendment's privilege against self-incrimination to proceedings under the Act. That privilege is not designed to enhance the reliability of a factfinding determination but stands in the Constitution for entirely independent reasons. Pp. 374–375.

107 Ill. 2d 91, 481 N. E. 2d 690, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 375.

Verlin R. Meinz argued the cause for petitioner. With him on the briefs were *Robert Agostinelli*, *Peter A. Carusona*, and *Jean Herigodt*.

Mark L. Rotert argued the cause for respondent. With him on the brief were *Neil F. Hartigan*, Attorney General of Illinois, *Roma J. Stewart*, Solicitor General, and *Sally L. Dilgart*, Assistant Attorney General.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented by this case is whether the proceedings under the Illinois Sexually Dangerous Persons Act (Act), Ill. Rev. Stat., ch. 38, ¶105–1.01 *et seq.* (1985), are "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination.

Petitioner Terry B. Allen was charged by information in the Circuit Court of Peoria County with committing the crimes of unlawful restraint and deviate sexual assault. Shortly thereafter the State filed a petition to have petitioner declared a sexually dangerous person within the meaning of

*Briefs of *amici curiae* were filed for the American Psychiatric Association by *Joel I. Klein;* for the Edwin F. Mandel Legal Aid Clinic by *Randall D. Schmidt;* and for the Mental Health Information Service, Second Judicial Department, by *Francis M. Savastano* and *Robert A. Feenick*.

the Act.[1] After a preliminary hearing on the information, the criminal charges were dismissed for lack of probable cause, and the petition was apparently dismissed as well. Petitioner was then recharged by indictment, and the petition to declare him sexually dangerous was reinstated.

Pursuant to the Act, with petitioner and counsel present, the trial court ordered petitioner to submit to two psychiatric examinations; the court explained the procedure as well as petitioner's rights under the Act, and petitioner indicated that he understood the nature of the proceedings. At the bench trial on the petition, the State presented the testimony of the two examining psychiatrists, over petitioner's objection that they had elicited information from him in violation of his privilege against self-incrimination. The trial court ruled that petitioner's statements to the psychiatrists were not themselves admissible, but allowed each psychiatrist to give his opinion based upon his interview with petitioner. Both psychiatrists expressed the view that petitioner was mentally ill and had criminal propensities to commit sexual assaults. Petitioner did not testify or offer other evidence at the trial. Based upon the testimony of the psychiatrists, as well as that of the victim of the sexual assault for which petitioner had been indicted, the trial court found petitioner to be a sexually dangerous person under the Act. Consistent with the requirements of Illinois case law, see *People* v. *Pembrock*, 62 Ill. 2d 317, 321–322, 342 N. E. 2d 28, 29–30 (1976), the court made three specific findings: that at the time of trial petitioner had been suffering from a mental disorder for not less than one year; that he had propensities to commit

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[1] The Act defines sexually dangerous persons as follows:

"All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons." ¶ 105–1.01.

sex offenses; and that by his actions he had demonstrated such propensities.

The Appellate Court of Illinois for the Third District reversed, over one dissent. Relying on *Estelle* v. *Smith*, 451 U. S. 454 (1981), the court held that the trial court had improperly relied upon testimony obtained in violation of petitioner's privilege against self-incrimination. 123 Ill. App. 3d 669, 463 N. E. 2d 135 (1984).[2]

The Supreme Court of Illinois unanimously reversed the Appellate Court and reinstated the trial court's finding that petitioner was a sexually dangerous person. 107 Ill. 2d 91, 481 N. E. 2d 690 (1985). It held that the privilege against self-incrimination was not available in sexually-dangerous-person proceedings because they are "essentially civil in nature," the aim of the statute being to provide "treatment, not punishment." *Id.*, at 99–101, 481 N. E. 2d, at 694–695. The court also found support for its ruling in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). Observing that the State's interest in treating, and protecting the public from, sexually dangerous persons would be "almost totally thwarted" by allowing those persons to refuse to answer questions posed in psychiatric interviews, and that the privilege would be "of minimal value in assuring reliability," the court concluded that "due process does not require the application of the privilege." 107 Ill. 2d, at 102–103, 481 N. E. 2d, at 696. Finally, the court held that "a defendant's statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent

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[2] The Appellate Court interpreted the Act to require specific proof of more than one act of sexual assault. It therefore concluded that the State had relied on the psychiatrists to make its entire case because the victim had only testified about one act. The Supreme Court of Illinois thereafter interpreted the Act to require proof of only one act, and concluded that the victim's testimony was sufficient to satisfy the State's burden in this case. 107 Ill. 2d 91, 105–106, 481 N. E. 2d 690, 697 (1985).

criminal proceedings." *Id.*, at 104, 481 N. E. 2d, at 696. We granted certiorari, 474 U. S. 979 (1985), and now affirm.

The Self-Incrimination Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." This Court has long held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U. S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973)); *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924). In this case the Illinois Supreme Court ruled that a person whom the State attempts to commit under the Act is protected from use of his compelled answers in any subsequent criminal case in which he is the defendant. What we have here, then, is not a claim that petitioner's statements to the psychiatrists might be used to incriminate him in some future criminal proceeding, but instead his claim that because the sexually-dangerous-person proceeding is itself "criminal," he was entitled to refuse to answer any questions at all.

The question whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction. See *United States* v. *Ward*, 448 U. S. 242, 248 (1980); *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U. S. 232, 236–237 (1972). Here, Illinois has expressly provided that proceedings under the Act "shall be civil in nature," ¶105–3.01, indicating that when it files a petition against a person under the Act it intends to proceed in a nonpunitive, noncriminal manner, "without regard to the procedural protections and restrictions available in criminal prosecutions."

Ward, *supra*, at 249. As petitioner correctly points out, however, the civil label is not always dispositive. Where a defendant has provided "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied. 448 U. S., at 248–249. We think that petitioner has failed to provide such proof in this case.

The Illinois Supreme Court reviewed the Act and its own case law and concluded that these proceedings, while similar to criminal proceedings in that they are accompanied by strict procedural safeguards, are essentially civil in nature. 107 Ill. 2d, at 100–102, 481 N. E. 2d, at 694–695. We are unpersuaded by petitioner's efforts to challenge this conclusion. Under the Act, the State has a statutory obligation to provide "care and treatment for [persons adjudged sexually dangerous] designed to effect recovery," ¶ 105–8, in a facility set aside to provide psychiatric care, *ibid.*[3] And "[i]f the patient is found to be no longer dangerous, the court shall order that he be discharged." ¶ 105–9. While the committed person has the burden of showing that he is no longer dangerous,[4] he may apply for release at any time. *Ibid.*[5]

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[3] Under Illinois Department of Corrections regulations, the progress of persons confined at such facilities is reviewed at least every six months by a staff psychiatrist, and a request for a review hearing may be made at any time. 8 Ill. Reg. 14501 (1984).

[4] Even if he fails to meet his burden the committed person may nonetheless be conditionally released:

"If the court finds that the patient appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public." ¶ 105–9.

[5] The Act further provides that "[u]pon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed." *Ibid.*

In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of "the traditional aims of punishment—retribution and deterrence." *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963). Cf. *Addington* v. *Texas*, 441 U. S. 418, 428 (1979) (in Texas "civil commitment state power is not exercised in a punitive sense"); *French* v. *Blackburn*, 428 F. Supp. 1351, 1358–1359 (MDNC 1977), summarily aff'd, 443 U. S. 901 (1979) (State need not accord privilege against self-incrimination in civil commitment proceeding).

Petitioner offers several arguments in support of his claim that despite the apparently nonpunitive purposes of the Act, it should be considered criminal as far as the privilege against self-incrimination is concerned. He first notes that the State cannot file a sexually-dangerous-person petition unless it has already brought criminal charges against the person in question. ¶ 105–3. In addition, the State must prove that the person it seeks to commit perpetrated "at least one act of or attempt at sexual assault or sexual molestation." 107 Ill. 2d, at 105, 481 N. E. 2d, at 697. To petitioner, these factors serve to distinguish the Act from other civil commitments, which typically are not tied to any criminal charge and which petitioner apparently concedes are not "criminal" under the Self-Incrimination Clause. Tr. of Oral Arg. 23–24. We disagree. That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one. And as the State points out, it must prove more than just the commission of a sexual assault: the Illinois Supreme Court, as we noted above, has construed the Act to require proof of the existence of a mental disorder for more than one year and a propensity to commit sexual

assaults, in addition to demonstration of that propensity through sexual assault. See *supra*, at 366–367.

The discussion of civil commitment in *Addington*, *supra*, in which this Court concluded that the Texas involuntary-commitment scheme is not criminal insofar as the requirement of proof beyond a reasonable doubt is concerned, fully supports our conclusion here:

> "[T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question—did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.*, at 429 (emphasis in original).

While here the State must prove at least one act of sexual assault, that antecedent conduct is received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior. 107 Ill. 2d, at 105, 481 N. E. 2d, at 697.

In his attempt to distinguish this case from other civil commitments, petitioner places great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials. In particular, he observes that the Act provides an accused with the right to counsel, ¶ 105–5, the right to demand a jury trial, *ibid.*, and the right to confront and cross-examine witnesses, *People* v. *Nastasio*, 19 Ill. 2d 524, 529–530, 168 N. E. 2d 728, 731 (1960). At the conclusion of the hearing, the trier of fact must determine whether the prosecution has proved the person's sexual dangerousness beyond a reasonable doubt.

¶105–3.01; *People* v. *Pembrock*, 62 Ill. 2d 317, 342 N. E. 2d 28 (1976). But as we noted above, the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there. See *People* v. *English*, 31 Ill. 2d 301, 304, 201 N. E. 2d 455, 458 (1964).

Relying chiefly on *In re Gault*, 387 U. S. 1 (1967), petitioner also urges that the proceedings in question are "criminal" because a person adjudged sexually dangerous under the Act is committed for an indeterminate period to the Menard Psychiatric Center, a maximum-security institution that is run by the Illinois Department of Corrections and that houses convicts needing psychiatric care as well as sexually dangerous persons. Whatever its label and whatever the State's alleged purpose, petitioner argues, such commitment is the sort of punishment—total deprivation of liberty in a criminal setting—that *Gault* teaches cannot be imposed absent application of the privilege against self-incrimination. We believe that *Gault* is readily distinguishable.

First, *Gault*'s sweeping statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty," *id.*, at 50, is plainly not good law. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies, *Addington* demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections. Indeed, petitioner apparently concedes that traditional civil commitment does not require application of the privilege. Only two Terms ago, in *Minnesota* v. *Murphy*, 465 U. S., at 435, n. 7, this Court stated that a person may not claim the privilege merely because his answer might result in revocation of his probationary status. Cf. *Middendorf* v. *Henry*, 425 U. S. 25, 37 (1976) ("[F]act that a proceed-

ing will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment").

The Court in *Gault* was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. 387 U. S., at 49–50. Here, by contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. Nor does the fact that Menard is apparently a maximum-security facility affect our analysis:

> "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U. S., at 426.

Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive.

Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly

does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. Indeed, counsel for the State assures us that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners. Tr. of Oral Arg. 32–33. We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.

Our conclusion that proceedings under the Act are not "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination does not completely dispose of this case. Petitioner rather obliquely suggests that even if his commitment proceeding was not criminal, the Fourteenth Amendment's guarantee of due process nonetheless required application of the privilege. In particular, petitioner contends that the Illinois Supreme Court "grossly miscalculated" in weighing the interests set out in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today.

We think that the parties, and to some extent the Supreme Court of Illinois, have in their reliance on *Mathews* v. *Eldridge* misconceived that decision. *Mathews* dealt with the procedural safeguards required by the Due Process Clause of the Fifth Amendment before a person might be deprived of property, and its focus was on such safeguards as were necessary to guard against the risk of erroneous deprivation. As the Supreme Court of Illinois and the State have both pointed out, it is difficult, if not impossible, to see how requiring the privilege against self-incrimination in these proceedings would in any way advance reliability. Indeed, the State takes the quite plausible view that denying the evaluating

psychiatrist the opportunity to question persons alleged to be sexually dangerous would *decrease* the reliability of a finding of sexual dangerousness. As in *Addington*, "to adopt the criminal law standard gives no assurance" that States will reach a "better" result. 441 U. S., at 430–431.

The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons. *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961) (involuntary confessions excluded "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system"). Just as in a "criminal case" it would be no argument against a claim of the privilege to say that granting the claim would decrease the reliability of the factfinding process, the privilege has no place among the procedural safeguards discussed in *Mathews* v. *Eldridge*, which are designed to enhance the reliability of that process.

For the reasons stated, we conclude that the Illinois proceedings here considered were not "criminal" within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege. Here, as in *Addington*, "[t]he essense of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold" of the sort urged by petitioner. 441 U. S., at 431. The judgment of the Supreme Court of Illinois is therefore

Affirmed.

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

Paragraph 105 of the Illinois Criminal Code authorizes a special procedure for the involuntary commitment of indi-

viduals found to be "sexually dangerous persons."[1] In many respects, the proceeding is virtually identical to Illinois' proceeding for prosecution of sex-related crimes. When the criminal law casts so long a shadow on a putatively civil proceeding, I think it clear that the procedure must be deemed a "criminal case" within the meaning of the Fifth Amendment.[2]

I

As the Court reaffirms today, the fact that a State attaches a "civil" label to a proceeding is not dispositive. *Ante*, at 369. Such a label cannot change the character of a criminal proceeding. *In re Gault*, 387 U. S. 1, 49–50 (1967). Moreover, the words "criminal case" in the Fifth Amendment have been consistently construed to encompass certain proceedings that have both civil and criminal characteristics.[3] And, of course, a State's duty to respect the commands in the Fifth Amendment cannot be avoided by the names it applies to its procedures or to the persons whom it accuses of wrongful conduct. It is the substance of the Illinois procedure, rather than its title, that is relevant to our inquiry.[4] Nei-

[1] Ill. Rev. Stat., ch. 38, ¶ 105–1.01 *et seq.* (1985).

[2] The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."

[3] See *Boyd* v. *United States*, 116 U. S. 616, 633–634 (1886) ("We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal"); *United States* v. *United States Coin & Currency*, 401 U. S. 715, 718 (1971) ("From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 [to the Government in a nominally "civil" proceeding] because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct").

[4] "It is well settled that realities rather than benign motives or noncriminal labels determine the relevance of constitutional policies. *In re Winship*, . . . 397 U. S. [358, 365–366 (1970)]. See *In re Gault*, 387 U. S. 1, 21, 27, 50 . . . (1967); *Breed* v. *Jones*, 421 U. S. [519, 528 (1975)]." *United States ex rel. Stachulak* v. *Coughlin*, 520 F. 2d 931, 936 (CA7 1975).

ther the word "civil" nor the unsettling term applied by the State—"sexually dangerous person"—should be permitted to obscure our analysis.

The impact of an adverse judgment against an individual deemed to be a "sexually dangerous person" is at least as serious as a guilty verdict in a typical criminal trial. In *Humphrey* v. *Cady*, 405 U. S. 504 (1972), we referred to the potentially indefinite commitment to the "sex deviate facility" located in the Wisconsin State Prison, *id.*, at 506, as "a massive curtailment of liberty." *Id.*, at 509. In a case arising under the Illinois statute we review today, *United States ex rel. Stachulak* v. *Coughlin*, 520 F. 2d 931 (1975), the Court of Appeals for the Seventh Circuit noted that the sexually-dangerous-person proceeding authorizes far longer imprisonment than a mere finding of guilt on an analogous criminal charge.[5] Moreover, the stigma associated with an adjudication as a "sexually dangerous person" is at least as great as that associated with most criminal convictions and "is certainly more damning than a finding of juvenile delinquency." *Id.*, at 936.

The distinctive element of Illinois' "sexually dangerous person" proceeding, however, is its relationship to Illinois' criminal law. Quite simply, criminal law occupies a central role in the sexually-dangerous-person proceeding. Like the prosecution for a criminal offense, the procedure may only begin "when any person is charged with a criminal offense."[6]

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[5] "The instant case illustrates the potential disparity in the magnitude of the loss. Stachulak was originally charged with Indecent Solicitation of a Child in violation of Ill. Ann. Stat., ch. 38, § 11–6 (Smith-Hurd 1969). That offense carried a maximum penalty of a $500 fine and less than one year imprisonment in a penal institution other than a penitentiary. Instead of prosecuting him on that charge, the state brought a proceeding, which culminated in an indeterminate commitment, under the Sexually Dangerous Persons Act. For the last five years, Stachulak has been confined at the Psychiatric Division of the Illinois State Penitentiary at Menard, a maximum-security penal institution." *Id.*, at 936, n. 4.

[6] Ill. Rev. Stat., ch. 38, ¶ 105–3 (1985).

Like the prosecution for a criminal offense, the decision whether to initiate the procedure is entrusted "to the Attorney General or to the State's Attorney of the county wherein such person is so charged."[7] Like the prosecution for a criminal offense, "the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceeding of proof beyond a reasonable doubt."[8] Like the prosecution for a criminal offense, if the prosecutor sustains his burden of proof, "the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian."[9]

Indeed, the Act even defines a "sexually dangerous person" with respect to criminal law, or rather, with respect to "criminal propensities":

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons."[10]

According to the Illinois Supreme Court's interpretation of this definition, moreover, the prosecutor must prove that the individual charged with being a sexually dangerous person committed a criminal offense: "It is clear . . . that the statute requires more than the proof of mere 'propensity'; it also requires that the State prove that the defendant has 'demonstrated' this propensity. This language can only mean that the State must prove at least one act of or attempt at sexual

[7] *Ibid.*

[8] ¶ 105–3.01.

[9] ¶ 105–8.

[10] ¶ 105–1.01.

assault or sexual molestation." 107 Ill. 2d 91, 105, 481 N. E. 2d 690, 697 (1985).

Thus, the Illinois "sexually dangerous person" proceeding may only be triggered by a criminal incident; may only be initiated by the sovereign State's prosecuting authorities; may only be established with the burden of proof applicable to the criminal law; may only proceed if a criminal offense is established; and has the consequence of incarceration in the State's prison system—in this case, Illinois' maximum-security prison at Menard. It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system—for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of proof, and for the Director of Corrections as custodian—that the proceeding must be considered "criminal" for purposes of the Fifth Amendment.[11]

II

The principal argument advanced by the State—and accepted by the Court, *ante*, at 369–370—is that the statute has a benign purpose. The State points out that the statute, in appointing the Director of Corrections as guardian, requires that the Director provide "care and treatment for the person committed to him designed to effect recovery";[12] requires

[11] The "sexually dangerous person" proceeding shares other characteristics with criminal law as well. The statute requires that the individual "have the right to demand a trial by jury and to be represented by counsel." ¶ 105–5. Under the Illinois Supreme Court's construction, moreover, an individual has the right to confront and cross-examine witnesses. *People* v. *Nastasio*, 19 Ill. 2d 524, 529–530, 168 N. E. 2d 728, 731 (1960). Significantly, as with the latter set of requirements, many of the criminal law procedures that have been found applicable to the "sexually dangerous person" proceeding have been imposed by courts because of the nature of the proceeding. See, *e. g.*, *United States ex rel. Stachulak* v. *Coughlin*, 520 F. 2d 931 (CA7 1975) (requiring proof beyond a reasonable doubt); *People* v. *Pembrock*, 62 Ill. 2d 317, 342 N. E. 2d 28 (1976) (same); Ill. Rev. Stat., ch. 38, ¶ 105–3.01 (1985) (codifying requirement).

[12] ¶ 105–8.

that the Director place his ward "in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons";[13] and requires that the individual be released if "found to be no longer dangerous."[14]

The Illinois Supreme Court has stated unambiguously that "treatment, not punishment, is the aim of the statute." 107 Ill. 2d, at 100–101, 481 N. E. 2d, at 695. The Illinois court, of course, is the final authority on the meaning and the purpose of Illinois legislation. Nevertheless, the ultimate characterization of the sexually-dangerous-person proceeding for Fifth Amendment purposes remains a federal constitutional question.

A goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as "criminal." With respect to a conventional criminal statute, if a State declared that its goal was "treatment" and "rehabilitation," it is obvious that the Fifth Amendment would still apply. The sexually-dangerous-person proceeding similarly may not escape a characterization as "criminal" simply because a goal is "treatment." If this were not the case, moreover, nothing would prevent a State from creating an entire corpus of "dangerous person" statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and "criminal propensities," and constitutional protections for criminal defendants would be simply inapplicable. The goal would be "treatment"; the result would be evisceration of criminal law and its accompanying protections.

The Illinois Attorney General nevertheless argues that the importance of treatment in the Act has a special significance.

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[13] *Ibid.*

[14] ¶ 105–9. See also ¶ 105–8 ("The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided").

The State contends that recognizing a right to silence would make it impossible to reach a correct diagnosis concerning the existence of a mental disorder and the need for treatment. However, the Illinois General Assembly has squarely rejected this argument in other civil commitment proceedings. Illinois' civil commitment procedure expressly protects the individual's right to silence.[15] Quoting the Governor's Commission for the Revision of the Mental Health Code of Illinois, the Illinois Appellate Court explained this unequivocal State policy:

> "Experience in the public and private sectors has shown that application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment." *In re Rizer*, 87 Ill. App. 3d 795, 799, 409 N. E. 2d 383, 386 (1980).

The Attorney General's emphasis on the interference with treatment that the right of silence would create thus indeed has a significance, but not the one he suggests. For, not only would a characterization of the proceeding as "criminal" lead to a right to silence under the Fifth Amendment, but a characterization of the proceeding as "civil" would also lead to a right to silence under state law. It is only in the "sexually dangerous person" proceeding that the individual may be compelled to give evidence that will be used to deprive him of his liberty. The fact that this proceeding is unique—neither

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[15] See Ill. Rev. Stat., ch. 91½, ¶ 3–208 (1985) ("Whenever a petition has been executed pursuant to Section 3–507, 3–601, or 3–701, and prior to this examination for the purpose of certification of a person 12 or over, the person conducting this examination shall inform the person being examined in a simple comprehensible manner of the purpose of the examination; that he does not have to talk to the examiner; and that any statements he makes may be disclosed at a court hearing on the issue of whether he is subject to involuntary admission. If the person being examined has not been so informed, the examiner shall not be permitted to testify at any subsequent court hearing concerning the respondent's admission").

wholly criminal nor civil—surely cannot justify the unique deprivation of a constitutional protection.

III

It is, of course, true that "the State has a substantial interest in . . . protecting the public from sexually dangerous persons." 107 Ill. 2d, at 102, 481 N. E. 2d, at 696. But the fact that an individual accused of being a "sexually dangerous person" is also considered a danger to the community cannot justify the denial of the Fifth Amendment privilege; if so, the privilege would never be available for any person accused of a violent crime. The fact that it may be more difficult for the State to obtain evidence that will lead to incarceration similarly cannot prevent the applicability of the Fifth Amendment; if so, the right would never be justified, for it could always be said to have that effect. Nor can the fact that proof of sexual dangerousness requires evidence of noncriminal elements—the continuing requirement that a future criminal "propensity" be proved, for instance—prevent the applicability of the Fifth Amendment; if anything, that requirement should be the subject of greater, rather than lesser, concern.[16]

In the end, this case requires a consideration of the role and value of the Fifth Amendment. The privilege sometimes does serve the interest in making the truth-seeking function of a trial more reliable.[17] Indeed, a review of the

[16] See O. Holmes, The Common Law 65 (1923 ed.) ("Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after tomorrow. The law only deals with conduct"); *Thompson* v. *Bowie*, 4 Wall. 463, 471 (1866) ("When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted").

[17] "It has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny. Dean Wigmore states:

"'The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported . . . but enough have been verified to

psychiatrists' reports in this very case suggests the propriety of that concern.[18] The basic justification for the constitutional protection, however, also rests on the nature of our free society. As a distinguished leader of the Bar stated more than 30 years ago:

> "[T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such, it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by communists, and thus it may well be regarded as one of the signs which sets us off from communism." E. Griswold, The Fifth Amendment Today 81 (1955).[19]

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fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.'" *In re Gault*, 387 U. S. 1, 44–45 (1967) (quoting 3 J. Wigmore, Evidence § 822 (3d ed. 1940)).

[18] One of the psychiatrist's reports stated, in part:

"The defendant wanted to be found sexually dangerous and did so because he felt that it was a better alternative than a trial trying to be found not guilty. . . . I have the definite impression that he is unreliable and that sometimes he is not telling the truth." App. 36–37.

That doctor reported that the defendant admitted that he had "sexual intercourse" with the victim—a fact that she denied. None of the other incidents described in the doctor's report (the first of which occurred when the defendant was 10 years old) had any corroboration or involved an identified partner or victim.

[19] Cf. Amnesty International, Political Abuse of Psychiatry in the USSR, reprinted in Abuse of Psychiatry in the Soviet Union, Hearing before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs, 98th Cong., 1st Sess., 72–73 (1983)

For the Court, these concerns are not implicated today because the prosecution-initiated and prison-destined, sexually-dangerous-person proceeding is not "criminal" in nature. In my opinion, permitting a State to create a shadow criminal law without the fundamental protection of the Fifth Amendment conflicts with the respect for liberty and individual dignity that has long characterized, and that continues to characterize, our free society.

I respectfully dissent.

(In the Soviet Union, "[t]wo formal procedures are most commonly used to commit individuals to mental hospitals against their will: the civil and the criminal. . . . The *criminal procedure* for compulsory confinement is applicable to those who have been accused of a criminal offense, and whose mental health is called into question. . . . Under this procedure the accused loses virtually all of his or her procedural rights and is left only with the passive right to an honest psychiatric examination and a fair court hearing").

BAZEMORE ET AL. *v.* FRIDAY ET AL.

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

No. 85-93. Argued April 22, 1986—Decided July 1, 1986*

The private petitioners—who include employees of the North Carolina Agricultural Extension Service (Extension Service), recipients of its services, members of its Homemaker Clubs, and parents of youths that belong to its 4-H Clubs—filed suit against various state and local officials in Federal District Court (the United States intervened as a plaintiff), alleging racial discrimination in employment and in provision of services by the Extension Service, in violation of the Constitution and various federal statutes, including Title VII of the Civil Rights Act of 1964. The court refused to certify various proposed classes and entered judgment for respondents, finding that petitioners had not carried their burden of demonstrating that respondents had engaged in a pattern or practice of racial discrimination. The Court of Appeals affirmed.

Held:

1. For the reasons stated in the concurring opinion of JUSTICE BRENNAN, the Court of Appeals erred: in holding that under Title VII the Extension Service had no duty to eradicate salary disparities between white and black workers that had their origin prior to the date Title VII was made applicable to public employees; in disregarding petitioners' statistical analysis because it reflected pre-Title VII salary disparities; in holding that petitioners' regressions were unacceptable as evidence of discrimination; in ignoring evidence related to salary disparities presented by petitioners in addition to their multiple regression analyses; and in refusing to certify a class of black employees of the Extension Service, although the Court of Appeals was correct in refusing to certify a class of defendant counties.

2. For the reasons stated in the opinion of JUSTICE WHITE, neither the Constitution nor the applicable Department of Agriculture regulations required more than what the District Court and the Court of Appeals found the Extension Service has done to disestablish segregation in its 4-H and Homemaker Clubs.

751 F. 2d 662, affirmed in part, vacated in part, and remanded.

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*Together with No. 85-428, *United States et al.* v. *Friday et al.*, also on certiorari to the same court.

Deputy Solicitor General Kuhl argued the cause for petitioners in No. 85–428. With her on the briefs were *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Carvin, Walter W. Barnett, Louise A. Lerner*, and *David B. Marblestone. Eric Schnapper* argued the cause for petitioners in No. 85–93. With him on the briefs were *Edward D. Reibman, Julius LeVonne Chambers*, and *Ronald L. Ellis.*

Howard E. Manning, Jr., argued the cause for repondents in both cases. With him on the brief were *Howard E. Manning* and *Millard R. Rich*, Deputy Attorney General of North Carolina.†

PER CURIAM.

These cases present several issues arising out of petitioners' action against respondents for alleged racial discrimination in employment and provision of services by the North Carolina Agricultural Extension Service (Extension Service). The District Court declined to certify various proposed classes and, after a lengthy trial, entered judgment for respondents in all respects, finding that petitioners had not carried their burden of demonstrating that respondents had engaged in a pattern or practice of racial discrimination. The District Court also ruled against each of the individual plaintiffs' discrimination claims. The Court of Appeals affirmed. 751 F. 2d 662 (CA4 1984). We hold, for the reasons stated in the concurring opinion of JUSTICE BRENNAN, that the Court of Appeals erred in holding that under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, the Extension Service had no duty to eradi-

†Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Michael H. Gottesman, Robert M. Weinberg, David M. Silberman*, and *Laurence Gold;* and for the National Committee on Pay Equity et al. by *Edith Barnett* and *Eileen Stein.*

Robert E. Williams, Douglas S. McDowell, Thomas R. Bagby, and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

cate salary disparities between white and black workers that had their origin prior to the date Title VII was made applicable to public employers;[1] that the Court of Appeals erred in disregarding petitioners' statistical analysis because it reflected pre-Title VII salary disparities, and in holding that petitioners' regressions were unacceptable as evidence of discrimination; that the Court of Appeals erred in ignoring evidence presented by petitioners in addition to their multiple regression analyses; that, on remand, the Court of Appeals should examine all of the evidence in the record relating to salary disparities under the clearly-erroneous standard; that the reasons given by the Court of Appeals for refusing to certify a class of black employees of the Extension Service do not support a decision not to certify such a class; and that the Court of Appeals was correct in refusing to certify a class of defendant counties.[2] We further hold, for the reasons stated in the opinion of JUSTICE WHITE, that neither the Constitution nor the applicable Department of Agriculture regulations require more than what the District Court and

[1] The private petitioners contend that the salary disparities that occurred even prior to the date Title VII was made applicable to public employers, March 24, 1972, violate their rights under the Fourteenth Amendment, and that we should reach this issue because doing so would enable them to recover for such constitutional violations as occurred prior to that date. The Court of Appeals did not address petitioners' constitutional claim. Although there are statements in the Court of Appeals' opinion to the effect that salary disparities have lingered up to the present, the District Court made no finding as to precisely when, if ever, any disparities were eliminated. It noted simply that the "unification and integration of the Extension Service did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel . . . ." App. to Pet. for Cert. in No. 85–93, p. 31a. See also *id.*, at 122a–123a; 201a. If, on remand, it is finally determined that pre-1965 salary disparities did continue past the date of the merger to a time for which recovery is not barred by the applicable statute of limitations, the courts below will have to decide private petitioners' constitutional claim.

[2] The issue of the certification of a class of 4–H and Extension Homemaker Club members is now moot in light of the Court's resolution of the underlying claim.

the Court of Appeals found the Extension Service has done in this case to disestablish segregation in its 4–H and Extension Homemaker Clubs. Accordingly, the judgment of the Court of Appeals is affirmed in part and vacated in part, and the cases are remanded for further proceedings consistent with this opinion.[3]

It is so ordered.

JUSTICE BRENNAN, joined by all other Members of the Court, concurring in part.

I

A

The purpose of North Carolina's agricultural extension program, administered through the North Carolina Agricultural Extension Service (Extension Service), is to aid in the dissemination of "useful and practical information on sub-

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[3] The private petitioners also invite this Court to consider whether an employer may immunize itself from liability for employment discrimination by delegating its employment decisions to a third party that acts in a discriminatory manner. We agree with the United States, however, that that question is not properly presented on this record. Although the Court of Appeals stated that the Extension Service is not "separately responsible" for the selection of county chairmen, 751 F. 2d, at 677, it did note that "the agreement of the Extension Service and the County Commissioners is required in order to fill the vacancy [for County Chairman]." *Id.*, at 675. Similarly, the District Court expressly found that "in the memorandum of understanding between the Extension Service and the boards of county commissioners all appointments are worked out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy." App. to Pet. for Cert. in No. 85–93, p. 77a. This finding is supported by the record, App. 163.

Respondents do not contend that the Extension Service would not be liable for any pattern or practice of discrimination with respect to the hiring of County Extension Chairmen. Thus it was error for the Court of Appeals to consider solely the recommendations made by the Extension Service rather than the final hiring decisions in which the Extension Service and county acted together.

jects relating to agriculture and home economics." App. to Pet. for Cert. in No. 85–93, p. 7a (hereinafter Pet. App.). The Extension Service is a division of the School of Agriculture and Life Sciences at North Carolina State University (NCSU). It is headed by a Director who exercises authority over District Extension Chairmen responsible for administering all Extension Service programs within the State's six Extension Service districts. The District Extension Chairmen, in turn, supervise the 100 County Extension Chairmen who are responsible for developing and coordinating all Extension Service activities within their respective counties. The County Extension Chairmen also report to their respective Board of County Commissioners (Board), a unit of local government, on extension programs and on matters relating to budgeting and personnel.

The Extension Service operates in four major areas: home economics, agriculture, 4–H and youth, and community resource development. In both the home economics and 4–H areas, one of the Extension Service's methods entails the establishment of clubs to educate the club members in home economics and other useful and practical skills. The agricultural program educates and encourages farmers to adopt scientific methods and to adjust to changing economic circumstances. The community resource development program emphasizes group action through citizen groups and organizations. Each of these programs is implemented by local agents who are selected for employment jointly by the Extension Service and the county Boards. Agents are divided into three ranks: full agent, associate agent, and assistant agent. "While the three ranks of agents perform essentially the same types of tasks, when an agent is promoted his responsibilities increase and a higher level of performance is expected of him." *Id.*, at 17a.

The salaries of all workers are determined jointly by the Extension Service and the Boards. *Id.*, at 33a; CA App.

223; DX 78, CA App. 1684.[1] The federal, state, and county governments all contribute to these salaries. The Boards and the Extension Service determine jointly the proportionate share of salaries to be paid by the State and by the county. Moreover, all county extension hirings and firings are decided "'jointly between the North Carolina Agricultural Extension Service and the Board of County Commissioners.'" Pet. App. 24a (quoting Memorandum of Understanding, DX 78).

The Extension Service has overall responsibility for establishing qualifications for employment in the Service and for screening applicants before recommending qualified applicants to the county commissioners for appointment to vacant or new positions. The Extension Service also prepares and submits an annual budget request to the Board for the county's share of funds for salaries.

Each Board reviews the budget requests from the Extension Service each year and confers with and advises the District and County Extension Chairman concerning Extension Service programs. The Board furnishes the county's share of salaries for extension personnel. In addition, it provides office space and equipment, utilities, telephone, demonstration materials, etc.

Prior to August 1, 1965, the Extension Service was divided into two branches: a white branch and a "Negro branch." Only the "Negro branch" had a formal racial designation. The "Negro branch" was composed entirely of black personnel and served only black farmers, homemakers, and youth. The white branch employed no blacks, but did on occasion serve blacks. On August 1, 1965, in response to the Civil Rights Act of 1964, the State merged the two branches of the

[1] In this opinion, and in my opinion dissenting in part, *post*, p. 309, the following designations are used to refer to the record. GX, exhibit of Federal Government; DX, defendant's exhibit; Tr., trial transcript; CA App., Appendix in the Court of Appeals.

Extension Service into a single organization. However, as the District Court subsequently found, "[the] unification and integration of the Extension Service did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel . . . ." *Id.*, at 31a.

B

The private petitioners include employees of the Extension Service, recipients of its services, members of Extension Homemaker Clubs, and parents of 4–H Club youths. Complaint 12. They brought this action in 1971 alleging racial discrimination in employment and in the provision of services on the part of the Extension Service in violation of the First, Fifth, and Fourteenth Amendments to the Constitution, 42 U. S. C. §§ 1981, 1983 and 2000d, and 7 U. S. C. § 341 *et seq.* The defendants, respondents here, were William C. Friday, President of NCSU, and various officials associated with the University and its School of Agriculture. In addition, County Commissioners from Alamance, Edgecomb, and Mecklenburg Counties were also named as defendants.

On April 7, 1972, the United States intervened under § 902 of Title IX and §§ 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000h–2, 2000d, and 2000d–1. The United States subsequently amended its complaint in intervention to include allegations that defendants had also violated §§ 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §§ 2000e–2 and 2000e–5. The United States' complaint essentially tracked the claims made by the private petitioners. The private petitioners were permitted on the eve of trial to amend their complaint to add a claim under Title VII as well.

On two occasions prior to trial the District Court was asked, but declined, to certify the action as a class action.

Near the close of trial the plaintiffs again requested the court to certify four classes of plaintiffs and one class of defendants.[2] However, the District Court once again declined to do so, and this decision was subsequently upheld by the Court of Appeals. On the merits, the trial court explored allegations of racial discrimination in virtually every aspect of the Extension Service's employment practices and provision of services.[3] The District Court ruled in favor of respondents in all respects. On most issues it concluded that peti-

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[2] The classes considered by the District Court in its August 20, 1982, memorandum were:

"(1) All Black and Indian employees and potential employees of the [Extension Service] since November 18, 1971, and thereafter;

"(2) All Black and Indian persons who were recipients or potential recipients of service from the [Extension Service] on November 18, 1971, and thereafter;

"(3) All Black and Indian members or potential members of the [Extension Service's] 4–H Clubs on November 18, 1971, and thereafter;

"(4) All Black and Indian persons who were members or potential members of the [Extension Service's] Homemaker Clubs on November 18, 1971, and thereafter, and

"(5) [A defendant class consisting of a]ll County Commissioners in North Carolina, in their official capacities, on November 18, 1971, and thereafter." Pet. App. 37a.

The claims relating to American Indians were dismissed by the District Court because petitioners at trial presented no evidence to support these claims. *Id.*, at 49a, n. 11. No issue with respect to these claims is before us.

[3] Petitioners sought to prove that respondents had continued to assign black employees only to counties that had black employees prior to 1965; had failed to recruit, hire, and assign blacks on an equal basis with whites; had denied blacks the same compensation, terms, conditions, and privileges as were provided to whites; had segregated blacks in work assignments; had failed to establish selection standards sufficiently objective to prevent discrimination in hiring and promotion; had failed to correct the present effects of past discrimination; had failed to provide minorities with services equal to the services provided white persons; and had failed to maintain nonracially segregated 4–H Clubs and Extension Homemaker Clubs. *Id.*, at 50a–51a.

tioners had failed to carry their burden of proof. As a general proposition, the District Court was of the view that the Extension Service had conducted itself in a nondiscriminatory manner since it became subject to Title VII and since the merger of the black and white branches in 1965. Both the private petitioners and the United States limited their appeals to the claims that the District Court erred in considering the evidence before it regarding salaries and promotions to County Chairmen, and in concluding that the Extension Service had not discriminated against blacks with respect to salaries and promotions to County Chairmen. The United States also claimed that the system used to determine merit pay increases violated Title VII. The private petitioners also appealed the rejection of their claim that respondents were unlawfully providing services and materials to segregated 4–H and Extension Homemaker Clubs, and the District Court's refusal to certify the case as a class action. The Court of Appeals affirmed the District Court in all respects. 751 F. 2d 662 (CA4 1984). We granted certiorari, 474 U. S. 978 (1985).[4]

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[4]The question presented in the Federal Government's petition is whether black state employees establish a claim under § 703(a) of the 1964 Civil Rights Act, 42 U. S. C. 2000e–2(a), by identifying current salary disparities between themselves and white employees holding the same jobs, when such disparities result from a state policy before 1965 of paying blacks lower salaries than whites.

The private petitioners presented the same question as that presented by the Federal Government, and four additional questions:

(1) May a regression analysis be treated as probative evidence of discrimination where the analysis does not incorporate every conceivable relevant variable?

(2) May North Carolina satisfy its obligation to desegregate the *de jure* system of 4–H Clubs and Extension Homemaker Clubs by adopting a freedom of choice plan that fails?

(3) May an employer immunize itself from liability for illegal discrimination by delegating its hiring decisions to a third party?

(4) Did the Fourth Circuit err in denying class certification in this case?

II

The first issue we must decide is whether the Court of Appeals erred in upholding the District Court's finding that petitioners had not proved by a preponderance of the evidence that respondents had discriminated against black Extension Service employees in violation of Title VII by paying them less than whites employed in the same positions. The Court of Appeals reasoned that the Extension Service was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972 when Title VII became applicable to public employers such as the Extension Service.[5] It also reasoned that factors, other than those included in petitioners' multiple regression analyses, affected salary, and that therefore those regression analyses were incapable of sustaining a finding in favor of petitioners.

A

Both the Court of Appeals and the District Court found that before the black and white Extension Service branches were merged in 1965, the Extension Service maintained two separate, racially segregated branches and paid black employees less than white employees. Pet. App. 120a; 751 F. 2d, at 666. The Court of Appeals also acknowledged that after the merger of the Extension Service, "[s]ome preexisting salary disparities continued to linger on," and that these disparities continued after Title VII became applicable to the Extension Service in March 1972 and after this suit was filed. *Ibid.* Indeed, the Court of Appeals noted that "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting

[5] As originally enacted, Title VII of the Civil Rights Act of 1964 applied only to private employers. The Act was expanded to include public employees by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, whose effective date was March 24, 1972. See 42 U. S. C. §§ 2000e(a), (b), (f), (h).

on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all such disparity." *Id.*, at 672. See also Brief for Respondents 32 ("[E]fforts were made to reduce the average differences but due to the county by county salary differences and finding *[sic]* structure 1971 *[sic]*, the averages were not eliminated"). The court interpreted petitioners' claim on appeal to be that "the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not." 751 F. 2d, at 670. Relying on our cases in *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977), and *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977), it concluded, "[w]e do not think this is the law." 751 F. 2d, at 670.

The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior

to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.[6]

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[6] Neither *Hazelwood* nor *Evans* suggests any different rule, and indeed those cases support the result here. In *Evans*, respondent, a female flight attendant, was forced to resign in 1968 from her position due to her employer's policy forbidding female flight attendants to marry. Respondent there never brought an action with respect to this forced resignation. In 1972 she was rehired by the airline as a new hire, and given seniority only from that date. Although her claim with respect to the 1968 resignation was time barred, respondent filed suit claiming that the airline was guilty of a present, continuing violation of Title VII because the seniority system treated her less favorably than males who were hired after her termination in 1968 and prior to her reemployment. Further, she claimed that the seniority system gave present effect to the past, illegal forced retirement and thereby perpetuated the consequences of forbidden discrimination. Respondent had made no allegation that the seniority system itself was intentionally designed to discriminate. Because a lawsuit on the forced resignation was time barred, however, it was to be treated as an act occurring before the statute was passed, and therefore it had "no present legal consequences," 431 U. S., at 558, even though "[i]t may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Ibid.* The "critical question," the Court declared, "is whether any *present violation* exists." *Ibid.* (emphasis added). Because the employer was not engaged in discriminatory practices at the time the respondent in *Evans* brought suit, there simply was no violation of Title VII.

In *Hazelwood*, the Attorney General brought suit against the Hazelwood School District and various of its officials claiming that they were engaged in a pattern or practice of discriminatory hiring in violation of Title VII. We vacated the decision of the Court of Appeals that directed judgment for the Government, because that decision did not take into account the possibility that the prima facie statistical proof in the record "might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII." 433 U. S., at 309. We explained that "[a] public employer who from [1972] forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." *Ibid.*

Here, however, petitioners are alleging that in continuing to pay blacks less than similarly situated whites, respondents have *not* from the date of

The Court of Appeals' conclusion that pre-Act salary discrimination did not have to be eliminated undermines the rest of its analysis of the District Court opinion. Having rejected the effect of pre-Act discrimination, the court considered solely whether the Extension Service discriminated with respect to the application of quartile rankings which, according to the Court of Appeals, were "the only aspect of salary computation in which the Extension Service exercised any discretion." 751 F. 2d, at 674.[7] Because, as we have explained, the Extension Service was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII,[8] the Court of Appeals erred in concentrating its analysis solely on the issue whether there was racial discrimination in the ranking system.

B

We now turn to the issue whether the Court of Appeals erred in upholding the District Court's refusal to accept the petitioners' expert statistical evidence as proof of discrimina-

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the Act forward "made all [their] employment decisions in a wholly nondiscriminatory way." *Ibid.* Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood*, focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.

[7] Quartile ranking refers to the practice of the Extension Service of placing each agent in the first, second, third, or fourth quartile, according to his or her performance for the previous period. These rankings influence salary decisions.

[8] This lawsuit involves two distinct types of salary claims: those of employees subject to the premerger discriminatory pay structure and those hired after the merger of the black and white branches. If the acknowledged pre-1965 disparities continued for employees employed prior to 1965, then respondents violated the law. But for employees covered by this suit who were never employed under the dual system, it is meaningless to say that the pre-1965 disparity "continued" past 1972, absent (1) evidence that new disparities were created or begun *after* the merger that continued past 1972, or (2) evidence that new disparities were created after 1972. See Brief for Plaintiffs-Appellants Bazemore et al. in Nos. 82–1873(L), 82–1881, 82–1927, 82–2065 (CA4), pp. 24–41.

tion by a preponderance of the evidence. In a case alleging that a defendant has engaged in a pattern and practice of discrimination under § 707(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–6(a), plaintiffs must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters* v. *United States*, 431 U. S. 324, 336 (1977). Further, our decision in *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983), although not decided in the context of a pattern-and-practice case, makes clear that if the defendants have not succeeded in having a case dismissed on the ground that plaintiffs have failed to establish a prima facie case, and have responded to the plaintiffs' proof by offering evidence of their own, the factfinder then must decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination. *Id.*, at 715. This determination is subject to the clearly-erroneous standard on appellate review. See *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985); *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982).

At trial, petitioners relied heavily on multiple regression analyses designed to demonstrate that blacks were paid less than similarly situated whites. The United States' expert prepared multiple regression analyses relating to salaries for the years 1974, 1975, and 1981. Certain of these regressions used four independent variables—race, education, tenure, and job title. Petitioners selected these variables based on discovery testimony by an Extension Service official that four factors were determinative of salary: education, tenure, job title, and job performance. GX 159, pp. 90, 96. In addition, regressions done by the Extension Service itself for 1971 included the variables race, sex, education, and experience; and another in 1974 used the variables race, education,

and tenure to check for disparities between the salaries of blacks and whites. GX 214; Tr. 3915–3918; CA App. 1681; Tr. 3920.

The regressions purported to demonstrate that in 1974 the average black employee earned $331 less per year than a white employee with the same job title, education, and tenure, GX 123; CA App. 1601; Tr. 364–365, and that in 1975 the disparity was $395, GX 123; CA App. 1589; Tr. 377.[9] The regression for 1981 showed a smaller disparity which lacked statistical significance.

The Court of Appeals stated:

> "[The] district court refused to accept plaintiffs' expert testimony as proof of discrimination by a preponderance of the evidence because the plaintiffs' expert had not included a number of variable factors the court considered relevant, among them being the across the board and percentage pay increases which varied from county to county. The district court was, of course, correct in this analysis." 751 F. 2d, at 672.

The Court of Appeals thought the District Court correct for essentially two reasons: First, the Court of Appeals rejected petitioners' regression analysis because it "contained salary figures which reflect the effect of pre-Act discrimination, a consideration not actionable under Title VII . . . ." *Ibid.* (footnote omitted). Second, the court believed that "[a]n appropriate regression analysis of salary should . . . include *all* measurable variables thought to have an effect on salary level." *Ibid.* In particular, the court found that the failure to consider county-to-county differences in salary increases was significant. It concluded, noting: "[B]oth experts omitted from their respective analysis variables which ought to be reasonably viewed as determinants of salary. As a result, the regression analysis presented here must be

[9] Petitioners' expert testified that both of these disparities were statistically significant. Tr. 364–365, 377.

considered unacceptable as evidence of discrimination." *Ibid.* The Court of Appeals' treatment of the statistical evidence in this case was erroneous in important respects.

1

The Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." *Ibid.* Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.[10]

Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 252 (1981). Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely

[10] There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; but such was clearly not the case here.

than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

2

In this case the Court of Appeals failed utterly to examine the regression analyses in light of all the evidence in the record. Looked at in its entirety, petitioners offered an impressive array of evidence to support their contention that the Extension Service engaged in a pattern or practice of discrimination with respect to salaries. In addition to their own regression analyses described above, petitioners offered regressions done by the Extension Service for 1971 and 1974 that showed results similar to those revealed by petitioners' regressions. Tr. 3917; CA App. 1681. Petitioners also claim support from multiple regressions presented by respondents at trial for the year 1975. Using the same model that petitioners had used, and similar variables, respondents' expert obtained substantially the same result for 1975, a statistically significant racial effect of $384. CA App. 1716. Indeed, respondents also included in their analysis, "quartile rank" as an independent variable, and this *increased* the racial effect to $475.[11]

Petitioners also presented evidence of pre-Act salary discrimination, and of respondents' ineffectual attempts to eradicate it. For example, petitioners submitted evidence, and the District Court found, that blacks were paid less than whites in comparable positions prior to the merger of the black and white services in 1965. Pet. App. 120a. Moreover, in 1971, respondents acknowledged that substantial sal-

[11] With respect to the increased disparity when quartile rank was added to the regression analysis, respondents' expert stated that 20% of the data was missing when quartile rankings were added, and he was unable to explain the effect of the increase in the disparity when those rankings were added. Tr. 6242.

ary differences between blacks and whites existed.[12] In addition, evidence was offered to show that the efforts by the Extension Service to equalize those salaries in 1971 were insufficient to accomplish the goal. Tr. 242–246; GX 98. As we made clear in *Hazelwood School District* v. *United States*, 433 U. S., at 309–310, n. 15 "[p]roof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change."[13]

Further, petitioners presented evidence to rebut respondents' contention that county-to-county variations in contributions to salary explain the established disparity between black and white salaries. The United States presented evidence, which it claims respondents did not rebut, establishing that black employees were not located disproportionately in the counties that contributed only a small amount to Extension Service salaries. GX 216; see also CA App. 189. Absent a disproportionate concentration of blacks in such counties, it is difficult, if not impossible, to understand how the fact that some counties contribute less to salaries than others could explain disparities between black and white salaries.

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[12] Dr. T. Carlton Blalock, then Assistant Director for Administration in the Extension Service, pointed out that black county professionals were earning an average of $800 to $1,100 per year less than whites in 1970. Tr. 3905, 3911. The Blalock memorandum stated:

"Believe you'd agree our salaries for women & non-white men on average are lower—Our figures verify—Due to several factors-

-The competitive market—This is not acceptable as a reason though.

-Tradition—not just in Ext.

-Less county support for non-white positions." GX 157, App. 129.

[13] On appeal petitioners specifically complained that the District Court had not given any weight to the pre-Act discrimination in its analysis. However, to the extent that proof is required to establish discrimination with respect to salary disparities created after 1972, see *supra*, at 394–397, evidence of pre-Act discrimination is quite probative.

In addition, the United States presented an exhibit based on 1973 data for 23 counties showing 29 black employees who were earning less than whites in the same county who had comparable or lower positions and tenure. GX 102.

Finally, and there was some overlap here with evidence used to discredit the county-to-county variation theory, petitioners presented evidence consisting of individual comparisons between salaries of blacks and whites similarly situated. GX 102, DX 48. Witness testimony, claimed by petitioners to be unrebutted, also confirmed the continued existence of such disparities. CA App. 190; Tr. 2010–2012, 2685, 2825–2826.

Setting out the range of persuasive evidence offered by petitioners demonstrates the error of the Court of Appeals in focusing solely on the characteristics of the regression analysis. Although we think that consideration of the evidence makes a strong case for finding the District Court's conclusion clearly erroneous,[14] we leave that task to the Court of

[14] There was very little evidence to show that there was in fact no disparity in salaries between blacks and whites, or to demonstrate that any disparities that existed were the product of chance. The District Court did point to cases of individual differences that it found to be successfully rebutted by respondents. In addition, the District Court alluded to evidence presented by defendants relating to salaries for 1976 and thereafter, Pet. App. 146a–147a, CA App. 2227–2231, but, putting aside whether that evidence actually contradicted petitioners', it is simply not very probative of whether there existed a pattern or practice of discrimination prior to 1976. The District Court also pointed to "scattergrams" or graphs based on the data in respondents' regressions, concluding that these graphs displayed the salaries of blacks and whites "in a completely random distribution." Pet. App. 148a. Yet, as pointed out by the United States in its brief below, the very purpose of a regression analysis is to organize and explain data that may appear to be random. See Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 705–707 (1980). Thus, it is simply wrong to give weight to a scattergram while ignoring the underlying regression analysis. Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and

Appeals on remand which must make such a determination based on the "entire evidence" in the record. *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948).[15]

III

The private petitioners complain that the District Court and Court of Appeals erred in failing to certify this case as a class action. They seek the certification of three distinct classes: (1) all black employees of the Extension Service on or after November 18, 1971; (2) all current black members and potential black members of the 4–H and Extension Home-

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accounted for there was no significant disparity between the salaries of blacks and whites.

[15] We do note, however, that certain conclusions of the District Court are inexplicable in light of the record. First, the District Court, in referring to petitioners' expert's analyses stated that the regressions on which petitioners principally relied did not include job title. Pet. App. 119a. Yet the District Court expressly noted that in other regressions in which petitioners did include job title, a statistically significant disparity was noted. Second, the District Court stated that "the single most important factor in determining salaries for the Extension Service professional staff is job performance." *Id.*, at 134a. Yet the District Court failed even to note that respondents' regression analysis for 1975 which included a performance variable showed an even greater disparity in salary than did petitioners'.

Third, the District Court complained about the inclusion of the County Chairmen in petitioners' regression analysis, fearing that the fact that they were disproportionately white would skew the salary statistics to show whites earning more than blacks. Yet, because the regressions controlled for job title, adding County Chairmen as a variable in the regression would simply mean that the salaries of white County Chairmen would be compared with those of nonwhite County Chairmen. In any event, respondents' own regression at trial excluded County Chairmen and revealed a differential between black and white salaries.

Finally, the District Court listed nine variables that it believed were not accounted for in petitioners' regressions. See *id.*, at 133a. It did not, however, determine whether these variables were included in the evidence in other respects. For example, several of the "missing" variables relate to county-to-county variations, while others relate to performance, a variable expressly included in respondents' own regression.

maker Clubs on or after November 18, 1971;[16] and as a defendant (3) all County Commissioners in North Carolina who held that position on or after November 18, 1971. 751 F. 2d, at 667. The Court of Appeals upheld the District Court's denial of class certification.

A

With respect to the class of black employees, the Court of Appeals held that due to the fact that salaries are made up of money from several distinct sources, the Federal Government, the State, and the counties, the "claim of a potential plaintiff against one county will not be typical of the claim of another potential plaintiff against a different county." *Id.*, at 668.[17] It applied the same reasoning to the employees' charge of discrimination in the hiring of County Chairmen. *Ibid.* Yet the claims here were not asserted solely against the counties; they were asserted also against the Extension Service. And, as against the Extension Service, at least, it is clear that the claims of the named plaintiffs were "typical"

[16] Given the Court's disposition on the merits of the claims relating to the 4–H Clubs and the Extension Homemaker Clubs, we agree that the issue whether the District Court erred in refusing to certify a class of club members is now moot.

[17] The Court of Appeals analogized the present case to its decision in *Stastny* v. *Southern Bell Tel. & Tel. Co.*, 628 F. 2d 267 (CA4 1980), "in which we held that promotion and pay decisions subject to almost complete local autonomy in the various offices of Southern Bell throughout North Carolina would not support the typicality requirement under FRCP 23(a)(3) for a statewide class of employees." 751 F. 2d, at 668. The findings of the District Court flatly contradict the Court of Appeals' conclusion that salaries are reached in any "autonomous" fashion or are arrived at by the counties; rather the District Court explained that "[t]he salaries are determined jointly by the Service and the county board of commissioners." App. 77. This finding is supported by the Memorandum of Understanding between the Extension Service and the Boards of Commissioners for the relevant time period. See *id.*, at 162. Of course, that this case may be one in which it is proper to certify a class, is distinct from the question whether county variations serve as a basis for the demonstrated disparities between the salaries of black and white employees.

of other black employees who may have been paid less or denied promotion to chairman. Although it seems likely that the other requirements of Federal Rule of Civil Procedure 23 were met by this class, neither court below expressly considered the issue and we therefore leave that determination to the Court of Appeals on remand.[18]

B

The Court of Appeals also upheld the District Court's decision not to certify a class of County Commissioner defendants because there "was simply no evidence of any standardized practice among the one hundred separate counties in the state to deprive anyone of any rights solely because of race." Pet. App. 47a–48a. The Court of Appeals was of the view that "to have a proper class of defendants in a case such as this there must be either a statewide rule or practice so that relief is available if the rule or practice is invalid, or the adjudication with respect to a member of a defendant class must as a practical matter be dispositive of the interests of the other members of the class as provided in FRCP 23(b)(1)(B)." 751 F. 2d, at 670. We agree with the Court of Appeals that certification of a defendant class under Rule 23(b)(1)(B) in this case would have been improper. Whether an individual county acted intentionally with the Extension Service in setting salaries or in selecting County Chairmen in a discriminatory manner, is an issue that once decided with respect to a

[18] The District Court believed that a "most importan[t]" reason for not certifying this case as a class action was that "it is now settled law that class action certification is inappropriate and unnecessary in pattern and practice suits brought by the EEOC and the government pursuant to Title VII." Pet. App. 44a–46a. It cited our opinion in *General Telephone Co.* v. *EEOC*, 446 U. S. 318 (1980), for this proposition. The District Court misread that opinion. In *General Telephone Co.*, we held that in a pattern-and-practice case the *Government* need not be certified as a representative of the class of alleged victims. That case does not stand for the erroneous proposition that once the Government intervenes in a case brought by private plaintiffs, those plaintiffs lose their right to proceed as a class.

particular county could not "be dispositive of the interests of the other members of the class." The private petitioners have suggested no theory to support any different result.

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

We agree with JUSTICE BRENNAN's concurring opinion explaining the Court's reasoning insofar as the Court vacates the decision of the Court of Appeals. We write separately to affirm the Court of Appeals in rejecting the allegations of discrimination in the operation of 4–H and Homemaker Clubs. Prior to 1965, the Extension Service maintained segregated 4–H and Homemaker Clubs, and it is true that when this suit was started and when judgment was entered there were a great many all-white and all-black clubs. However, it is undisputed that in response to the Civil Rights Act of 1964 the Service discontinued its segregated club policy and opened any club, then existing or newly organized, to any otherwise eligible person regardless of race. The District Court could find no evidence of any discrimination since that time in either services or membership and concluded as a matter of fact that any racial imbalance existing in any of the clubs was the result of wholly voluntary and unfettered choice of private individuals. App. to Pet. for Cert. in No. 85–93, p. 172a. The court found that "the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4–H camps are fully integrated and have been for over ten years; and that no person has been denied membership in any club on account of race." *Id.*, at 181a. The Court of Appeals did

not disturb any of the findings of the District Court and affirmed its judgment with respect to the Clubs.

In view of the District Court's findings, this case presents no current violation of the Fourteenth Amendment since the Service has discontinued its prior discriminatory practices and has adopted a wholly neutral admissions policy. The mere continued existence of single-race clubs does not make out a constitutional violation. As the District Court found, one's choice of a Club is entirely voluntary. *Green* v. *School Board of New Kent County*, 391 U. S. 430 (1968), held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies. It was the effective predicate for imposing busing and pupil assignment programs to end dual school systems, but it has no application to the voluntary associations supported by the Extension Service. Even if the Service in effect assigned blacks and whites to separate clubs prior to 1965, it did not do so after that time. While schoolchildren must go to school, there is no compulsion to join 4–H or Homemaker Clubs, and while school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join. Nor does the Constitution require more than what the District Court and the Court of Appeals found the Service has done in this case to disestablish segregation in its Clubs. Our cases requiring parks and the like to be desegregated lend no support for requiring more than what has been done in this case. And however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu. We agree with the submission of the United States in this respect.

Petitioners rely on the Department of Agriculture regulation requiring the Service to take "affirmative action" to overcome the effects of prior discrimination in its programs.

But the Service has taken affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system, and it is the position of the United States and the federal parties that there has been full compliance with the regulation. In view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting in part.

I

The Court rejects the private petitioners' claim that the Extension Service had a duty under the Fourteenth Amendment and the regulations promulgated under Title VI of the Civil Rights Act of 1964 to desegregate the 4–H and Extension Homemaker Clubs in North Carolina. The Court concludes that the "Constitution . . . require[s no] more than what the District Court and the Court of Appeals found the Extension Service has done in this case to disestablish segregation in its 4–H and Extension Homemaker Clubs," *ante*, at 387–388, although the Court does not identify precisely what it is that has been done. The Court of Appeals determined that respondents' constitutional duty has been satisfied if a plaintiff cannot point to a minority individual who has been discriminated against with respect to membership in a 4–H or Extension Homemaker Club. In upholding the Court of Appeals in this respect, the Court joins the Extension Service in winking at the Constitution's requirement that States end their history of segregative practices, and callously thwarts an effort to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). JUSTICE WHITE's terse opinion offers only feeble excuses for

this departure from the Court's historic commitment to the eradication of segregation in this country. I dissent.

The 4–H and Youth Program in North Carolina is one of the major educational programs of the Extension Service. The Extension Service also operates an extension home economics program in each of the 100 counties of North Carolina, a program which also renders important assistance to the citizens of the State. Through these programs the Extension Service organizes and services 4–H and Extension Homemaker Clubs throughout the State. At trial, the Director of the Extension Service, Thomas Blalock, testified that 4–H agents recruit, train, and utilize volunteers to establish 4–H Clubs and Extension Homemaker Clubs; and that extension agents provide educational materials and training to the 4–H Clubs. Tr. 4196, 4199, 4217. Similarly, agents regularly meet with the Extension Homemaker Clubs, give lessons to them, and train individual club members to give home economics lessons to their members. App. to Pet. for Cert. in No. 85–93, p. 16a (hereinafter Pet. App.). See also Tr. of Oral Arg. 42. Federal law restricts the use of the name "4–H Club" to clubs affiliated with state extension services and certain other organizations. 7 CFR §§ 8.1–8.10 (1985).

The District Court found that prior to the early 1960's "[4–H] clubs were organized in the public schools and county 4–H agents would meet with the clubs during school hours and present educational programs to them. Thereafter, the clubs were moved out of the schools and were organized on a community basis with adult volunteers serving as leaders of the clubs." Pet. App. 19a. It is not disputed that prior to the merger of the black and white branches of the Extension Service separate Clubs were operated for blacks and whites. Tr. of Oral Arg. 37. Evidence introduced at trial demonstrated that in 1965, when the clubs were segregated, there were 1,474 all-white 4–H Clubs, out of a total of 2,687 (54.9%), GX 32, CA App. 1806; in 1980, 1,348 clubs out of a total of 3,448 (39.1%) remained all white. GX 11. In 1980, in

racially mixed communities, there were 580 all-white clubs, 296 all-black clubs, and 4 clubs of American Indians, for a total of 880 single-race clubs, *ibid.*; this, as compared to 892 in 1972, represented a decline of only 1.3% in the number of single-race clubs in eight years, GX 33, CA App. 1807.[1] With respect to Extension Homemaker Clubs, in 1972—the last year for which the Extension Service kept statistics—98.8% of all the Extension Homemaker Clubs were either all white or all black. App. 103.

II

The private petitioners and the United States took the position at trial that respondents are under an affirmative obligation to eliminate the effects of *de jure* segregation within the Extension Homemaker and 4–H Clubs. The United States based its argument on Title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder. Proposed Conclusions of Law of Plaintiff-Intervenor

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[1] In 1980 only 1,442, or 42% of the clubs were integrated—that is, contained one or more members of a minority group. GX 11. The number of integrated clubs in mixed communities, meanwhile, had grown from 586 in 1972 to 1,142 in 1977, so that in 1972, 39.6% of the units in mixed communities were integrated and in 1977, 56% of the clubs were so. App. 134.

The United States' proposed findings of fact with respect to both the 4–H Clubs and the Extension Homemaker Clubs pointed to testimony by several witnesses that they were aware of *no* mixed clubs in their respective counties even though many of these clubs were in racially mixed communities. Post Trial Findings of Fact, Conclusions of Law and Proposed Decree of Plaintiff-Intervenors in Civ. Action No. 2879 (EDNC), ¶¶ 245, 255. In an apparent attempt to detract from the accuracy of respondents' statistics, and thus show that there had been even less progress than the statistics indicated, the United States pointed out that the data offered were prepared entirely by the defendants, and were based solely on reports made by county 4–H agents, who were aware of the stated policy of the Extension Service to encourage integration of clubs. The United States also claimed no effort was made to monitor the accuracy of these reports. *Id.*, ¶¶ 250–254. Because of the legal theory adopted by the courts below, no findings of fact were ever made with respect to the significance or accuracy of these data.

United States in Civ. Action No. 2879 (EDNC), pp. 3, 19–20. The private petitioners based their claim on both the Constitution and Title VI. Complaint 23.

The trial judge rejected the argument. He was persuaded that there had been no violation of either the applicable regulations or the Constitution because no witness had claimed that membership in the clubs was anything but voluntary, "or that he or she had been denied membership in any such club on the basis of race; or that he or she had ever been subjected to discrimination with respect to any services offered by the Extension Service." Pet. App. 168a. Similarly, the Court of Appeals rejected the challenge relating to the racial composition of the 4–H and Extension Homemaker Clubs in a footnote stating that "[a]bsent proof of alleged racial discrimination, the mere existence of all white and all black 4–H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause." 751 F. 2d 662, 687, n. 128 (CA4 1984). The court noted that the record was devoid of proof of discrimination with respect to services provided by the clubs, and that there was insufficient proof of discrimination with respect to membership in any club. *Ibid.*

The private petitioners here reassert their position. They rely on regulations promulgated by the United States Department of Agriculture (USDA) under Title VI of the Civil Rights Act of 1964. In particular, they rely on 7 CFR § 15.3(b)(6)(i) (1985), which states:

> "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

In addition, they contend that the decision of this Court in *Green* v. *School Board of New Kent County*, 391 U. S. 430 (1968), supports the proposition that the fact that membership in the clubs is no longer officially based on race does not

relieve the Extension Service of its affirmative constitutional duty to dismantle the discriminatory system that it had created.

III

Respondents have never attempted to explain—either in the Court of Appeals or in this Court—how they are in compliance with this regulation, although they do not challenge its application to them. See, *e. g.*, Brief for Respondents 50. Inexplicably, the Court of Appeals did not even mention the regulation; and although the District Court mentioned it, that court simply ignored its obvious import. Pet. App. 169a–173a. The United States takes a position here contrary to that which it took at trial.[2] It contends that respondents have fully complied with the regulation because they have engaged

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[2] At the conclusion of trial in 1982 the United States sought inclusion of the following paragraphs in a decree to be entered by the District Court:

"20. The Defendants shall take the following affirmative steps with regard to extension services in order to eliminate the effects of the past and in order to assure an equal opportunity for participation in [Extension Service] services in the future.

"21. The Defendants shall within 90 days of this Order identify and define communities within counties according to the regulations and guidelines set forth by the U. S. Department of Agriculture and serve supporting documentation upon attorneys for the Plaintiffs and Plaintiff-Intervenors. . . .

. . . . . .

"22. Consistent with the above paragraph Defendants are ordered to implement the "All Reasonable Efforts" provisions of U. S. Department of Agriculture regulations and implementing guidelines as they relate to the desegregation of 4–H and Extension Homemaker clubs in integrated communities.

"23. Defendants shall make every effort to ensure that all community 4–H and Extension Homemaker clubs shall be fully desegregated.

"24. One year from the date of this Order, Defendants shall cease all contact with clubs which are still operated on a segregated basis, and have not shown that they have taken all reasonable efforts desegrated *[sic]* as required by para. 22 above." Proposed Decree of Plaintiff-Intervenors United States et al. in Civ. Action No. 2879 (EDNC), p. 9.

The United States did not appeal this issue to the Court of Appeals.

in "affirmative action to ensure that [their] program is open to all on an equal basis and that it avoids subsequent segregative conduct." Reply Brief for Federal Petitioners 18, n. 18. The Court similarly dismisses the regulation in a paragraph asserting that a mere change in policy constitutes affirmative action. I disagree.

It is absurd to contend that the requirement that States take "affirmative action" is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities. Moreover, the Court simply ignores the portion of the regulation that plainly requires that affirmative action be taken to "*overcome the effects of prior discrimination.*" There is no room to doubt, and the Court does not even bother to argue otherwise, that one of the *effects* of prior discrimination is the legacy of single-race Clubs that still exist in North Carolina.[3]

IV

It is not surprising that the USDA regulations require affirmative steps to eliminate the vestiges of official discrimination; the Constitution requires no less. In *Green* we rejected the argument that a "freedom of choice" plan whereby students were able to choose which of two schools in the school district to attend satisfied the affirmative obligation of the School Board to desegregate its schools, because it failed to achieve the racially nondiscriminatory school system mandated by *Brown* v. *Board of Education*, 349 U. S. 294 (1955). In *Green*, we noted that "[i]n the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely

[3] Indeed, guidelines promulgated by the USDA, also relied on by the United States, support the view that something more than passive nonobstructionism was required of the Extension Service here. With respect to the Extension Service Clubs, those guidelines provided, for example, that the Extension Service "take steps to assure that membership of such clubs is interracial in composition." CA App. 1933, 1949.

begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system." 391 U. S., at 437.

Respondents agree with the courts below that in the absence of any evidence of specific instances of discrimination, the State cannot be compelled to act to eliminate the effects of the prior *de jure* segregation. They cite no support for this proposition. This analysis is plainly wrong. It ignores the history of the Extension Service's administration of a segregated system of clubs. Our cases clearly demonstrate that prior *de jure* segregation gives rise to an affirmative duty to desegregate which cannot be met simply by a demonstration that no black person has been turned away from an all-white club. See *Gilmore* v. *City of Montgomery*, 417 U. S. 556, 566–567 (1974) ("The city was under an affirmative constitutional duty to eliminate every custom, practice, policy or usage reflecting an impermissible obeisance to the now thoroughly discredited doctrine of separate but equal. . . . This obviously meant that discriminatory practices in Montgomery parks and recreational facilities were to be eliminated root and branch") (internal quotation marks omitted); *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189, 213 (1973) ("If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system 'root and branch'"); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation"); *id.*, at 32 (discussing "affirmative duty to desegregate"); *Green*, 391 U. S., at 437 ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"). Indeed, before today the rule was that a "court

has not merely the power but the *duty* to render a decree that will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965) (voting rights context) (emphasis added). See also *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 340 (1970) (jury selection context).

The United States agrees that *Green* v. *School Board of New Kent County*, *supra*, "held that a public entity which has engaged in de jure racial segregation has an affirmative duty to desegregate . . . ." Reply Brief for Federal Petitioners 16. However, as it does with respect to the applicable regulations, the United States argues that this duty is fulfilled where admissions are normally determined by voluntary choice, so long as the State simply establishes a genuinely race-neutral admission system and refrains from segregative conduct. *Id.*, at 16–18.

The United States contends that the nature of the Clubs somehow renders the State's affirmative duty one that can be fulfilled by taking ineffective actions that border on inaction—declaring a neutral admissions policy and refraining from segregative activities. It submits that the school context is distinguishable from the present context because public officials did not assign youths to clubs.[4] The flaw in this

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[4] The United States argues:

"Where public officials do not assign persons to a particular program, there is no state-controlled attendance pattern, discriminatory or otherwise, to undo or redraw. Thus, unlike elementary and secondary education, affirmative action to assure a genuine and complete termination of all discrimination in activities affecting admissions will not leave in place any discriminatory conditions caused by previous state-imposed segregation. Such a genuinely race-neutral policy will, absent any subsequent conduct that contributes to segregation, fully dismantle the dual admission system because it will restore to the victims of discriminatory conduct (and provide to others) the system mandated by the Constitution, *i. e.*, one in which each person has an equal opportunity to participate in government activi-

argument is that public officials did, in effect, assign youths to clubs during the period of *de jure* segregation. Prior to the early 1960's, the 4–H Clubs were organized in the public schools, Pet. App. 19a, which were at that time, of course, still segregated. Tr. 4203–4204. Thus, those who wanted to join 4–H were, in effect, "assigned" to join the Club in their segregated school.[5] It is the racial segregation resulting from this practice that the State is under a duty to eradicate.

As a result, this case is in fact indistinguishable from *Green*, in which the State had operated a school system that assigned youths to schools according to race, and argued that a plan whereby students could choose which school to attend satisfied the State's obligation under the Fourteenth Amendment. The United States' argument here is identical to the argument of the School Board in *Green:* that "freedom of choice" serves to relieve the State of its *affirmative* duty to desegregate. *Green* squarely rejected that argument. Rather, we emphasized in *Green:*

> "'Freedom of Choice' is not a talisman; it is only a means of a constitutionally required end—*the abolition of the system of segregation and its effects.* If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end." 391 U. S., at 440 (quoting *Bowman* v. *County School Board*, 382 F. 2d 326, 333 (CA4 1967) (Sobeloff, J., concurring) (emphasis added)).

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ties free from discrimination and racial separation attributable to state action." Brief for Federal Petitioners 42–43.

[5] It is not clear whether the Extension Homemaker Clubs were also organized in the segregated schools, but that matters little, given that it is not disputed that these clubs too were operated on a segregated basis. Thus, as with the 4–H Clubs, although the Extension Service did not "assign" people to Homemaker Clubs, those who did join were in effect "assigned" to join a club of a particular race.

JUSTICE WHITE asserts that *Green* "has no application to the voluntary associations supported by the Extension Service," because "[e]ven if the Service in effect assigned blacks and whites to separate clubs prior to 1965, it did not do so after that time." *Ante*, at 408. In addition, JUSTICE WHITE asserts that this case is somehow distinguishable from *Green* because "while school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join." *Ante*, at 408. These observations do not advance the Court's position, however; they simply demonstrate why *Green* is on *all fours* with this case.

The second asserted basis for the Court's holding is that "[w]hile schoolchildren must go to school, there is no compulsion to join 4–H or Homemaker Clubs . . . ." *Ante*, at 408. It may also be true that, while children learn mathematics at school, they do not do so in 4–H or Homemaker Clubs. But that distinction is about as relevant as the Court's to the issue before us. Nothing in our earlier cases suggests that the State's obligation to desegregate is confined only to those activities in which members of the public are compelled to participate. On the contrary, it is clear that the State's obligation to desegregate formerly segregated entities extends beyond those programs where participation is compulsory to voluntary public amenities such as parks and recreational facilities. See, *e. g.*, *Gilmore* v. *City of Montgomery*, 417 U. S. 556 (1974); *Watson* v. *Memphis*, 373 U. S. 526 (1963); *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386, aff'd, 350 U. S. 877 (1955); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954).

Rather than attempt to justify the result it reaches with any reasoning or support from precedent, the Court adopts the reasoning of JUSTICE WHITE, who simply states a conclusion that "however sound *Green* may have been in the con-

text of public schools, it has no application to this wholly different milieu." *Ante*, at 408. We are left to wonder why this is so. While I agree that the remedy ultimately provided might properly vary in different contexts, I can see no justification in logic or precedent for relieving the State of the overall obligation to desegregate in one context while imposing that obligation in another. Yet this is precisely what the Court does by blindly ignoring the perpetuation of state-sponsored racial discrimination in the clubs run by the Extension Service.

The Court may be under the same misapprehension as was the District Court. That court characterized the problem facing it and the Extension Service in grave terms:

> "The simple truth is that in the matter of these one-race clubs the Extension Service has been faced with a dilemma which admits of no easy, readily available solution. On the one hand it has been under constant pressure from the government to eliminate racially segregated clubs or terminate services to them. On the other hand there is the stark reality that in North Carolina as well as all other states integration of the races more frequently than not meets with strong resistance.
>
> "The choice thus posed is whether it is better that the Extension Service continue to provide its much needed services to well over 100,000 North Carolina members while striving to achieve full integration of the clubs or that it withdraw such services altogether as the government would have it do. The Extension Service has opted for the former, and in so doing this court does not perceive that it has violated the rights of anyone under any law." Pet. App. 182a–185a.

JUSTICE WHITE states that *Green* was the "effective predicate for imposing busing and pupil assignment programs to end dual school systems . . . ." *Ante*, at 408.

The District Court, however, was certainly not limited in crafting a remedy requiring the Extension Service to cut off

funds and services to one-race Clubs. Nor, as the Court seems to suggest, was the District Court required to initiate busing or club member assignment. Rather, in the exercise of its equitable powers, a court may require any of a broad variety of measures, provided they prove to be effective in desegregating the Clubs. See 391 U. S., at 439–441. The delineation of the precise measures to be taken by the Extension Service on this record is a task that should be left to the District Court in the first instance. *Id.*, at 439. It is true that *Green* supports the proposition that where the vestiges of the *de jure* system have all but disappeared, the limited measures proposed by the United States in this case may fulfill that duty. Thus, in *Green*, we said that, "[a]lthough the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device." *Id.*, at 440. On this record, however, it hardly appears to have been an effective device.

I would hold simply that the Government's position that the Extension Service's affirmative duty can be fulfilled on the facts of this case through passive means is erroneous, as is respondents' view that the State can be conclusively determined to have fulfilled its duty as long as no black can point to a blatant discriminatory act. To the extent that the Court reads *Green* and the Constitution to require anything less, it is wrong.

Syllabus

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.

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

No. 84–1656. Argued February 25, 1986—Decided July 2, 1986

In 1975, the District Court found petitioner union and petitioner apprenticeship committee of the union guilty of violating Title VII of the Civil Rights Act of 1964 by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union. The court ordered petitioners to end their discriminatory practices, established a 29% nonwhite membership goal, based on the percentage of nonwhites in the relevant labor pool in New York City, to be achieved by July 1981, and also ordered petitioners to implement procedures designed to achieve this goal under the supervision of a court-appointed administrator. Thereafter, the administrator proposed and the court adopted an affirmative-action program. The Court of Appeals affirmed, with modifications. On remand, the District Court adopted a revised affirmative-action program, and extended the time to meet the 29% membership goal. The Court of Appeals again affirmed. In 1982 and again in 1983, the District Court found petitioners guilty of civil contempt for disobeying the court's earlier orders. The court imposed a fine to be placed in a special Employment, Training, Education, and Recruitment Fund (Fund), to be used to increase nonwhite membership in the union and its apprenticeship program. The District Court ultimately entered an amended affirmative-action program establishing a 29.23% nonwhite membership goal to be met by August 1987. The Court of Appeals affirmed the District Court's contempt findings (with one exception), the contempt remedies, including the Fund order, and the affirmative-action program with modifications, holding that the 29.23% nonwhite membership goal was proper and did not violate Title VII or the Constitution.

Held: The judgment is affirmed.

753 F. 2d 1172, affirmed.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III, and VI, concluding that:

1. The District Court did not use incorrect statistical evidence in evaluating petitioners' membership practices. Pp. 440–442.

2. The contempt fines and Fund order were proper remedies for civil contempt. These sanctions were clearly designed to coerce compliance with the District Court's order, rather than to punish petitioners for their contemptuous conduct, and thus were not criminal contempt citations. Pp. 442–444.

3. The District Court properly appointed an administrator to supervise petitioners' compliance with the court's orders. In light of the difficulties inherent in monitoring such compliance, and especially petitioners' established record of resistance to prior state and federal court orders, appointment of an administrator was well within the District Court's discretion. While the administrator may interfere with petitioners' membership operations, such "interference" is necessary to put an end to petitioners' discriminatory ways. Pp. 481–482.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Parts IV, V, and VII that:

1. Section 706(g) of Title VII does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief, such as the District Court ordered in this case, as a remedy for past discrimination. Pp. 444–479.

(a) Section 706(g)'s language plainly expresses Congress' intent to vest district courts with broad discretion to award "appropriate" equitable relief to remedy unlawful discrimination. The last sentence of § 706(g), which prohibits a district court from ordering a union to admit an individual who was "refused admission . . . for any reason other than discrimination" does not say that a court may order relief only for actual victims of past discrimination. Rather, the provision addresses only the situation where the plaintiff demonstrates that a union has engaged in unlawful discrimination but the union can show that a particular individual would have been refused admission even in the absence of discrimination. In this case, neither the membership goal nor the Fund order required petitioners to admit to membership individuals who had been refused admission for reasons unrelated to discrimination. Pp. 445–447.

(b) The availability of affirmative race-conscious relief under § 706 (g) as a remedy for violations of Title VII furthers the broad purposes underlying the statute. In some circumstances, such relief may be the only effective means available to ensure the full enjoyment of the rights protected by Title VII. Pp. 447–451.

(c) The legislative history does not indicate that Congress intended that affirmative relief under § 706(g) benefit only the identified victims of past discrimination. Opponents of Title VII charged that employers and labor unions would be required to implement racial quotas or preferences to avoid liability under the statute. Supporters insisted that Title VII did not require "racial balancing." The debate in Congress concern-

ing what Title VII did and did not require culminated in the adoption of § 703(j), which expressly states that the statute does not require an employer or a union to adopt quotas or preferences simply because of racial imbalance. But Congress gave no intimation as to whether such measures would be acceptable as *remedies* for Title VII violations. An examination of the legislative policy behind Title VII discloses that Congress did not intend to prohibit a court from ordering affirmative action in appropriate circumstances as a remedy for past discrimination. This interpretation of the scope of a district court's remedial power under § 706(g) is confirmed by the contemporaneous interpretation of the Equal Employment Opportunity Commission and the Justice Department, the two agencies charged with enforcing Title VII, and is also confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, which amended Title VII by, *inter alia,* modifying § 706(g) to empower district courts to order "any other equitable relief as the court deems appropriate." Pp. 452–470.

(d) This Court's prior decisions, such as *Teamsters* v. *United States,* 431 U. S. 324, *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, and *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, held only that a court may order relief designed to make individual victims of racial discrimination whole, and did not suggest that individual "make-whole" relief was the *only* kind of remedy available under the statute. On the contrary, these cases emphasized that a district court's remedial power should be exercised both to eradicate the effects of unlawful discrimination *and* to make the victims of past discrimination whole. Nor can *Firefighters* v. *Stotts,* 467 U. S. 561, be properly read to prohibit a court from ordering any kind of affirmative race-conscious relief that might benefit nonvictims. Such a reading would distort § 706(g)'s language and would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity. Pp. 470–475.

(e) While § 706(g) does not foreclose a district court from instituting some sorts of racial preferences where necessary to remedy past discrimination, such relief is not always proper. The court should exercise its discretion with an eye toward Congress' concern that affirmative race-conscious measures not be invoked simply to create a racially balanced work force. In this case, the relief ordered by the District Court was proper. Both that court and the Court of Appeals agreed that the membership goal and Fund order were necessary to remedy petitioners' pervasive and egregious discrimination. The District Court established the membership goal as a means by which it can measure petitioners' compliance with its orders, rather than as a strict racial quota. Moreover, both the membership goal and the Fund order are temporary

measures and do not unnecessarily trammel the interests of white employees. Pp. 475–479.

2. The District Court's orders do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. They were properly and narrowly tailored to further the Government's compelling interest in remedying past discrimination. Pp. 479–481.

JUSTICE POWELL concluded that:

1. The District Court acted within the remedial authority granted by § 706(g) in establishing the Fund order and numerical goal at issue. Neither Title VII's plain language nor the legislative history supports a view that all remedies must be limited to benefiting actual victims of discrimination. In cases such as this where there is a history of egregious violations of Title VII, an injunction alone may be insufficient to remedy the violations. Pp. 483–484.

2. The Fund order and membership goal do not contravene the equal protection component of the Due Process Clause of the Fifth Amendment. The finding of the courts below that petitioners have committed egregious violations of Title VII clearly establishes a compelling governmental interest sufficient to justify the imposition of a racially classified remedy. Moreover, the District Court's remedy is narrowly tailored to the goal of eradicating petitioners' discrimination. The Fund order was carefully structured to vindicate the compelling governmental interests. As to the percentage goal, it is doubtful, given petitioners' history of discrimination, that any other effective remedy was available. The goal was not imposed as a permanent requirement and was directly related to the percentage of nonwhites in the relevant work force. Neither the Constitution nor Title VII requires a particular racial balance in the workplace, and, indeed, the Constitution forbids such a requirement if imposed for its own sake. Here, the flexible application of the goal requirement demonstrates that it is not a means to achieve racial balance. Moreover, it does not appear from the record that nonminorities will be burdened directly, if at all. Pp. 484–489.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts II–A, III, and VI of which O'CONNOR, J., joined, and an opinion with respect to Parts IV, V, and VII, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 483. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 489. WHITE, J., filed a dissenting opinion, *post*, p. 499. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 500.

Martin R. Gold argued the cause for petitioners. With him on the briefs were *Robert P. Mulvey* and *William Rothberg.*

O. Peter Sherwood, Deputy Solicitor General of New York, argued the cause for respondents. With him on the brief for respondent New York State Division of Human Rights were *Robert Abrams,* Attorney General, *Robert Hermann,* Solicitor General, and *Lawrence S. Kahn, Colvin W. Grannum, Jane Levine,* and *Martha J. Olson,* Assistant Attorneys General. *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Kuhl, Samuel A. Alito, Jr., Brian K. Landsberg, Dennis J. Dimsey, David K. Flynn,* and *Johnny J. Butler* filed briefs for respondent Equal Employment Opportunity Commission. *Frederick A. O. Schwarz, Jr., Leonard Koerner, Stephen J. McGrath, Lorna B. Goodman,* and *Lin B. Saberski* filed a brief for respondent city of New York.*

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*Briefs of *amici curiae* urging reversal were filed for Local 542, International Union of Operating Engineers, et al. by *Robert M. Weinberg, Michael H. Gottesman, Jeremiah A. Collins, Edward D. Foy, Jr.,* and *George H. Cohen;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp,* Attorney General of California, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, *Marian M. Johnston,* Deputy Attorney General, *William J. Guste, Jr.,* Attorney General of Louisiana, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Robert M. Spire,* Attorney General of Nebraska, *W. Cary Edwards,* Attorney General of New Jersey, *Paul Bardacke,* Attorney General of New Mexico, *David Frohnmayer,* Attorney General of Oregon, *Charles G. Brown,* Attorney General of West Virginia, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Elisabeth S. Shuster;* for the city of Birmingham, Alabama, by *James P. Alexander, Linda A. Friedman,* and *James K. Baker;* for the city of Detroit et al. by *Daniel B. Edelman, John H. Suda, Charles L. Reischel, Frederick N. Merkin,* and *Robert Cramer;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Paul C. Saunders, Harold R. Tyler, James Robertson, Norman Redlich, William L. Robinson, Richard T. Seymour, Grover G. Hankins, Charles E. Carter, E. Richard Larson,* and

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI, and an opinion with respect to Parts IV, V, and VII in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

In 1975, petitioners were found guilty of engaging in a pattern and practice of discrimination against black and Hispanic individuals (nonwhites) in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and ordered to end their discriminatory practices, and to admit a certain percentage of nonwhites to union membership by July 1981. In 1982 and again in 1983, petitioners were found guilty of civil contempt for disobeying the District Court's earlier orders. They now challenge the District Court's contempt finding, and also the remedies the court ordered both for the Title VII violation and for contempt. Principally, the issue presented is whether the remedial provision of Title VII, see 42 U. S. C. § 2000e–5(g), empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination.

I

Petitioner Local 28 of the Sheet Metal Workers' International Association (Local 28) represents sheet metal workers

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Burt Neuborne; for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius L. Chambers, Ronald L. Ellis, Clyde E. Murphy, Eric Schnapper, Samuel Rabinove, Richard T. Foltin, Theodore R. Mann, Marvin E. Frankel, Grover G. Hankins, Antonia Hernandez, Kenneth Kimerling,* and *David Saperstein;* for the National Conference of Black Mayors, Inc., by *Conrad K. Harper;* for the NOW Legal Defense and Education Fund et al. by *Marsha Levick* and *Emily J. Spitzer;* and for the North Carolina Association of Black Lawyers by *Joseph A. Broderick, Wayne Alexander, G. K. Butterfield, James E. Ferguson II, John H. Harmon, William A. Marsh, Jr., Brenda F. McGhee,* and *Floyd B. McKissick, Sr.*

Briefs of *amici curiae* were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for the National Association of Manufacturers by *Dennis H. Vaughn, John C. Fox, Paul Grossman,* and *Jan S. Amundson.*

employed by contractors in the New York City metropolitan area. Petitioner Local 28 Joint Apprenticeship Committee (JAC) is a management-labor committee which operates a 4-year apprenticeship training program designed to teach sheet metal skills. Apprentices enrolled in the program receive training both from classes and from on-the-job work experience. Upon completing the program, apprentices become journeyman members of Local 28. Successful completion of the program is the principal means of attaining union membership.[1]

In 1964, the New York State Commission for Human Rights determined that petitioners had excluded blacks from the union and the apprenticeship program in violation of state law. The State Commission found, among other things, that Local 28 had never had any black members or apprentices, and that "admission to apprenticeship is conducted largely on a nepot[is]tic basis involving sponsorship by incumbent union members," App. JA–407, creating an impenetrable barrier for nonwhite applicants.[2] Petitioners were ordered to "cease and desist" their racially discriminatory practices. The New York State Supreme Court affirmed the State Commission's findings, and directed petitioners to implement objective standards for selecting apprentices. *State Comm'n for Human Rights* v. *Farrell*, 43 Misc. 2d 958, 252 N. Y. S. 2d 649 (1964).

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[1] In addition to completing the apprenticeship program, an individual can gain membership in Local 28 by (1) transferring directly from a "sister" union; (2) passing a battery of journeyman level tests administered by the union; and (3) gaining admission at the time a nonunion sheet metal shop is organized by Local 28. In addition, during periods of full employment, Local 28 issues temporary work permits which allow nonmembers to work within its jurisdiction.

[2] The Sheet Metal Workers' International Union was formed in 1888, under a Constitution which provided for the establishment of "white local unions" and relegated blacks to membership in subordinate locals. Local 28 was established in 1913 as a "white local union." Although racial restrictions were formally deleted from the International Constitution in 1946, Local 28 refused to admit blacks until 1969.

When the court's orders proved ineffective, the State Commission commenced other state-court proceedings in an effort to end petitioners' discriminatory practices. Petitioners had originally agreed to indenture two successive classes of apprentices using nondiscriminatory selection procedures, but stopped processing applications for the second apprentice class, thus requiring that the State Commission seek a court order requiring petitioners to indenture the apprentices. *State Comm'n for Human Rights* v. *Farrell*, 47 Misc. 2d 244, 262 N. Y. S. 2d 526, aff'd, 24 App. Div. 2d 128, 264 N. Y. S. 2d 489 (1st Dept. 1965). The court subsequently denied the union's request to reduce the size of the second apprentice class, and chastised the union for refusing "except for token gestures, to further the integration process." *State Comm'n for Human Rights* v. *Farrell*, 47 Misc. 2d 799, 800, 263 N. Y. S. 2d 250, 252 (1965). Petitioners proceeded to disregard the results of the selection test for a third apprentice class on the ground that nonwhites had received "unfair tutoring" and had passed in unreasonably high numbers. The state court ordered petitioners to indenture the apprentices based on the examination results. *State Comm'n for Human Rights* v. *Farrell*, 52 Misc. 2d 936, 277 N. Y. S. 2d 287, aff'd, 27 App. Div. 2d 327, 278 N. Y. S. 2d 982 (1st Dept.), aff'd, 19 N. Y. 2d 974, 228 N. E. 2d 691 (1967).

In 1971, the United States initiated this action under Title VII and Executive Order No. 11246, 3 CFR 339 (1964–1965 Comp.) to enjoin petitioners from engaging in a pattern and practice of discrimination against black and Hispanic individuals (nonwhites).[3] The New York City Commission on Human Rights (City) intervened as plaintiff to press claims

[3] The Equal Employment Opportunity Commission (EEOC) was substituted as named plaintiff in this case. The Sheet Metal and Air Conditioning Contractors' Association of New York City (Contractors' Association) was also named as a defendant. The New York State Division of Human Rights (State), although joined as a third- and fourth-party defendant in this action, realigned itself as a plaintiff.

that petitioners had violated municipal fair employment laws, and had frustrated the City's efforts to increase job opportunities for minorities in the construction industry. *United States* v. *Local 638, Enterprise Assn. of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning, and General Pipefitters*, 347 F. Supp. 164 (SDNY 1972). In 1970, the City had adopted a plan requiring contractors on its projects to employ one minority trainee for every four journeyman union members. Local 28 was the only construction local which refused to comply voluntarily with the plan. In early 1974, the City attempted to assign six minority trainees to sheet metal contractors working on municipal construction projects. After Local 28 members stopped work on the projects, the District Court directed the JAC to admit the six trainees into the apprenticeship program, and enjoined Local 28 from causing any work stoppage at the affected job sites. The parties subsequently agreed to a consent order that required the JAC to admit up to 40 minorities into the apprenticeship program by September 1974. The JAC stalled compliance with the consent order, and only completed the indenture process under threat of contempt.

Following a trial in 1975, the District Court concluded that petitioners had violated both Title VII and New York law by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union. *EEOC* v. *Local 638*, 401 F. Supp. 467 (SDNY 1975). Noting that as of July 1, 1974, only 3.19% of the union's total membership, including apprentices and journeymen, was nonwhite, the court found that petitioners had denied qualified nonwhites access to union membership through a variety of discriminatory practices. First, the court found that petitioners had adopted discriminatory procedures and standards for admission into the apprenticeship program. The court examined some of the factors used to select apprentices, including the entrance examination and high-school diploma requirement,

and determined that these criteria had an adverse discriminatory impact on nonwhites, and were not related to job performance. The court also observed that petitioners had used union funds to subsidize special training sessions for friends and relatives of union members taking the apprenticeship examination.[4]

Second, the court determined that Local 28 had restricted the size of its membership in order to deny access to nonwhites. The court found that Local 28 had refused to administer yearly journeyman examinations despite a growing demand for members' services.[5] Rather, to meet this increase in demand, Local 28 recalled pensioners who obtained doctors' certificates that they were able to work, and issued hundreds of temporary work permits to nonmembers; only one of these permits was issued to a nonwhite. Moreover, the court found that "despite the fact that Local 28 saw fit to request [temporary workers] from sister locals all across the country, as well as from allied New York construction unions such as plumbers, carpenters, and iron workers, it never once sought them from Sheet Metal Local 400," a New York City union comprised almost entirely of nonwhites. *Id.*, at 485. The court concluded that by using the temporary permit system rather than continuing to administer journey-

[4] The court also noted that petitioners' failure to comply with EEOC regulations requiring them to keep records of each applicant's race had made it difficult for the court to evaluate the discriminatory impact of petitioners' selection procedures.

[5] The court noted that Local 28 had offered journeyman examinations in 1968 and 1969 as a result of arbitration proceedings initiated by the Contractors' Association to force Local 28 to increase its manpower. Only 24 of 330 individuals, all of them white, passed the first examination and were admitted to the union. The court found that this examination had an adverse impact on nonwhites and had not been validated in accordance with EEOC guidelines, and was therefore violative of Title VII. Some nonwhites did pass the second examination, and the court concluded that Local 28's failure to keep records of the number of whites and nonwhites tested made it impossible to determine whether that test had also had an adverse impact on nonwhites.

man tests, Local 28 successfully restricted the size of its membership with the "illegal effect, if not the intention, of denying nonwhites access to employment opportunities in the industry." *Ibid.*

Third, the District Court determined that Local 28 had selectively organized nonunion sheet metal shops with few, if any, minority employees, and admitted to membership only white employees from those shops. The court found that "[p]rior to 1973 no non-white ever became a member of Local 28 through the organization of a non-union shop." *Ibid.* The court also found that, despite insistent pressure from both the International Union and local contractors, Local 28 had stubbornly refused to organize sheet metal workers in the local blowpipe industry because a large percentage of such workers were nonwhite.

Finally, the court found that Local 28 had discriminated in favor of white applicants seeking to transfer from sister locals. The court noted that from 1967 through 1972, Local 28 had accepted 57 transfers from sister locals, all of them white, and that it was only after this litigation had commenced that Local 28 accepted its first nonwhite transfers, two journeymen from Local 400. The court also found that on one occasion, the union's president had incorrectly told nonwhite Local 400 members that they were not eligible for transfer.

The District Court entered an order and judgment (O&J) enjoining petitioners from discriminating against nonwhites, and enjoining the specific practices the court had found to be discriminatory. Recognizing that "the record in both state and federal court against these defendants is replete with instances of . . . bad faith attempts to prevent or delay affirmative action," *id.*, at 488,[6] the court concluded that "the

[6] The court remarked:

"After [State] Justice Markowitz [in the 1964 state-court proceeding] ordered implementation of [a plan intended to] create a 'truly nondiscriminatory union[,]' Local 28 flouted the court's mandate by expending union

imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place the defendants in a position of compliance with [Title VII]." *Ibid.* The court established a 29% nonwhite membership goal, based on the percentage of nonwhites in the relevant labor pool in New York City, for the union to achieve by July 1, 1981. The parties were ordered to devise and to implement recruitment and admission procedures designed to achieve this goal under the supervision of a court-appointed administrator.[7]

The administrator proposed, and the court adopted, an Affirmative Action Program which, among other things, required petitioners to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-nonwhite ratio to be negotiated by the parties, conduct extensive recruitment and publicity campaigns aimed at minorities,[8] secure the administrator's consent before issuing temporary work permits, and maintain

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funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the [apprenticeship examination]. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprentice programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program. More recently, the defendants unilaterally suspended court-ordered time tables for admission of forty non-whites to the apprentice program pending trial of this action, only completing the admission process under threat of contempt citations." 401 F. Supp., at 488.

[7] The O & J also awarded backpay to those nonwhites who could demonstrate that they were discriminatorily excluded from union membership.

[8] The District Court had concluded that petitioners had earned a well-deserved reputation for discriminating against nonwhites, and that this reputation "operated and still operates to discourage non-whites seeking membership in the local union or its apprenticeship program." *Id.*, at 487. The publicity campaign was consequently designed to dispel this reputation, and to encourage nonwhites to take advantage of opportunities for union membership.

detailed membership records, including separate records for whites and nonwhites. *EEOC* v. *Local 638*, 421 F. Supp. 603 (1975). Local 28 was permitted to extend any of the benefits of the program to whites and other minorities, provided that this did not interfere with the programs' operation.

The Court of Appeals for the Second Circuit affirmed the District Court's determination of liability, finding that petitioners had "consistently and egregiously violated Title VII." *EEOC* v. *Local 638*, 532 F. 2d 821, 825 (1976). The court upheld the 29% nonwhite membership goal as a temporary remedy, justified by a "long and persistent pattern of discrimination," *id.*, at 830, and concluded that the appointment of an administrator with broad powers was clearly appropriate, given petitioners' refusal to change their membership practices in the face of prior state and federal court orders. However, the court modified the District Court's order to permit the use of a white-nonwhite ratio for the apprenticeship program only pending implementation of valid, job-related entrance tests. Local 28 did not seek certiorari in this Court to review the Court of Appeals' judgment.

On remand, the District Court adopted a Revised Affirmative Action Program and Order (RAAPO) to incorporate the Court of Appeals' mandate. RAAPO also modified the original Affirmative Action Program to accommodate petitioners' claim that economic problems facing the construction industry had made it difficult for them to comply with the court's orders. Petitioners were given an additional year to meet the 29% membership goal. RAAPO also established interim membership goals designed to "afford the parties and the Administrator with some device to measure progress so that, if warranted, other provisions of the program could be modified to reflect change *[sic]* circumstances." App. JA–168. The JAC was directed to indenture at least 36 apprentices by February 1977, and to determine the size of future ap-

prenticeship classes subject to review by the administrator.[9] A divided panel of the Court of Appeals affirmed RAAPO in its entirety, including the 29% nonwhite membership goal. *EEOC* v. *Local 638*, 565 F. 2d 31 (1977). Petitioners again chose not seek certiorari from this Court to review the Court of Appeals' judgment.

In April 1982, the City and State moved in the District Court for an order holding petitioners in contempt.[10] They alleged that petitioners had not achieved RAAPO's 29% nonwhite membership goal, and that this failure was due to petitioners' numerous violations of the O&J, RAAPO, and orders of the administrator. The District Court, after receiving detailed evidence of how the O&J and RAAPO had operated over the previous six years, held petitioners in civil contempt. The court did not rest its contempt finding on petitioners' failure to meet the 29% membership goal, although nonwhite membership in Local 28 was only 10.8% at the time of the hearing. Instead, the court found that petitioners had "failed to comply with RAAPO . . . almost from its date of entry," App. to Pet. for Cert. A–156, identifying six "separate actions or omissions on the part of the defendants [that] have impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." *Id.*, at A–150. Specifically, the court determined that petitioners had (1) adopted a policy of underutilizing the apprenticeship program in order to limit nonwhite membership and employment

[9] The Affirmative Action Program originally had required the JAC to indenture at least 300 apprentices by July 1, 1976, and at least 200 apprentices in each year thereafter, up to and including 1981. These figures were adjusted downward after petitioners complained that economic conditions made it impossible for them to indenture this number of apprentices. The District Court also permitted petitioners to defer administration of the journeyman examination for the same reason.

[10] The Contractors' Association and individual Local 28 contractors were also named as respondents to the contempt proceeding.

opportunities;[11] (2) refused to conduct the general publicity campaign required by the O&J and RAAPO to inform nonwhites of membership opportunities; (3) added a job protection provision to the union's collective-bargaining agreement that favored older workers and discriminated against nonwhites (older workers provision); (4) issued unauthorized work permits to white workers from sister locals; and (5) failed to maintain and submit records and reports required by RAAPO, the O&J, and the administrator, thus making it difficult to monitor petitioners' compliance with the court's orders.

To remedy petitioners' contempt, the court imposed a $150,000 fine to be placed in a fund designed to increase nonwhite membership in the apprenticeship program and the union. The administrator was directed to propose a plan for utilizing the fund. The court deferred imposition of further coercive fines pending receipt of the administrator's recommendations for modifications to RAAPO.[12]

In 1983, the City brought a second contempt proceeding before the administrator, charging petitioners with additional violations of the O&J, RAAPO, and various adminis-

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[11] The court explained that the "journeymen benefiting from this policy of underutilizing the apprenticeship program comprise Local 28's white incumbent membership." App. to Pet. for Cert. A–151. The court rejected Local 28's contention that any underutilization of the apprenticeship program could be blamed on difficult economic circumstances, emphasizing that the court had "not overlooked the obstacles or problems with which [petitioners] have had to contend," and that it had "given much consideration to the economic condition of the sheet metal trade in particular and the construction industry in general over the past six years." *Id.*, at A–156.

[12] The District Court found it necessary to modify RAAPO in light of the fact that the 29% nonwhite membership goal was no longer viable on the present timetable, and also because five other locals with predominantly white memberships had recently merged with Local 28. The court denied petitioners' cross-motion for an order terminating both the O&J and RAAPO, finding that these orders had not caused petitioners unexpected or undue hardship.

trative orders. The administrator found that the JAC had violated RAAPO by failing to submit accurate reports of hours worked by apprentices, thus preventing the court from evaluating whether nonwhite apprentices had shared in available employment opportunities, and that Local 28 had: (1) failed, in a timely manner, to provide the racial and ethnic data required by the O&J and RAAPO with respect to new members entering the union as a result of its merger with five predominantly white sheet metal locals, (2) failed to serve copies of the O&J and RAAPO on contractors employing Local 28 members, as ordered by the administrator, and (3) submitted inaccurate racial membership records.[13]

The District Court adopted the administrator's findings and once again adjudicated petitioners guilty of civil contempt. The court ordered petitioners to pay for a computerized recordkeeping system to be maintained by outside consultants, but deferred ruling on additional contempt fines pending submission of the administrator's fund proposal. The court subsequently adopted the administrator's proposed Employment, Training, Education, and Recruitment Fund (Fund) to "be used for the purpose of remedying discrimination." App. to Pet. for Cert. A–113—A–114. The Fund was used for a variety of purposes. In order to increase the pool of qualified nonwhite applicants for the apprentice-

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[13] The administrator's comments revealed that he was more concerned with Local 28's "inability to provide accurate data" than with the specific errors he had discovered. He emphasized that Local 28 had "no formal system to verify the racial and ethnic composition of [its] membership," App. to Pet. for Cert. A–133, and that "[s]uch verification that was done, was done on a totally haphazard basis." *Ibid.* He concluded that "[t]he lack of any proper verification controls confirms . . . that Local 28 has not acted in the affirmative manner contemplated by the court." *Ibid.* More generally, he observed that "[t]he violations found herein cannot be viewed in isolation, rather they must be seen as part of a pattern of disregard for state and federal court orders and as a continuation of conduct which led the court to find defendants in contempt." *Id.*, at A–138.

ship program, the Fund paid for nonwhite union members to serve as liaisons to vocational and technical schools with sheet metal programs, created part-time and summer sheet metal jobs for qualified nonwhite youths, and extended financial assistance to needy apprentices. The Fund also extended counseling and tutorial services to nonwhite apprentices, giving them the benefits that had traditionally been available to white apprentices from family and friends. Finally, in an effort to maximize employment opportunities for all apprentices, the Fund provided financial support to employers otherwise unable to hire a sufficient number of apprentices, as well as matching funds to attract additional funding for job training programs.[14]

The District Court also entered an Amended Affirmative Action Plan and Order (AAAPO) which modified RAAPO in several respects. AAAPO established a 29.23% minority membership goal to be met by August 31, 1987. The new goal was based on the labor pool in the area covered by the newly expanded union. The court abolished the apprenticeship examination, concluding that "the violations that have occurred in the past have been so egregious that a new approach must be taken to solve the apprentice selection problem." *Id.*, at A–112. Apprentices were to be selected by a three-member Board, which would select one minority apprentice for each white apprentice indentured. Finally, to prevent petitioners from underutilizing the apprenticeship program, the JAC was required to assign to Local 28 contractors one apprentice for every four journeymen, unless the contractor obtained a written waiver from respondents.

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[14] The Fund was to be financed by the $150,000 fine from the first contempt proceeding, plus an additional payment of $0.02 per hour for each hour worked by a journeyman or apprentice. The Fund would remain in existence until the union achieved its nonwhite membership goal, and the District Court determined that the Fund was no longer necessary.

Petitioners appealed the District Court's contempt orders, the Fund order, and the order adopting AAAPO.[15] A divided panel of the Court of Appeals affirmed the District Court's contempt findings,[16] except the finding based on adoption of the older workers' provision.[17] *EEOC* v. *Local 638*, 753 F. 2d 1172 (1985). The court concluded that "[p]articularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, . . . the combination of violations found by [the District Court] amply demonstrates the union's foot-dragging egregious noncompliance . . . and adequately supports [its] findings of civil contempt against both Local 28 and the JAC." *Id.*, at 1183. The

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[15] Petitioners did not appeal the denial of their cross-motion to terminate the O & J and RAAPO. The city cross-appealed from that part of AAAPO establishing a temporary 29.23% nonwhite membership goal, claiming that the percentage should be higher. The Court of Appeals denied the cross-appeal.

[16] With respect to the finding of underutilization of the apprenticeship program, the court noted that the District Court had mistakenly compared the total number of apprentices enrolled during the period before the O & J was entered against the number of new enrollees admitted during the period after entry of the O & J. However, the court found this error inconsequential, since the statistical comparison was "only a small part of the overall evidence showing underutilization of the apprenticeship program." *EEOC* v. *Local 638*, 753 F. 2d 1172, 1180 (1985). The court determined that the District Court's finding of underutilization was supported by strong evidence that despite a need for more apprentices, petitioners refused to advertise the apprenticeship program and thereby help fill the need. See n. 22, *infra*. The court also noted that "[m]any of the uncertainties about underutilization that are urged by defendants are due in large part to the union's noncompliance with the reporting provisions of RAAPO." 753 F. 2d, at 1183.

[17] The court held that plaintiffs had failed to prove that the older workers' provision had either a discriminatory purpose or effect, because although negotiated, it was never actually implemented. The court instructed the District Court on remand to determine the status and effect of the provision. Because adoption of this provision was the only contemptuous conduct that the Contractors' Association had been charged with, the Court of Appeals vacated all contempt relief against the Association.

court also affirmed the District Court's contempt remedies, including the Fund order, and affirmed AAAPO with two modifications: it set aside the requirement that one minority apprentice be indentured for every white apprentice,[18] and clarified the District Court's orders to allow petitioners to implement objective, nondiscriminatory apprentice selection procedures.[19] The court found the 29.23% nonwhite membership goal to be proper in light of Local 28's "long continued and egregious racial discrimination," *id.*, at 1186, and because it "will not unnecessarily trammel the rights of any readily ascertainable group of non-minority individuals." *Id.*, at 1187. The court rejected petitioners' argument that the goal violated Title VII or the Constitution. The court also distinguished AAAPO from the race-conscious order invalidated by this Court in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), on three grounds: (1) unlike the order in *Stotts*, AAAPO did not conflict with a bona fide seniority plan; (2) the *Stotts* discussion of § 706(g) of Title VII, 42 U. S. C. § 2000e–5(g), applied only to "make whole" relief and did not address the prospective relief contained in AAAPO and the Fund order; and (3) this case, unlike *Stotts*, involved intentional discrimination.

Local 28 and the JAC filed a petition for a writ of certiorari. They present several claims for review: (1) that the District Court relied on incorrect statistical data; (2) that the

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[18] The court recognized that "temporary hiring ratios may be necessary in order to achieve integration of a work force from which minorities have been unlawfully barred," but cautioned that "such race-conscious ratios are extreme remedies that must be used sparingly and 'carefully tailored to fit the violations found.'" *Id.*, at 1188, quoting *Association Against Discrimination* v. *Bridgeport*, 647 F. 2d 256, 281 (CA2 1981). Noting that petitioners had voluntarily indentured 45% nonwhites since January 1981, the court concluded that a strict 1-to-1 hiring requirement was not needed to insure that a sufficient number of nonwhites were selected for the apprenticeship program.

[19] The EEOC had argued that AAAPO prohibited the use of any new selection procedures until the 29.23% membership goal was reached.

contempt remedies ordered by the District Court were criminal in nature and were imposed without due process; (3) that the appointment of an administrator to supervise membership practices interferes with their right to self-governance; and (4) that the membership goal and Fund are unconstitutional. Principally, however, petitioners, supported by the Solicitor General, maintain that the membership goal and Fund exceed the scope of remedies available under Title VII because they extend race-conscious preferences to individuals who are not the identified victims of petitioners' unlawful discrimination. We granted the petition, 474 U. S. 815 (1985), and now affirm the Court of Appeals.

II

Petitioners argue that the District Court relied on incorrect statistical evidence in violation of Title VII and of petitioners' right to due process.

A

Under the O & J and RAAPO, petitioners were directed to attain a 29% nonwhite membership goal by July 1981. This goal was based on the percentage of minorities in the relevant labor pool within New York City. Petitioners argue that because members and applicants for Local 28 membership have always been drawn from areas outside of New York City, the nonwhite membership goal should have accounted for the percentage of minorities in the relevant labor pool in these areas. Although they concede that there is no evidence in the record from which the correct percentage could be derived, they insist that the District Court's figure is erroneous, and that this error was "significant."[20]

[20] In their brief, petitioners also suggest that the District Court's 29% membership goal was used to confirm its original finding of discrimination, and was therefore invalid under *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977) (proof of a pattern of discrimination by statistical evidence must be drawn from relevant geographical locations). However, the Court of Appeals recognized that the District Court's finding of

The 29% nonwhite membership goal was established more than a decade ago and was twice affirmed by the Court of Appeals. Petitioners did not seek certiorari from this Court to review either of the Court of Appeals' judgments. Consequently, we do not have before us any issue as to the correctness of the 29% figure. See *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 432 (1976). Under AAAPO, petitioners are now obligated to attain a 29.23% nonwhite-membership goal by August 1987. AAAPO adjusted the original 29% membership goal to account for the fact that Local 28's members were now drawn from areas outside of New York City. Thus, even assuming that the original 29% membership goal was erroneous, it would not affect petitioners' existing obligations under AAAPO, or any other issue now before us.[21]

B

Petitioners argue that the District Court also relied on incorrect data in finding that they had underutilized the apprenticeship program. The Court of Appeals recognized this error, see n. 20, *supra*, but affirmed the finding based on

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liability "did not rely on inferences from racial ratios of population and employment in the area," but rather "was based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years." *EEOC* v. *Local 638*, 565 F. 2d 31, 36, n. 8 (1977). In any event, petitioners conceded at oral argument that they do not "challeng[e] any finding that there was deliberate discrimination." Tr. of Oral Arg. 7.

[21] Petitioners contend that "[i]nasmuch as [they] have now been held in contempt for not achieving the [29% membership] quota, the propriety of the evidence upon which it was derived is relevant." Brief for Petitioners 35–36. In the first place, the District Court expressly stated that petitioners were not held in contempt for failing to attain the 29% membership goal. In any event, a "contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio* v. *Zeitz*, 333 U. S. 56, 69 (1948); see also *Walker* v. *City of Birmingham*, 388 U. S. 307, 313–314 (1967); *United States* v. *Rylander*, 460 U. S. 752, 756–757 (1983); C. Wright & A. Miller, Federal Practice and Procedure § 2960, pp. 597–598 (1973).

other evidence presented to the District Court.[22] Petitioners do not explain whether, and if so, why, the Court of Appeals' evaluation of the evidence was incorrect. Based on our own review of the record, we cannot say that the District Court's resolution of the evidence presented on this issue was clearly erroneous. Cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 98, n. 15 (1984); *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982). Moreover, because petitioners do not challenge three of the findings on which the first contempt order was based, any alleged use of incorrect statistical evidence by the District Court provides no basis for disturbing the contempt citation. As the Court of Appeals observed, petitioners' "failure to have the apprentices employed is both an independent ground for contempt and a symptom of the effects of defendants' other kinds of contemptuous conduct." 753 F. 2d, at 1183.

III

The District Court imposed a variety of contempt sanctions in this case, including fines to finance the Fund, a computerized recordkeeping requirement, and attorney's fees and expenses. Petitioners claim that these sanctions, while ostensibly imposed for civil contempt, are in fact punitive, and were issued without the procedures required for criminal contempt proceedings, see Fed. Rule Crim. Proc. 42(b); 42 U. S. C. §2000h. We reject this contention.

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[22] The court pointed to evidence before the District Court showing that after the O & J was entered: (1) there was a "sharp increase" in the ratio of journeymen to apprentices employed by contractors; (2) the average number of hours worked annually by journeymen "increased dramatically"; (3) the percentage of unemployed apprentices decreased; and (4) the union issued hundreds of temporary work permits, mostly to white journeymen. Based on this evidence, the Court of Appeals concluded that despite the need for more apprentices, Local 28 had deliberately shifted employment opportunities from apprentices to predominantly white journeymen, and had refused to conduct the general publicity campaign required by RAAPO to attract nonwhites to the apprenticeship program.

Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court. *United States* v. *Mine Workers*, 330 U. S. 258, 302 (1947). On the other hand, sanctions in civil contempt proceedings may be employed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Id.*, at 303–304; see also *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949); *Penfield Co. of California* v. *SEC*, 330 U. S. 585, 590 (1947); *Nye* v. *United States*, 313 U. S. 33, 42 (1941); *McCrone* v. *United States*, 307 U. S. 61, 64 (1939); 42 U. S. C. § 2000h. Under this standard, the sanctions issued by the District Court were clearly civil in nature.

The District Court determined that petitioners had underutilized the apprenticeship program to the detriment of nonwhites, and that this was one of the factors that had prevented petitioners even from approaching the court-ordered 29% nonwhite membership goal. The Fund—and the fines used to finance it—sought to remedy petitioners' contemptuous conduct by increasing nonwhite membership in the apprenticeship program in a variety of ways. In an attempt to encourage nonwhite interest in the apprenticeship program, petitioners were required to finance recruiting efforts at vocational schools, and to create summer and part-time sheet metal jobs for qualified vocational students. Nonwhite apprentices were provided with tutorial, counseling, and financial support services. In an effort to stimulate employment opportunities for *all* apprentices, the Fund helped subsidize contractors who could not afford to hire one apprentice for every four journeymen, and helped the union secure matching training funds. The court carefully considered "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired," *Mine Workers*, *supra*, at 304, and concluded that the Fund was necessary to secure petitioners' compliance with its earlier orders.

Under the terms of the Fund order, petitioners could purge themselves of the contempt by ending their discriminatory practices and by achieving the court-ordered membership goal; they would then be entitled, with the court's approval, to recover any moneys remaining in the Fund. Thus, the sanctions levied by the District Court were clearly designed to coerce compliance with the court's orders, rather than to punish petitioners for their contemptuous conduct.[23]

IV

Petitioners, joined by the EEOC, argue that the membership goal, the Fund order, and other orders which require petitioners to grant membership preferences to nonwhites are expressly prohibited by § 706(g), 42 U. S. C. § 2000e–5(g), which defines the remedies available under Title VII. Petitioners and the EEOC maintain that § 706(g) authorizes a district court to award preferential relief only to the actual victims of unlawful discrimination.[24] They maintain that the

[23] The District Court had also determined that petitioners had failed to comply with the detailed recordkeeping requirements of the O & J and RAAPO. The computerized recordkeeping system was clearly designed to foster petitioners' compliance with these provisions. Finally, the assessment of attorney fees and expenses compensated respondents for costs occasioned by petitioners' contemptuous conduct.

[24] Both petitioners and the EEOC present this challenge from a rather curious position. Petitioners did not seek review in this Court of the 29% membership goal twice approved by the Court of Appeals, even though that goal was similar to the 29.23% goal they now challenge. However, we reject the State's contention that either res judicata or the law of the case prohibits us from now addressing the legality of the membership goal. See *United States* v. *A. S. Kreider Co.*, 313 U. S. 443, 445–446 (1941); *Southern R. Co.* v. *Clift*, 260 U. S. 316, 319 (1922); *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912); 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404 [4.–6], p. 141 (2d ed. 1984).

The EEOC challenges the membership goal and Fund order even though the EEOC has, throughout this litigation, joined the other plaintiffs in asking the courts to order numerical goals, implementing ratios, and timetables. In the complaint, the Government sought the "selection of sufficient apprentices from among qualified non-white applicants to overcome the effects of past discrimination." App. JA–374. In its post-trial memoran-

membership goal and the Fund violate this provision, since they require petitioners to admit to membership, and otherwise to extend benefits to, black and Hispanic individuals who are not the identified victims of unlawful discrimination.[25] We reject this argument, and hold that § 706(g) does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination. Specifically, we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.

A

Section 706(g) states:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful

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dum, the Government urged the court to "establish a goal of no less than 30 per cent non white membership in Local 28." *Id.*, at JA–277. To achieve this goal, the Government asked the court to order petitioners to select apprentices based on a 1-to-1 white to nonwhite ratio, and argued that "a reasonable preference in favor of minority persons to remedy past discriminatory injustices is permissable *[sic]*." *Ibid.*

[25] The last sentence of § 706(g) addresses only court orders requiring the "admission or reinstatement of an individual as a member of a union." 42 U. S. C. § 2000e–5(g). Thus, even under petitioners' reading of § 706(g), that provision would not apply to several of the benefits conferred by the Fund, to wit the tutorial, liaison, counseling, stipend, and loan programs extended to nonwhites. Moreover, the District Court established the Fund in the exercise of its contempt powers. Thus, even assuming that petitioners correctly read § 706(g) to limit the remedies a court may impose *for a violation of Title VII*, that provision would not necessarily limit the District Court's authority to order petitioners to implement the Fund. The EEOC, without citing any authority, maintains that "contempt sanctions imposed to enforce Title VII must not themselves violate the statute's policy of providing relief only to the actual victims of discrimination." Brief for EEOC 11. We need not decide whether § 706(g) restricts a court's contempt powers, since we reject the proposition that § 706(g) always prohibits a court from ordering affirmative race-conscious relief which might incidentally benefit individuals who were not the actual victims of discrimination.

> employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination of account of race, color, religion, sex, or national origin in violation of . . . this title." 78 Stat. 261, as amended, and as set forth in 42 U. S. C. § 2000e–5(g).

The language of § 706(g) plainly expresses Congress' intent to vest district courts with broad discretion to award "appropriate" equitable relief to remedy unlawful discrimination. *Teamsters* v. *United States*, 431 U. S. 324, 364 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975).[26] Nevertheless, petitioners and the EEOC argue

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[26] Section 706(g) was modeled after § 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c). See *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 769; *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 419. Principles developed under the National Labor Relations Act "guide, but do not bind, courts tailoring remedies under Title VII." *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 226, n. 8 (1982). Section 10(c) as we have noted, was intended to give the National Labor Relations Board broad authority to formulate appropriate remedies:

"[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving

that the last sentence of § 706(g) prohibits a court from ordering an employer or labor union to take affirmative steps to eliminate discrimination which might incidentally benefit individuals who are not the actual victims of discrimination. This reading twists the plain language of the statute.

The last sentence of § 706(g) prohibits a court from ordering a union to admit an individual who was "refused admission . . . for any reason other than discrimination." It does not, as petitioners and the EEOC suggest, say that a court may order relief only for the actual victims of past discrimination. The sentence on its face addresses only the situation where a plaintiff demonstrates that a union (or an employer) has engaged in unlawful discrimination, but the union can show that a particular individual would have been refused admission even in the absence of discrimination, for example, because that individual was unqualified. In these circumstances, § 706(g) confirms that a court could not order the union to admit the unqualified individual. *Patterson* v. *Greenwood School District 50*, 696 F. 2d 293, 295 (CA4 1982); *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 174–177 (CA3 1977), cert. denied, 438 U. S. 915 (1978); *Day* v. *Mathews*, 174 U. S. App. D. C. 231, 233, 530 F. 2d 1083, 1085 (1976); *King* v. *Laborers' International Union, Local No. 818*, 443 F. 2d 273, 278–279 (CA6 1971). In this case, neither the membership goal nor the Fund order required petitioners to admit to membership individuals who had been refused admission for reasons unrelated to discrimination. Thus, we do not read § 706(g) to prohibit a court from ordering the kind of affirmative relief the District Court awarded in this case.

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the adaption of means to end to the empiric process of administration." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941).

See also *Franks*, *supra*, at 769, n. 29 ("[Section] 706(g) grants . . . broader discretionary powers than those granted the [NLRB under § 10(c)]").

B

The availability of race-conscious affirmative relief under § 706(g) as a remedy for a violation of Title VII also furthers the broad purposes underlying the statute. Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment. "[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' . . . and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." *Steelworkers* v. *Weber*, 443 U. S. 193, 203 (1979) (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). Title VII was designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971); see *Teamsters*, *supra*, at 364–365; *Franks*, *supra*, at 763, 771; *Albemarle Paper*, *supra*, at 417–418. In order to foster equal employment opportunities, Congress gave the lower courts broad power under § 706(g) to fashion "the most complete relief possible" to remedy past discrimination. *Franks*, *supra*, at 770; *Albemarle Paper*, *supra*, at 418.

In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant

employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII. See *e. g.*, *Thompson* v. *Sawyer*, 219 U. S. App. D. C. 393, 430, 678 F. 2d 257, 294 (1982); *Chisholm* v. *United States Postal Service*, 665 F. 2d 482, 499 (CA4 1981); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 943–945 (CA10 1979); *United States* v. *City of Chicago*, 549 F. 2d 415, 437 (CA7), cert. denied, 434 U. S. 875 (1977), modified, 663 F. 2d 1354, 1362 (1981) (en banc); *Rios* v. *Enterprise Assn. Steamfitters Local 638*, 501 F. 2d 622, 631–632 (CA2 1974); *NAACP* v. *Allen*, 340 F. Supp. 703 (MD Ala. 1972), aff'd and remanded, 493 F. 2d 614 (CA5), on remand *sub nom. NAACP* v. *Dothard*, 373 F. Supp. 504, 506–507 (MD Ala. 1974) (Johnson, J.); see also Edwards & Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich. L. Rev. 1, 9 (1976) ("[A] number of courts have held that some form of preferential remedy is the most effective means of enforcing equal employment opportunity when the facts show a long history of discrimination against a protected class").

Further, even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's reputation for discrimination may discourage minorities from seeking available employment. See *Morrow* v. *Crisler*, 491 F. 2d 1053, 1056 (CA5) (en banc), cert. denied, 419 U. S. 895 (1974); *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (CA8 1971), cert. denied, 406 U. S. 950 (1972); Spiegelman, Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine, 20 Harv. Civ. Rights–Civ. Lib. L. Rev. 339, 388 (1985); see also *Taylor* v. *Jones*, 653 F. 2d 1193, 1203 (CA8 1981) ("[I]n cases where a discriminatory atmosphere has been shown, the more common forms of relief . . . may not be appropriate or adequate"); Edwards &

Zaretsky, *supra*, at 6. In these circumstances, affirmative race-conscious relief may be the only means available "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); see *Teamsters*, 431 U. S., at 348.[27] Affirmative action "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." *NAACP* v. *Allen*, 493 F. 2d, at 621.

Finally, a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on

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[27] We have steadfastly recognized that affirmative race-conscious relief may provide an effective means of remedying the effects of past discrimination. See *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 277 (1986) (opinion of POWELL, J.) ("[T]o eliminate every vestige of racial segregation and discrimination . . . race-conscious remedial action may be necessary"); *id.*, at 301 (MARSHALL, J., dissenting) ("[R]acial distinctions . . . are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination"); *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980) (upholding 10% set aside of federal contract funds for minority businesses); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) (state university may consider race as a factor in admissions process); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977) (reapportionment of voting districts in accordance with specific numerical racial goals permissible under Voting Rights Act of 1965); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971) (school board properly took race into account in redrawing school districts); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971) (court may use mathematical racial ratios as starting point for remedying school segregation); *United States* v. *Montgomery County Board of Education*, 395 U. S. 225 (1969) (court may properly impose flexible racial ratios for faculty and staff).

hiring or promotions, or continued use of a discriminatory selection procedure.

We have previously suggested that courts may utilize certain kinds of racial preferences to remedy past discrimination under Title VII. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 483 (1980) (opinion of BURGER, C. J.) ("Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor"); *id.*, at 513 (POWELL, J., concurring) ("The Courts of Appeals have approved temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population"); *University of California Regents* v. *Bakke*, 438 U. S. 265, 353 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) ("[T]he Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII"). The Courts of Appeals have unanimously agreed that racial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII.[28]

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[28] *E. g.*, *Pennsylvania* v. *International Union of Operating Engineers*, 770 F. 2d 1068 (CA3 1985), cert. denied, 474 U. S. 1060 (1986); *Paradise* v. *Prescott*, 767 F. 2d 1514, 1527–1530 (CA11 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F. 2d 479, 485–489 (CA6 1985), aff'd *sub nom. Firefighters* v. *Cleveland*, *post*, p. 501; *Smith* v. *Segar*, 238 U. S. App. D. C. 103, 147–148, 738 F. 2d 1249, 1293–1294 (1984), cert. denied, 471 U. S. 1115 (1985); *Williams* v. *City of New Orleans*, 729 F. 2d 1554, 1557 (CA5 1984); *Thompson* v. *Sawyer*, 219 U. S. App. D. C. 393, 429–430, 678 F. 2d 251, 293–294 (1982); *Chisholm* v. *United States Postal Service*, 665 F. 2d 482, 499 (CA4 1981); *Taylor* v. *Jones*, 653 F. 2d 1193, 1203 (CA8 1981); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 934–945 (CA10 1979); *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 616 F. 2d 350, 364 (CA8 1980), cert. denied, 452 U. S. 938 (1981); *United States* v. *City of Alexandria*, 614 F. 2d 1358, 1363–1366 (CA5 1980); *EEOC* v. *Contour Chair Lounge Co.*, 596 F. 2d 809, 813–814 (CA8 1979); *Davis* v. *County of Los Angeles*, 566 F. 2d 1334, 1342–1344 (CA9 1977), vacated as moot, 440 U. S. 625 (1979); *EEOC* v. *American Tel. & Tel. Co.*,

C

Despite the fact that the plain language of § 706(g) and the purposes of Title VII suggest the opposite, petitioners and the EEOC maintain that the legislative history indicates that Congress intended that affirmative relief under § 706(g) benefit only the identified victims of past discrimination. To support this contention, petitioners and the EEOC rely principally on statements made throughout the House and Senate debates to the effect that Title VII would not require employers or labor unions to adopt quotas or preferences that would benefit racial minorities.

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556 F. 2d 167, 174–177 (CA3 1977), cert. denied, 438 U. S. 915 (1978); *United States* v. *City of Chicago*, 549 F. 2d 415, 436–437 (CA7 1977), cert. denied, 434 U. S. 875 (1977), modified, 663 F. 2d 1354, 1362 (CA7 1981) (en banc); *United States* v. *International Union of Elevator Constructors, Local Union No. 5*, 538 F. 2d 1012, 1017–1020 (CA3 1976); *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 273 (CA4), cert. denied, 429 U. S. 920 (1976); *Morgan* v. *Kerrigan*, 530 F. 2d 431, 434 (CA1), cert. denied, 426 U. S. 935 (1976); *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017, 1027–1028 (CA1 1974), cert. denied, 421 U. S. 910 (1975); *Rios* v. *Enterprise Assn. Steamfitters Local 638*, 501 F. 2d 622, 629–633 (CA2 1974); *United States* v. *Masonry Contractors Assn. of Memphis, Inc.*, 497 F. 2d 871, 877 (CA6 1974); *United States* v. *Local Union No. 212 International Brotherhood of Electrical Workers*, 472 F. 2d 634, 636 (CA6 1973); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 377 (CA8 1973); *United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46*, 471 F. 2d 408, 412–414 (CA2), cert. denied, 412 U. S. 939 (1973); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 553–554 (CA9), cert. denied, 404 U. S. 984 (1971); *Local 53, International Assn. of Heat and Frost Insulators and Asbestos Workers* v. *Volger*, 407 F. 2d 1047, 1055 (CA5 1969).

Given the consistent record in the Courts of Appeals, some commentators have concluded that the legality of court-ordered, race-conscious affirmative action under Title VII was "settled." See B. Schlei & P. Grossman, Employment Discrimination Law, ch. 37, p. 1200, and n. 20 (1976); C. Sullivan, M. Zimmer, & R. Richards, Federal Statutory Law of Employment Discrimination § 13.2, p. 815, and n. 11 (1980); Blumrosen, Affirmative Action in Employment After *Weber*, 34 Rutgers L. Rev. 1, 39–41 (1981).

Our examination of the legislative history of Title VII convinces us that, when examined in context, the statements relied upon by petitioners and the EEOC do not indicate that Congress intended to limit relief under § 706(g) to that which benefits only the actual victims of unlawful discrimination. Rather, these statements were intended largely to reassure opponents of the bill that it would not require employers or labor unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination. See *Weber*, 443 U. S., at 205. The bill's supporters insisted that this would not be the intent and effect of the legislation, and eventually agreed to state this expressly in § 703(j), 42 U. S. C. § 2000e–2(j). Contrary to the arguments made by petitioners and the EEOC, these statements do not suggest that a court may not order preferential relief under § 706(g) when appropriate to remedy past discrimination. Rather, it is clear that the bill's supporters only wished to emphasize that an employer would not violate the statute merely by having a racially imbalanced work force, and, consequently, that a court could not order an employer to adopt racial preferences merely to correct such an imbalance.

1

H. R. 7152, the bill that ultimately became the Civil Rights Act of 1964, was introduced in the House by Representatives on June 20, 1963, and referred to the Committee on the Judiciary. The bill contained no provisions addressed to discrimination in employment, but the Judiciary Committee amended it by adding Title VII. H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, pp. 26–32 (1963). Title VII as reported by the Judiciary Committee included a version of § 706(g), which read, in relevant part: "No order of the court shall require the admission or reinstatement of an individual as a member of a union . . . if such individual was refused admission, suspended, or expelled . . . for *cause*." H. R. Rep. No. 914, *supra*, at 12 (emphasis added). The word "cause"

was deleted from the bill on the House floor and replaced by the language "any reason other than discrimination on account of race, color, religion, or national origin." 110 Cong. Rec. 2567–2571 (1964). Representative Celler, the Chairman of the House Judiciary Committee and the sponsor of this amendment, explained:

> "[T]he purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment." *Id.*, at 2567.

See also *id.*, at 2570 (remarks of Rep. Gill) ("[W]e would not interfere with discharges for ineptness, or drunkeness *[sic]*").

2

Even before the Judiciary Committee's bill reached the House floor, opponents charged that Title VII would require that an employer maintain a racially balanced work force. The Minority Report of the Judiciary Committee observed that "the word discrimination is nowhere defined in the bill," and charged that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance." H. R. Rep. No. 914, at 68, 73.[29] To

[29] Much of the debate in the House centered around the extent of the EEOC's enforcement powers. The original House Judiciary Committee bill empowered the EEOC to issue judicially enforceable cease-and-desist orders upon a finding of discrimination. H. R. Rep. No. 914, 88th Cong., 1st Sess., 41 (1963). The Judiciary Committee eventually deleted the EEOC's cease-and-desist powers in favor of allowing the Commission, or aggrieved persons with the Commission's permission, to enforce Title VII through civil court actions. *Ibid.* The Senate deleted the EEOC's power to bring suit, giving the Attorney General the power to institute suit in

demonstrate how the bill would operate in practice, the Report posited a number of hypothetical employment situations, concluding each time that Title VII would compel employers "to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law." *Id.*, at 69 (emphasis in original).[30] In response, Republican proponents of the bill issued a statement emphasizing that the EEOC could not enforce the statute merely to achieve racial balance:

> "[T]he Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions." *Id.*, pt. 2, p. 29.

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cases where there existed a pattern or practice of discrimination. See 42 U. S. C. § 2000e–6. Power to litigate was restored to the EEOC in 1972. See Equal Employment Opportunity Act of 1972 § 4a, 86 Stat. 103, 104, 42 U. S. C. § 2000e–5.

[30] For illustrative purposes, we include two of these "examples":

"Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then, go into the street and recruit members of the stipulated race in sufficient number . . . else his local could be held in violation of Federal law." H. R. Rep. No. 914, at 71.

"Assume two women of separate races apply to [a] firm for the position of stenographer; further assume that the employer for some indefinable reason, prefers one above the other, whether because of personality, superior alertness, intelligence, work history, or general neatness. Assume the employer has learned good things about the character of one and derogatory things about the character of the other which are not subject to proof. If his firm is not 'racially balanced,' [the employer] has no choice, he must employ the person of that race which, by ratio, is next up, even though he is certain in his own mind that the woman he is not allowed to employ would be a superior employee." *Id.*, at 72–73.

When H. R. 7152 actually reached the House floor, Representative Celler attempted to respond to charges that the existence of racial imbalance would constitute "discrimination" under Title VII, or that the EEOC would be authorized to "order the hiring and promotion only of employees of certain races or religious groups." 110 Cong. Rec. 1518 (1964).[31] Nevertheless, accusations similar to those made in the Judiciary Committee's Minority Report were repeatedly raised on the House floor. For example, Representative Alger charged that Title VII would "demand by law, special privileges for Negroes":

> "The Negro represents about 10 percent of the population of the United States and it cannot be said he is being kept from opportunity if he is represented in 10 percent of the working force. Now we are asked to ignore population ratios and force the hiring of Negroes even when it will mean, as in Government, that they are given preferential hiring far beyond the 10 percent of the population they represent." *Id.*, at 1645.

Representative Abernathy raised the scenario of a "union [having] to send out a 'racially' balanced staff of organizers to sign up a crew of 'racially balanced' carpenters, a crew of 'racially balanced' laborers, 'racially balanced' plumbers, electricians, plasterers, roofers, and so forth, before a construction job could begin." *Id.*, at 1620; see also *id.*, at 1633, 2557 (remarks of Rep. Dowdy); *id.*, at 2558 (remarks of Rep. Ashmore); *id.*, at 2571 (remarks of Rep. Gathings). Supporters of the bill stridently denied any intent to require "racial bal-

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[31] Representative Celler explained that the Commission would have no power "to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people . . . simply because they are of a given race or religion." 110 Cong. Rec. 1518 (1964). He emphasized that "[n]o order could be entered against an employer except by a court," and that "[e]ven then, the court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination." *Ibid.*

ancing."[32] Thus, in response to charges that an employer or labor union would be guilty of "discrimination" under Title VII simply because of a racial imbalance in its work force or membership roster, supporters of the bill insisted repeatedly that Title VII would not require employers or unions to implement hiring or promotional quotas in order to achieve racial balance. The question whether there should be any comparable restrictions with respect to a court's use of racial preferences as an appropriate *remedy for past discrimination* under § 706(g) simply did not arise during the House debates.

3

After passing the House by a vote of 290 to 130, the bill ran into equally strong opposition in the Senate. Opponents initially sought to have it sent to the Senate Judiciary Committee, which was hostile to civil rights legislation. The debate on this motion focused on the merits of the bill; many Senators again raised the specter of "racial balancing." Senator Ervin charged that under the substantive provisions of Title VII, "the Commission could . . . tell an employer that he had too few employees . . . and enter an order . . . requiring him to hire more persons, not because the employer thought he needed more persons, but because the Commission wanted to

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[32] See *id.*, at 1540 (remarks of Rep. Lindsay) (The bill "does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the committee"); *id.*, at 1600 (remarks of Rep. Minish) ("[U]nder title VII . . . no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job"); *id.*, at 1994 (remarks of Rep. Healy) ("Opponents of the bill say that it sets up racial quotas for job[s] . . . . The bill does not do that"); *id.*, at 2558 (remarks of Rep. Goodell) ("There is nothing here as a matter of legislative history that would require racial balancing . . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved").

compel him to employ persons of a particular race." 110 Cong. Rec., at 4764. Similarly, Senator Robertson stated:

> "This title suggests that hiring should be done on some percentage basis in order that racial imbalance will be overcome. It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And, if by chance that employer had 20 colored employees he would have to fire 10 of them in order to rectify the situation." *Id.*, at 5092.

Senator Humphrey, one of the most vocal proponents of H. R. 7152, rose to the bill's defense. He introduced a newspaper article quoting the answers of a Justice Department expert to common objections to Title VII. In response to the "objection" that "[w]hite people would be fired, to make room for Negroes," the article stated that "[t]he bill would not authorize anyone to order hiring or firing to achieve racial or religious balance." *Id.*, at 5094. Later, responding to a political advertisement suggesting that federal agencies would interpret "discrimination" under Title VII as synonymous with racial imbalance, Senator Humphrey stressed that Title VII "does [not] in any way authorize the Federal Government to prescribe, as the advertisement charges, a 'racial balance' of job classifications or office staffs or 'preferential treatment of minorities'" to achieve such a balance. *Id.*, at 5423. After 17 days of debate, the Senate voted to take up the bill directly without referring it to a committee. *Id.*, at 6417.

Senators Humphrey and Kuchel, who served as bipartisan floor managers for H. R. 7152, opened formal debate on the merits of the bill and addressed opponents' charges that Title

VII would require employers to implement quotas to achieve a certain racial balance. Senator Humphrey stressed that "[c]ontrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance." *Id.*, at 6549. Senator Kuchel elaborated:

> "[Title VII] is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to . . . racial balance in job classifications, racial balance in membership, and preferential advancement for members of so called minority groups. Nothing could be further from the truth . . . . [T]he important point . . . is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group." *Id.*, at 6563.

These sentiments were echoed by Senators Case and Clark, who spoke as bipartisan team "captains" in support of Title VII. The Senators submitted an interpretative memorandum which explained that "[t]here is no requirement in title VII that an employer maintain a racial balance in his work force." *Id.*, at 7213. Senator Clark also introduced a Justice Department memorandum which repeated what supporters of the bill had tried to make clear:

> "There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Ne-

groes to whites, Jews to gentiles, Italians to English, or women to men." *Id.*, at 7207.

Opponents of the bill invoked a 2-month filibuster, again raising the charge that "discrimination" would be defined to include racial imbalance. Senator Robertson remarked: "What does discrimination mean? If it means what I think it does, and which it could mean, it means that a man could be required to have a quota *or he would be discriminating.*" *Id.*, at 7419 (emphasis added). Senators Smathers and Sparkman conceded that Title VII did not in so many words require the use of quotas, but feared that employers would adopt racial quotas or preferences to avoid being charged with discrimination. *Id.*, at 7800, 8500, 8618–8619. Even outsiders joined in the debate. Senator Javits referred to charges raised by Governor Wallace of Alabama that the bill "vested power in a federal inspector who, under an allegation of racial imbalance . . . can establish a quota system whereby a certain percentage of a certain ethnic group must be employed." *Id.*, at 11471. The bill's supporters insisted that employers would not be required to implement racial quotas to avoid being charged with liability.[33] Nonetheless, opponents remained skeptical.

Recognizing that their own verbal assurances would not end the dispute over "racial balancing," supporters of the bill eventually agreed to insert an explicit disclaimer

[33] See *id.*, at 7420 (remarks of Sen. Humphrey) ("[I]f [Senator Robertson] can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race . . . I will start eating the pages"); *id.*, at 8500–8501 (remarks of Sen. Allott) ("[I]f anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill"); *id.*, at 8921 (remarks of Sen. Williams) ("[T]here is nothing whatever in the bill which provides for racial balance or quotas in employment"); *id.*, at 11471 (remarks of Sen. Javits) (the bill "in no respect imposes a quota system or racial imbalance standard"); *id.*, at 11848 (remarks of Sen. Humphrey) (the title "does not provide that any quota systems may be established to maintain racial balance in employment").

into the language of the bill to assuage opponents' fears. Senator Dirksen introduced the comprehensive "Dirksen-Mansfield" amendment as a substitute for the entire bill, which added several provisions defining and clarifying the scope of Title VII's substantive provisions. One of those provisions, § 703(j), specifically addressed the charges of "racial balancing":

> "Nothing contained in this subchapter shall be interpreted to require any . . . labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race [admitted to the labor organization, or to any apprenticeship program] in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U. S. C. § 2000e–2(j).

As Senator Humphrey explained:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." 110 Cong. Rec., at 12723.

See also *id.*, at 12618 (remarks of Sen. Muskie) (§ 703(j) "limit[s] the term 'unlawful employment practice' by spelling out

a number of situations that could not be considered unlawful").[34] Section 703(j) apparently calmed the fears of most opponents, for complaints of "racial balance" and "quotas" died down considerably after its adoption.

In contrast to the heated debate over the substantive provisions of § 703, the Senate paid scant attention to the remedial provisions of § 706(g). Several Senators did emphasize, in reference to the last sentence of section 706(g), that "[t]he title does not provide for the reinstatement or employment of a person . . . if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title." 110 Cong. Rec., at 11848 (remarks of Sen. Humphrey).[35] While both petitioners and the EEOC liberally quote from these excerpts, we do not read these statements as supporting their argument that a district court may not order affirmative race-conscious relief which may incidentally benefit individuals who are not identified victims of unlawful discrimination. To the contrary, these statements confirm

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[34] Even before introduction of the Dirksen-Mansfield substitute bill, Senator Allott proposed an amendment which would preclude courts from finding "an unlawful employment practice . . . solely on the basis of evidence that an imbalance exists with respect to . . . race." *Id.*, at 9881. He explained that his amendment was addressed to charges that Title VII "is intended to require hiring to overcome racial imbalance in the workforce," *ibid.*, and that "an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the [EEOC]." *Ibid.* Senator Allott's amendment was superseded by the Dirksen-Mansfield substitute bill, and was never voted upon.

[35] See *id.*, at 6549 (remarks of Sen. Humphrey) ("No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of [§ 706(g)], which makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin"); *id.*, at 7214 (Interpretative Memorandum); *id.*, at 14465 (Bipartisan Civil Rights Newsletter No. 28).

our reading of the last sentence of § 706(g): that a court has no power to award relief to an individual who was denied an employment opportunity for reasons other than discrimination.

After 83 days of debate, the Senate adopted Title VII by a vote of 73 to 27. 110 Cong. Rec., at 14511. Rather than setting up a Conference Committee, the House voted directly upon, and passed, the Senate version of the bill. *Id.*, at 15897. The bill's sponsors repeated, for the last time, that Title VII "[did] not require quotas, racial balance, or any of the other things that the opponents have been saying about it." *Id.*, at 15876 (remarks of Rep. Lindsay); see also *id.*, at 15893 (remarks of Rep. MacGregor); *ibid.* (remarks of Rep. McCulloch).

To summarize, many opponents of Title VII argued that an employer could be found guilty of discrimination under the statute simply because of a racial imbalance in his work force, and would be compelled to implement racial "quotas" to avoid being charged with liability. *Weber*, 443 U. S., at 205. At the same time, supporters of the bill insisted that employers would not violate Title VII simply because of racial imbalance, and emphasized that neither the Commission nor the courts could compel employers to adopt quotas solely to facilitate racial balancing. *Id.*, at 207, n. 7. The debate concerning what Title VII did and did not require culminated in the adoption of § 703(j), which stated expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance. However, while Congress strongly opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as *remedies* for Title VII violations.[36]

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[36] Cf. *Bakke*, 438 U. S., at 342, n. 17 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) ("Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to ban the use of

Congress' failure to consider this issue is not surprising, since there was relatively little civil rights litigation prior to the adoption of the 1964 Civil Rights Act. More importantly, the cases that had been litigated had not resulted in the sort of affirmative-action remedies that, as later became apparent, would sometimes be necessary to eliminate effectively the effects of past discrimination. Thus, the use of racial preferences as a *remedy* for past discrimination simply was not an issue at the time Title VII was being considered. Our task then is to determine whether Congress intended to preclude a district court from ordering affirmative action in appropriate circumstances as a remedy for past discrimination. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 706 (1945); *Burnet* v. *Guggenheim*, 288 U. S. 280, 285 (1933). Our examination of the legislative policy behind Title VII leads us to conclude that Congress did not intend to prohibit a court from exercising its remedial authority in that way.[37]

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racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends").

[37] We also reject petitioners' argument that the District Court's remedies contravened § 703(j), since they require petitioners to grant preferential treatment to blacks and Hispanics based on race. Our examination of the legislative history convinces us that § 703(j) was added to Title VII to make clear that an employer or labor union does not engage in "discrimination" simply because of a racial imbalance in its work force or membership, and would not be required to institute preferential quotas to avoid Title VII liability. See *Steelworkers* v. *Weber*, 443 U. S. 193, 205, n. 5 (1979) ("[Section] 703(j) speaks to substantive liability under Title VII"); *Teamsters*, 431 U. S., at 339–340, n. 20 ("[Section] 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population"); *Franks*, 424 U. S., at 758 ("[T]he . . . provisions of § 703 . . . delineat[e] which employment practices are illegal and thereby prohibited and which are not"). We reject the notion that § 703(j) somehow qualifies or proscribes a court's authority to order relief otherwise appropriate under § 706(g) in circumstances where an illegal discriminatory act or practice is established. See *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d, at 174; *United States* v. *International Union of Elevator Constructors, Local Union No. 5*, 538 F. 2d, at 1019; *Patterson* v. *American Tobacco Co.*, 535 F. 2d, at 273; *Boston Chapter, NAACP, Inc.*, 504 F. 2d, at 1028; *Rios* v. *Enterprise Assn.*

Congress deliberately gave the district courts broad authority under Title VII to fashion the most complete relief possible to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper*, 422 U. S., at 418. As we noted above, affirmative race-conscious relief may in some instances be necessary to accomplish this task. In the absence of any indication that Congress intended to limit a district court's remedial authority in a way which would frustrate the court's ability to enforce Title VII's mandate, we decline to fashion such a limitation ourselves.

4

Our reading of the scope of the district court's remedial powers under § 706(g) is confirmed by the contemporaneous interpretations of the EEOC and the Justice Department.[38] Following the enactment of the Civil Rights Act of 1964, both the Justice Department and the EEOC, the two federal agen-

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Steamfitters Local 638, 501 F. 2d, at 631; Blumrosen, 34 Rutgers L. Rev., at 39.

[38] Although the EEOC now makes a contrary argument, we note that the brief for the United States and the EEOC submitted by the Solicitor General in *Weber, supra*, described the 1964 legislative history as follows:

"To be sure, there was considerable concern that the Act would be construed to require the use of quota systems to establish and maintain racial balance in employers' work forces. . . . The sponsors of the bill repeatedly assured its opponents that this was not the intent and would not be the effect of the statute. . . . But these assurances did not suggest restrictions on remedies that could be ordered after a finding of discrimination. Instead, they made it clear that the statute would not impose a duty on employers to establish racially balanced work forces and that it would not require or even permit employers to establish racial quotas for employment in the absence of discrimination of the kind prohibited by the Act. . . ." Brief for United States and EEOC, O. T. 1978, Nos. 78–432, 78–435, and 78–436, pp. 29–30 (citations omitted).

The brief concludes that "the last sentence of Section 706(g) simply state[s] that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act." *Id.*, at 30–31.

cies charged with enforcing Title VII, steadfastly maintained that race-conscious remedies for unlawful discrimination are available under the statute. Both agencies have, in appropriate cases, sought court orders and consent decrees containing such provisions. See, *e. g.*, *United States* v. *City of Alexandria*, 614 F. 2d 1358 (CA5 1980); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918 (CA10 1979); *EEOC* v. *Contour Chair Lounge Co.*, 596 F. 2d 809 (CA8 1979); *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167 (CA3 1977); *United States* v. *Masonry Contractors Assn. of Memphis, Inc.*, 497 F. 2d 871 (CA6 1974); *United States* v. *Local Union No. 212 International Brotherhood of Electrical Workers*, 472 F. 2d 634 (CA6 1973); *United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46*, 471 F. 2d 408 (CA2), cert. denied, 412 U. S. 939 (1973); *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 548 (CA9), cert. denied, 404 U. S. 984 (1971); see also Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 CFR § 1608 (1985); Uniform Guidelines on Employee Selection Procedures § 1607.17; 42 Op. Atty. Gen. 405 (1969). The agencies' contemporaneous reading of the statute lends strong support to our interpretation. See *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U. S. 46, 54–55 (1977).

5

Finally, our interpretation of § 706(g) is confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which amended Title VII in several respects. One such change modified the language of § 706(g) to empower a court to order "such affirmative action as may be appropriate, which may include, *but is not limited to* reinstatement or hiring of employees . . . *or any other equitable relief as the court deems appropriate.*" 42 U. S. C. § 2000e–5(g) (emphasized language added in 1972). This language was intended "to give the courts wide discretion ex-

ercising their equitable powers to fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972). While the section-by-section analysis undertaken in the Conference Committee Report stressed the need for "make-whole" relief for the "victims of unlawful discrimination," *id.*, at 7168, 7565, nowhere did Congress suggest that a court lacked the power to award preferential remedies that might benefit non-victims. Indeed, the Senate's rejection of two other amendments supports a contrary conclusion.

During the 1972 debates, Senator Ervin introduced an amendment to counteract the effects of the Department of Labor's so-called Philadelphia Plan. The Philadelphia Plan was established pursuant to Executive Order No. 11246, 3 CFR 339 (1964–1965 Comp.), and required prospective federal contractors to submit affirmative-action programs including "specific goals of minority manpower utilization." *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159, 163 (CA3), cert. denied, 404 U. S. 854 (1971). Attacking the Plan as "[t]he most notorious example of discrimination in reverse," 118 Cong. Rec., at 1663, Senator Ervin proposed an amendment to Title VII that read, in relevant part: "No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." *Id.*, at 1662. Senator Ervin complained that the amendment was needed because both the Department of Labor and the EEOC were ignoring § 703(j)'s prohibition against requiring employers to engage in preferential hiring for racial minorities. *Id.*, at 1663–1664.

Senator Javits vigorously opposed Senator Ervin's proposal. First, he recognized that the amendment, while targeted at the Philadelphia Plan, would also jettison "the whole concept of 'affirmative action' as it has been developed under Executive Order 11246 *and as a remedial concept under*

Title VII." *Id.*, at 1664 (emphasis added). He explained that the amendment would "deprive the courts of the opportunity to order affirmative action under title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment." *Id.*, at 1665. To emphasize this point, Senator Javits had printed in the Congressional Record both the decision of the Court of Appeals for the Third Circuit sustaining the Philadelphia Plan, and a decision by the Court of Appeals for the Ninth Circuit affirming a District Court's Title VII remedial order requiring a union to indenture a certain percentage of black apprentices and to offer special programs for certain black applicants. *Id.*, at 1665–1675 (reprinting *Contractors Assn.*, and *Ironworkers Local 86*, *supra*).[39] Senator Javits summarized his attack on the Ervin amendment as follows:

> "[I]t would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired, and that could apply to government as well as private employers." *Id.*, at 1675.

Senator Williams, referring to Senator Javits' examples of "the kind of situation that could be affected adversely" by Senator Ervin's amendment, argued that the "amendment would strip title VII . . . of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination." *Id.*, at 1676. The Ervin amendment was defeated by a margin of 2 to 1. *Ibid.*

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[39] Senator Javits also referred to the decision in *United States* v. *Enterprise Assn. Steamfitters Local 638*, 337 F. Supp. 217 (SDNY 1972): "I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case, an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices." 118 Cong. Rec. 1665 (1972).

Senator Ervin proposed a second amendment that would have extended § 703(j)'s prohibition against racial preferences to "Executive Order Numbered 11246, or any other law or Executive Order," *id.*, at 4917–4918; this amendment was also defeated resoundingly. *Id.*, at 4918.[40] Thus, the legislative history of the 1972 amendments to Title VII confirms the availability of race-conscious affirmative action as a remedy under the statute. Congress was aware that both the Executive and Judicial Branches had used such measures to remedy past discrimination,[41] and rejected amendments that would have barred such remedies. Instead, Congress reaffirmed the breadth of the court's remedial powers under § 706(g) by adding language authorizing courts to order "any

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[40] The House considered a bill that would have transferred administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC. See H. R. 1746, 92d Cong., 1st Sess., § 717(f) (1971); H. R. Rep. No. 92–238, pp. 14–16, 57 (1971). Because the OFCC had required contractors to adopt hiring goals in order to bid on federal projects, opponents feared that the bill would give the EEOC the authority to order racial quotas. Representative Dent proposed an amendment that read: "The Commission shall be prohibited from imposing or requiring a quota or preferential treatment with respect to numbers of employees, or percentage of employees of any race, color, religion, sex, or national origin." 117 Cong. Rec. 31784 (1971). Supporters of this amendment repeated what the 1964 Congress had adamantly insisted upon: that "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." *Ibid.* (remarks of Rep. Dent); see *id.*, at 32091 (remarks of Rep. Erlenborn). The bill ultimately passed by the House left the OFCC intact, and the Dent amendment never came to a vote.

[41] In addition to the decisions cited by Senator Javits, other federal courts had, prior to the passage of the 1972 amendments, approved of the use of racial preferences to remedy the effects of illegal employment discrimination. See, *e. g.*, *Carter* v. *Gallagher*, 452 F. 2d 315, 330 (CA8 1971) (en banc), cert. denied, 406 U. S. 950 (1972); *Local 53, International Assn. of Heat and Frost Insulators and Asbestos Workers* v. *Volger*, 407 F. 2d, at 1055; *United States* v. *Central Motor Lines, Inc.*, 338 F. Supp. 532, 560–562 (WDNC 1971); *United States* v. *Sheet Metal Workers International Assn., Local 10*, 3 EPD ¶ 8068 (NJ 1970).

other equitable relief as the court deems appropriate." 42 U. S. C. §2000e–5(g). The section-by-section analysis undertaken by the Conference Committee Report confirms Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII: "[I]n any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec., at 7166, 7564. Thus, "[e]xecutive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race." *Bakke*, 438 U. S., at 353, n. 28 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); see also *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F. 2d 1017, 1027–1028 (CA1 1974), cert. denied, 421 U. S. 910 (1975); *United States* v. *Local No. 212 International Brotherhood of Electrical Workers*, 472 F. 2d, at 636; *United States* v. *International Union of Elevator Constructors, Local Union No. 5*, 538 F. 2d 1012, 1017–1020 (CA3 1976); cf. *North Haven Board of Education* v. *Bell*, 456 U. S. 512, 534–535 (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).[42]

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[42] Again, we note that the brief submitted by the Solicitor General in *Weber* urged this reading of the 1972 legislative history. The Solicitor General argued that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972." Brief for United States and EEOC, O. T. 1978, Nos. 78–432, 78–435, and 78–436, p. 31. Referring specifically to the amendment to the language of § 706(g), the Government argued:

"In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that numerical, race-conscious relief is available under Title VII to remedy employment discrimination." *Id.*, at 35.

D

Finally, petitioners and the EEOC find support for their reading of § 706(g) in several of our decisions applying that provision. Petitioners refer to several cases for the proposition that court-ordered remedies under § 706(g) are limited to make-whole relief benefiting actual victims of past discrimination. See *Ford Motor Co.* v. *EEOC*, 458 U. S. 219 (1982); *Connecticut* v. *Teal*, 457 U. S. 440 (1982); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). This reliance is misguided. The cases cited hold only that a court may order relief designed to make individual victims of racial discrimination whole. See *Teamsters*, *supra* (competitive seniority); *Franks*, *supra*, at 779 (same); *Albemarle Paper*, *supra*, at 422 (backpay). None of these decisions suggested that individual "make-whole" relief was the *only* kind of remedy available under the statute; on the contrary, several cases emphasized that the district court's remedial powers should be exercised both to eradicate the effects of unlawful discrimination as well as to make the victims of past discrimination whole. *Teamsters*, *supra*, at 364; *Franks*, *supra*, at 771; *Albemarle Paper*, *supra*, at 421. Neither do these cases suggest that § 706(g) prohibits a court from ordering relief which might benefit nonvictims; indeed several cases acknowledged that the district court has broad authority to "devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom." *Teamsters*, *supra*, at 361, n. 47; see also *Franks*, *supra*, at 770; *Albemarle Paper*, *supra*, at 418.

Petitioners claim to find their strongest support in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). In *Stotts*, the city of Memphis, Tennessee, had entered into a consent decree re-

quiring affirmative steps to increase the proportion of minority employees in its Fire Department. Budgetary cuts subsequently forced the city to lay off employees; under the city's last-hired, first-fired seniority system, many of the black employees who had been hired pursuant to the consent decree would have been laid off first. These employees sought relief, and the District Court, concluding that the proposed layoffs would have a racially discriminatory effect, enjoined the city from applying its seniority policy "insofar as it will decrease the percentage of black[s] that are presently employed." *Id.*, at 567. We held that the District Court exceeded its authority.

First, we rejected the claim that the District Court was merely enforcing the terms of the consent decree since the parties had expressed no intention to depart from the existing seniority system in the event of layoffs. Second, we concluded that the District Court's order conflicted with § 703(h) of Title VII,[43] which "permits the routine application of a seniority system absent proof of an intention to discriminate." *Id.*, at 577. Since the District Court had found that the proposed layoffs were not motivated by a discriminatory purpose, we held that the court erred in enjoining the city from applying its seniority system in making the layoffs.

We also rejected the Court of Appeals' suggestion that the District Court's order was justified by the fact that, had plaintiffs prevailed at trial, the court could have entered an order overriding the city's seniority system. Relying on *Teamsters*, *supra*, we observed that a court may abridge a bona fide seniority system in fashioning a Title VII remedy only to make victims of intentional discrimination whole, that

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[43] "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race." 42 U. S. C. § 2000e–2(h).

is, a court may award competitive seniority to individuals who show that they had been discriminated against. However, because none of the firefighters protected by the court's order was a proven victim of illegal discrimination, we reasoned that at trial the District Court would have been without authority to override the city's seniority system, and therefore the court could not enter such an order merely to effectuate the purposes of the consent decree.

While not strictly necessary to the result, we went on to comment that "[o]ur ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g)" which, we noted, "is to provide 'make-whole' relief only to those who have been actual victims of illegal discrimination." 467 U. S., at 579–580. Relying on this language, petitioners, joined by the EEOC, argue that both the membership goal and the Fund order contravene the policy behind § 706(g) since they extend preferential relief to individuals who were not the actual victims of illegal discrimination. We think this argument both reads *Stotts* too broadly and ignores the important differences between *Stotts* and this case.

Stotts discussed the "policy" behind § 706(g) in order to supplement the holding that the District Court could not have interfered with the city's seniority system in fashioning a Title VII remedy. This "policy" was read to prohibit a court from awarding make-whole relief, such as competitive seniority, backpay, or promotion, to individuals who were denied employment opportunities for reasons unrelated to discrimination. The District Court's injunction was considered to be inconsistent with this "policy" because it was tantamount to an award of make-whole relief (in the form of competitive seniority) to individual black firefighters who had not shown that the proposed layoffs were motivated by racial discrimination. See Note, Race-Conscious Remedies Versus Seniority Systems: *Firefighters Local Union No. 1784* v.

Stotts, 30 St. Louis U. L. J. 257, 269 (1985).[44] However, this limitation on *individual* make-whole relief does not affect a court's authority to order race-conscious affirmative action. The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination.[45] In this case, neither the membership goal nor the Fund order required petitioners to indenture or train particular individuals, and neither required them to admit to membership individuals who were refused admission for reasons unrelated to discrimination. We decline petitioners' invitation to read *Stotts* to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims.[46] This reading would distort

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[44] We note that, consistent with *Stotts*, the District Court in this case properly limited make-whole relief to the actual victims of discrimination. The court awarded backpay, for example, only to those class members who could establish that they were discriminated against.

[45] Even where the district court orders such relief, we note that § 706(g) protects the right of the employer or the union to exclude a particular individual from its work force or membership for reasons unrelated to discrimination.

[46] The Government urged a different interpretation of *Stotts* earlier in this lawsuit. In July 1984, petitioners' counsel, in a letter to the Court of Appeals, argued that *Stotts* "affects the propriety [of the remedies ordered] by the district court." App. 5. In response, counsel for the EEOC submitted that "the decision in *Stotts* does not affect the disposition of the issues in this appeal." *Ibid.* Counsel explained that "the court's discussion [in *Stotts*] of § 706(g) is not relevant to the relief challenged by the appellants since it relates only to the award of retroactive or 'make whole' relief and not to the use of prospective remedies," like those ordered by the District Court. *Id.*, at 6. With respect to the last sentence of § 706(g), counsel stated:

"The last sentence of § 706(g) . . . deals with 'make whole' relief and does not even address prospective relief, let alone state that all prospective remedial orders must be limited so that they only benefit the specific vic-

the language of § 706(g), and would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity.[47]

E

Although we conclude that § 706(g) does not foreclose a district court from instituting some sorts of racial preferences where necessary to remedy past discrimination, we do not mean to suggest that such relief is always proper. While the fashioning of "appropriate" remedies for a particular Title VII violation invokes the "equitable discretion of the district courts," *Franks*, 424 U. S., at 770, we emphasize that a court's judgment should be guided by sound legal principles. In particular, the court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force. In the majority of Title VII cases, the

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tims of the employer's or union's past discriminatory acts. Moreover, the language and the legislative history of § 706(g) support the Commission's position that carefully tailored prospective race-conscious measures are permissible Title VII remedies. . . . [T]he fact that this interpretation was consistently followed by the Commission and the Department of Justice, during the years immediately following enactment of Title VII entitles the interpretation to great deference." App. 7–8.

[47] The federal courts have declined to read *Stotts* broadly, and have instead limited the decision to its facts. See *Pennsylvania* v. *International Union of Operating Engineers*, 770 F. 2d 1068 (CA3 1985), cert. denied, 474 U. S. 1060 (1986); *Paradise* v. *Prescott*, 767 F. 2d, at 1527–1530; *Turner* v. *Orr*, 759 F. 2d 817, 823–826 (CA11 1985); *Vanguards of Cleveland* v. *Cleveland*, 753 F. 2d, at 485–489; *Diaz* v. *American Telephone & Telegraph*, 752 F. 2d 1356, 1360, n. 5 (CA9 1985); *Van Aken* v. *Young*, 750 F. 2d 43, 44–45 (CA6 1984); *Wygant* v. *Jackson Bd. of Ed.*, 746 F. 2d 1152, 1157–1159 (CA6 1984), rev'd on other grounds, 476 U. S. 267 (1986); *Kromnick* v. *School Dist. of Philadelphia*, 739 F. 2d 894, 911 (CA3 1984), cert. denied, 469 U. S. 1107 (1985); *Grann* v. *Madison*, 738 F. 2d 786, 795, n. 5 (CA7), cert. denied, 469 U. S. 918 (1984); *Deveraux* v. *Geary*, 596 F. Supp. 1481, 1485–1487 (Mass. 1984), aff'd, 765 F. 2d 268 (CA1 1985); *NAACP* v. *Detroit Police Officers Assn.*, 591 F. Supp. 1194, 1202–1203 (ED Mich. 1984).

court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by those practices. However, in some cases, affirmative action may be necessary in order effectively to enforce Title VII. As we noted before, a court may have to resort to race-conscious affirmative action when confronted with an employer or labor union that has engaged in persistent or egregious discrimination. Or such relief may be necessary to dissipate the lingering effects of pervasive discrimination. Whether there might be other circumstances that justify the use of court-ordered affirmative action is a matter that we need not decide here. We note only that a court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and that the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct.[48] In this case, several factors lead us to conclude that the relief ordered by the District Court was proper.

First, both the District Court and the Court of Appeals agreed that the membership goal and Fund order were necessary to remedy petitioners' pervasive and egregious discrimination. The District Court set the original 29% membership goal upon observing that "[t]he record in both state and federal courts against [petitioners] is replete with instances of their bad faith attempts to prevent or delay affirm-

[48] This cautious approach to the use of racial preferences has been followed by the Courts of Appeals. As one commentator has noted:

"While the circuit courts of appeals have indicated that they possess [the] power [to award race-conscious affirmative relief], they have been reluctant to exercise it. The federal appellate courts have preferred to issue less harsh orders such as recruiting and posting of notices of vacancies. They have tended to impose hiring orders only after employer recalcitrance has been demonstrated." Blumrosen, 34 Rutgers L. Rev., at 41.

See also Edwards & Zaretsky, Preferential Remedies for Employment Discrimination, 74 Mich. L. Rev. 1, 6–7 (1975).

ative action." 401 F. Supp., at 488. The court extended the goal after finding petitioners in contempt for refusing to end their discriminatory practices and failing to comply with various provision of RAAPO. In affirming the revised membership goal, the Court of Appeals observed that "[t]his court has twice recognized Local 28's long continued and egregious racial discrimination . . . and Local 28 has presented no facts to indicate that our earlier observations are no longer apposite." 753 F. 2d, at 1186. In light of petitioners' long history of "foot-dragging resistance" to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile. Rather, the District Court properly determined that affirmative race-conscious measures were necessary to put an end to petitioners' discriminatory ways.

Both the membership goal and Fund order were similarly necessary to combat the lingering effects of past discrimination. In light of the District Court's determination that the union's reputation for discrimination operated to discourage nonwhites from even applying for membership, it is unlikely that an injunction would have been sufficient to extend to nonwhites equal opportunities for employment. Rather, because access to admission, membership, training, and employment in the industry had traditionally been obtained through informal contacts with union members, it was necessary for a substantial number of nonwhite workers to become members of the union in order for the effects of discrimination to cease. The Fund, in particular, was designed to insure that nonwhites would receive the kind of assistance that white apprentices and applicants had traditionally received through informal sources. On the facts of this case, the District Court properly determined that affirmative, race-conscious measures were necessary to assure the equal employment opportunities guaranteed by Title VII.

Second, the District Court's flexible application of the membership goal gives strong indication that it is not being

used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge petitioners' efforts to remedy past discrimination. The court has twice adjusted the deadline for achieving the goal, and has continually approved of changes in the size of the apprenticeship classes to account for the fact that economic conditions prevented petitioners from meeting their membership targets; there is every reason to believe that both the court and the administrator will continue to accommodate *legitimate* explanations for petitioners' failure to comply with the court's orders. Moreover, the District Court expressly disavowed any reliance on petitioners' failure to meet the goal as a basis for the contempt finding, but instead viewed this failure as symptomatic of petitioners' refusal to comply with various subsidiary provisions of RAAPO. In sum, the District Court has implemented the membership goal as a means by which it can measure petitioners' compliance with its orders, rather than as a strict racial quota.[49]

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[49] Other factors support the finding that the membership goal has not been applied as a strict racial quota. For example, the Court of Appeals has twice struck down provisions requiring petitioners to indenture one nonwhite apprentice for each white apprentice indentured. Petitioners, however, characterize the following comments by the District Court as evidence that the 29.23% membership goal is in reality an inflexible quota:

"Although defendants were given seven years to attain [the 29% membership] goal . . . they have not. Indeed, they have a long way to go. In addition, they consistently have violated numerous court orders that were designed to assist in the achievement of that goal. The court therefore sees no reason to be lenient with defendants, for whatever reason, and orders that the . . . merged locals must reach a nonwhite membership of 29.23% by August 31, 1987. If the goal is not attained by that date, defendants will face fines that will threaten their very existence." App. to Pet. for Cert. A–123.

The District Court's comments express the understandable frustration of a court faced with 15 years of petitioners' deliberate resistance to ending discrimination. We do not view these statements as evidence that the court intends to apply the nonwhite membership goal as an inflexible quota. The record shows that the District Court has been willing to accommodate

Third, both the membership goal and the Fund order are temporary measures. Under AAAPO "[p]referential selection of [union members] will end as soon as the percentage of [minority union members] approximates the percentage of [minorities] in the local labor force." *Weber*, 443 U. S., at 208–209; see *United States* v. *City of Alexandria*, 614 F. 2d, at 1366. Similarly, the Fund is scheduled to terminate when petitioners achieve the membership goal, and the court determines that it is no longer needed to remedy past discrimination. The District Court's orders thus operate "as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance." *Weber*, 443 U. S., at 216 (BLACKMUN, J., concurring).

Finally, we think it significant that neither the membership goal nor the Fund order "unnecessarily trammel[s] the interests of white employees." *Id.*, at 208; *Teamsters*, 431 U. S., at 352–353. Petitioners concede that the District Court's orders did not require any member of the union to be laid off, and did not discriminate against *existing* union members. See *Weber*, *supra*, at 208; see also 30 St. Louis U. L. J., at 264. While whites seeking admission into the union may be denied benefits extended to their nonwhite counterparts, the court's orders do not stand as an absolute bar to such individuals; indeed, a majority of new union members have been white. See *City of Alexandria*, *supra*, at 1366. Many provisions of the court's orders are race-neutral (for example, the requirement that the JAC assign one apprentice for every four journeyman workers), and petitioners remain free to adopt the provisions of AAAPO and the Fund order for the benefit of white members and applicants.

V

Petitioners also allege that the membership goal and Fund order contravene the equal protection component of the Due

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legitimate reasons for petitioners' failure to comply with court orders, and we have no reason to expect that this will change in the future.

Process Clause of the Fifth Amendment because they deny benefits to white individuals based on race. We have consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination. See *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986); *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). We have not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. See *Wygant*, 476 U. S., at 274 (opinion of POWELL, J.) (means chosen must be "narrowly tailored" to achieve "compelling government interest"); *id.*, at 284–287 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 301–302 (MARSHALL, J., dissenting); *id.*, at 313 (STEVENS, J., dissenting) (public interest served by racial classification and means pursued must justify adverse effects on the disadvantaged group); *Fullilove*, 448 U. S., at 491 (opinion of BURGER, C. J.) (racial preferences subject to "a most searching examination"); *id.*, at 519 (MARSHALL, J., concurring in judgment) (remedial use of race must be substantially related to achievement of important governmental objectives); *Bakke*, 438 U. S., at 305 (opinion of POWELL, J.) (racial classification must be necessary to accomplishment of substantial state interest); *id.*, at 359 (opinion of BRENNAN, WHITE, MARSHALL and BLACKMUN, JJ.) (remedial use of race must be substantially related to achievement of important governmental objectives). We need not resolve this dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination.

In this case, there is no problem, as there was in *Wygant*, with a proper showing of prior discrimination that would justify the use of remedial racial classifications. Both the District Court and Court of Appeals have repeatedly found

petitioners guilty of egregious violations of Title VII, and have determined that affirmative measures were necessary to remedy their racially discriminatory practices. More importantly, the District Court's orders were properly tailored to accomplish this objective. First, the District Court considered the efficacy of alternative remedies, and concluded that, in light of petitioners' long record of resistance to official efforts to end their discriminatory practices, stronger measures were necessary. See *Fullilove*, *supra*, at 510 (POWELL, J., concurring); *Arthur* v. *Nyquist*, 712 F. 2d 816, 822 (CA2 1983); *NAACP* v. *Allen*, 493 F. 2d, at 621. The court devised the temporary membership goal and the Fund as tools for remedying past discrimination. More importantly, the District Court's orders will have only a marginal impact on the interests of white workers. See *Wygant*, 476 U. S., at 282–283 (opinion of POWELL, J.); *id.*, at 287 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 295 (WHITE, J., concurring in judgment); *id.*, at 309–310 (MARSHALL, J., dissenting); *id.*, at 317 (STEVENS, J., dissenting). Again, petitioners concede that the District Court's orders did not disadvantage *existing* union members. While white applicants for union membership may be denied certain benefits available to their nonwhite counterparts, the court's orders do not stand as an absolute bar to the admission of such individuals; again, a majority of those entering the union after entry of the court's orders have been white. We therefore conclude that the District Court's orders do not violate the equal protection safeguards of the Constitution.[50]

VI

Finally, Local 28 challenges the District Court's appointment of an administrator with broad powers to supervise its

[50] Petitioners also argue that "the construction of Title VII adopted by the Court of Appeals has the effect of making the Civil Rights Act an unconstitutional bill of attainder, visiting upon white persons the sins of past discrimination by others." Brief for Petitioners 33. We reject this contention as without merit.

compliance with the court's orders as an unjustifiable interference with its statutory right to self-governance. See 29 U. S. C. § 401(a). Preliminarily, we note that while AAAPO gives the administrator broad powers to oversee petitioners' membership practices, Local 28 retains complete control over its other affairs. Even with respect to membership, the administrator's job is to insure that petitioners comply with the court's orders and admit sufficient numbers of nonwhites; the administrator does not select the particular individuals that will be admitted, that task is left to union officials. In any event, in light of the difficulties inherent in monitoring compliance with the court's orders, and especially petitioners' established record of resistance to prior state and federal court orders designed to end their discriminatory membership practices, appointment of an administrator was well within the District Court's discretion. See Fed. Rule Civ. Proc. 53; *Ruiz* v. *Estelle*, 679 F. 2d 1115, 1160–1163 (CA5 1982), cert. denied, 460 U. S. 1042 (1983); *Gary W.* v. *Louisiana*, 601 F. 2d 240, 244–245 (CA5 1979). While the administrator may substantially interfere with petitioners' membership operations, such "interference" is necessary to put an end to petitioners' discriminatory ways.

VII

To summarize our holding today, six Members of the Court agree that a district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII, see Parts IV–A through IV–D, *supra* (opinion of BRENNAN, J., joined by MARSHALL, J., BLACKMUN, J., and STEVENS, J.); *post*, at 483 (POWELL, J., concurring in part and concurring in judgment); *post*, at 499 (WHITE, J., dissenting), that the District Court did not use incorrect statistical evidence in establishing petitioners' nonwhite membership goal, see Part II–A, *supra*, that the contempt fines and Fund order were proper remedies for civil contempt, see

Part III, *supra*, and that the District Court properly appointed an administrator to supervise petitioners' compliance with the court's orders, see Part VI, *supra*. Five Members of the Court agree that in this case, the District Court did not err in evaluating petitioners' utilization of the apprenticeship program, see Part II–B, *supra*, and that the membership goal and the Fund order are not violative of either Title VII or the Constitution, see Parts IV–E, V, *supra* (opinion of BRENNAN, J., joined by MARSHALL, J., BLACKMUN, J., and STEVENS, J.); *post* this page, 486–487, and n. 1 (POWELL, J., concurring in part and concurring in judgment). The judgment of the Court of Appeals is hereby

Affirmed.

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

I join Parts I, II, III, and VI of JUSTICE BRENNAN's opinion. I further agree that § 706(g) does not limit a court in all cases to granting relief only to actual victims of discrimination. I write separately with respect to the issues raised in Parts IV and V to explain why I think the remedy ordered under the circumstances of this case violated neither Title VII nor the Constitution.

I

Petitioners contend that the Fund order and the membership goal imposed by the District Court and upheld by the Court of Appeals are forbidden by § 706(g) because that provision authorizes an award of preferential relief only to the actual victims of unlawful discrimination. The plain language of Title VII does not clearly support a view that all remedies must be limited to benefiting victims. And although the matter is not entirely free from doubt, I am unpersuaded by petitioners' reliance on the legislative history of Title VII. Rather, in cases involving particularly egregious conduct a district court may fairly conclude that an injunction

alone is insufficient to remedy a proven violation of Title VII. This is such a case.

The history of petitioners' contemptuous racial discrimination and their successive attempts to evade all efforts to end that discrimination is well stated in Part I of the Court's opinion. Under these circumstances the District Court acted within the remedial authority granted by § 706(g) in establishing the Fund order and numerical goal at issue in this case. This Court's decision in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), is not to the contrary. There, the question whether Title VII might *ever* authorize a remedy that benefits those who were not victims of discrimination was not before us, although there is language in the opinion suggesting an answer to that question.

II

There remains for consideration the question whether the Fund order and membership goal contravene the equal protection component of the Due Process Clause of the Fifth Amendment because they may deny benefits to white individuals based on race. I have recently reiterated what I believe to be the standard for assessing a constitutional challenge to a racial classification:

> "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.' *Fullilove* v. *Klutznick*, 448 U. S. 448, 491 (1980) (opinion of BURGER, C. J.). There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest' *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); see *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); cf. *Graham* v. *Richardson*, 403 U. S. 365, 375 (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that

goal.' *Fullilove*, *supra*, at 480." *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 273–274 (1986).

The finding by the District Court and the Court of Appeals that petitioners have engaged in egregious violations of Title VII establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy. It would be difficult to find defendants more determined to discriminate against minorities. My inquiry, therefore, focuses on whether the District Court's remedy is "narrowly tailored," see *Wygant*, *supra*, at 280, n. 6, to the goal of eradicating the discrimination engaged in by petitioners. I believe it is.

The Fund order is supported not only by the governmental interest in eradicating petitioners' discriminatory practices, it also is supported by the societal interest in compliance with the judgments of federal courts. Cf. *United States* v. *Mine Workers*, 330 U. S. 258, 303 (1947). The Fund order was not imposed until *after* petitioners were held in contempt. In requiring the Union to create the Fund, the District Court expressly considered "'the consequent seriousness of the burden' to the defendants." App. to Pet. for Cert. 156, quoting 330 U. S., at 304. Moreover, the focus of the Fund order was to give minorities opportunities that for years had been available informally only to nonminorities. The burden this imposes on nonminorities is slight. Under these circumstances, I have little difficulty concluding that the Fund order was carefully structured to vindicate the compelling governmental interests present in this case.

The percentage goal raises a different question. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), this Court upheld the constitutionality of the "minority business enterprise" provision of the Public Works Employment Act of 1977, which required, absent administrative waiver, that at least 10% of federal funds granted for local public works projects be used by grantees to procure services or supplies from businesses owned by minority group members. In my

concurring opinion, I relied on four factors that had been applied by Courts of Appeals when considering the proper scope of race-conscious hiring remedies. Those factors were: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions if the hiring plan could not be met. *Id.*, at 510–511. A final factor of primary importance that I considered in *Fullilove*, as well as in *Wygant*, was "the effect of the [remedy] upon innocent third parties." 448 U. S., at 514. Application of those factors demonstrates that the goal in this case comports with constitutional requirements.

First, it is doubtful, given petitioners' history in this litigation, that the District Court had available to it any other effective remedy. That court, having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending petitioners' discriminatory practices. Here, the court imposed the 29% goal in 1975 only after declaring that "[i]n light of Local 28's and JAC's failure to 'clean house' this court concludes that the imposition of a remedial racial goal . . . is essential to place the defendants in a position of compliance with the 1964 Civil Rights Act." *EEOC* v. *Local 638*, 401 F. Supp. 467, 488 (SDNY 1975).[1] On these facts, it is fair to conclude that ab-

[1] In its decision establishing the initial goal, the District Court explained: "The record in both state and federal court against these [union and JAC] defendants is replete with instances of their bad faith attempts to prevent or delay affirmative action. After Justice Markowitz [in his 1964 state-court proceeding] ordered implementation of the Corrected Fifth Draft, with the intent and hope that it would create 'a truly nondiscriminatory union[,]' Local 28 flouted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the JAC battery. JAC obtained an exemption from state affirmative action regulations directed towards

sent authority to set a goal as a benchmark against which it could measure progress in eliminating discriminatory practices, the District Court may have been powerless to provide an effective remedy. Second, the goal was not imposed as a permanent requirement, but is of limited duration. Third, the goal is directly related to the percentage of nonwhites in the relevant work force.

As a fourth factor, my concurring opinion in *Fullilove* considered whether waiver provisions were available in the event that the hiring goal could not be met. The requirement of a waiver provision or, more generally, of flexibility with respect to the imposition of a numerical goal reflects a recognition that neither the Constitution nor Title VII requires a particular racial balance in the workplace. Indeed, the Constitution forbids such a requirement if imposed for its own sake. *Fullilove*, *supra*, at 507. "We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." *Wygant*, *supra*, at 280. Thus, a court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination. A goal is a means, useful in limited circumstances, to assist a court in determining whether discrimination has been eradicated.

The flexible application of the goal requirement in this case demonstrates that it is not a means to achieve racial balance. The contempt order was not imposed for the Union's failure to achieve the goal, but for its failure to take the prescribed steps that would facilitate achieving the goal. Additional

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the administration of apprentice programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program. More recently, the defendants unilaterally suspended court-ordered time tables for admission of forty non-whites to the apprentice program pending trial of this action, only completing the admission process under threat of contempt citations." 401 F. Supp., at 488.

flexibility is evidenced by the fact that this goal, originally set to be achieved by 1981, has been twice delayed and is now set for 1987.[2]

It is also important to emphasize that on the record before us, it does not appear that nonminorities will be burdened directly, if at all. Petitioners' counsel conceded at oral argument that imposition of the goal would not require the layoff of nonminority union workers, and that therefore the District Court's order did not disadvantage existing union members. Tr. of Oral Arg. 21. This case is thus distinguishable from *Wygant* where the plurality opinion noted that "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." 476 U. S., at 283. In contrast to the layoff provision in *Wygant*, the goal at issue here is akin to a hiring goal. In *Wygant* the plurality observed:

> "In cases involving valid *hiring* goals, the burden to be borne by individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.*, at 282.[3]

My view that the imposition of flexible goals as a remedy for past discrimination may be permissible under the Con-

[2] The District Court declared that "[i]f the goal is not attained by [August 31, 1987], defendants will face fines that will threaten their very existence." App. to Pet. for Cert. A–123. I agree with the plurality, however, that this statement cannot be taken as evidence that the goal will be applied as an inflexible quota. *Ante*, at 478.

[3] Of course, it is too simplistic to conclude from the combined holdings in *Wygant* and this case that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in *Wygant*. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue.

stitution is not an endorsement of their indiscriminate use. Nor do I imply that the adoption of such a goal will always pass constitutional muster.[4]

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I join Parts II–A, III, and VI of the Court's opinion. I would reverse the judgment of the Court of Appeals on statutory grounds insofar as the membership "goal" and the Fund order are concerned, and I would not reach petitioners' constitutional claims. I agree with JUSTICE WHITE, however, that the membership "goal" in this case operates as a rigid racial quota that cannot feasibly be met through good-faith efforts by Local 28. In my view, § 703(j), 42 U. S. C. § 2000e-2(j), and § 706(g), 42 U. S. C. § 2000e-5(g), read together, preclude courts from ordering racial quotas such as this. I therefore dissent from the Court's judgment insofar as it affirms the use of these mandatory quotas.

In *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), the Court interpreted § 706(g) as embodying a policy against court-ordered remedies under Title VII that award racial preferences in employment to individuals who have not been subjected to unlawful discrimination. See *id.*, at 579–583. The dissenting opinion in *Stotts* urged precisely the position advanced by JUSTICE BRENNAN's plurality opinion today—that any such policy extends only to awarding make-whole relief

[4] If the record now before us supported the position taken by JUSTICE O'CONNOR, I might well view this case differently. JUSTICE O'CONNOR apparently assumes that the goal can be achieved by August 31, 1987, only if the District Court requires "'the replacement of journeymen by apprentices on a strictly racial basis.'" *Post*, at 498 (quoting *EEOC* v. *Local 638*, 753 F. 2d 1172, 1195 (CA2 1985) (Winter, J., dissenting)). If and when that happens, petitioners will be free to argue that an impermissible quota has been imposed on the union and the JAC. An examination of what *has occurred* in this litigation over the years makes plain that the District Court has not enforced the goal in the rigid manner that concerns JUSTICE O'CONNOR. Based on the record actually before us, I am satisfied that the goal imposed by the District Court is a flexible one.

to particular nonvictims of discrimination, and does not bar classwide racial preferences in certain cases. *Id.*, at 612–614 (BLACKMUN, J., dissenting). The Court unquestionably rejected that view in *Stotts*. Although technically dicta, the discussion of § 706(g) in *Stotts* was an important part of the Court's rationale for the result it reached, and accordingly is entitled to greater weight than the Court gives it today. See *id.*, at 582–583.

It is now clear, however, that a majority of the Court believes that the last sentence of § 706(g) does not in all circumstances prohibit a court in a Title VII employment discrimination case from ordering relief that may confer some racial preferences with regard to employment in favor of nonvictims of discrimination. See *ante*, at 444–475 (opinion of BRENNAN, J.); *ante*, at 483–484 (opinion of POWELL, J.); *post*, at 499 (opinion of WHITE, J.). Even assuming that some forms of race-conscious affirmative relief, such as racial hiring goals, are permissible as remedies for egregious and pervasive violations of Title VII, in my view the membership "goal" and Fund order in this case were impermissible because they operate not as goals but as racial quotas. Such quotas run counter to § 703(j) of Title VII, and are thus impermissible under § 706(g) when that section is read in light of § 703(j), as I believe it should be.

The plurality asserts that § 703(j) in no way "qualifies or proscribes a court's authority to order relief otherwise appropriate under § 706(g) in circumstances where an illegal discriminatory act or practice is established." *Ante*, at 464, n. 37. According to the plurality, § 703(j) merely provides that an employer or union does not engage in unlawful discrimination simply on account of a racial imbalance in its work force or membership, and thus is not required to institute preferential quotas to avoid Title VII liability. Thus, the plurality concedes that § 703(j) is aimed at racial quotas, but interprets it as limiting only the substantive liability of employers and unions, not the remedial powers of courts.

This interpretation of § 703(j) is unduly narrow. Section 703(j) provides:

> "*Nothing contained in this title shall be interpreted to require* any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area" 78 Stat. 257 (emphasis added).

In *Steelworkers* v. *Weber*, 443 U. S. 193, 205, n. 5 (1979), the Court stated that "Section 703(j) speaks to substantive liability under Title VII." While this is *one* purpose of § 703(j), the Court in *Weber* had no occasion to consider whether it was the *exclusive* purpose. In my view, the words "Nothing contained in this title shall be interpreted to require" plainly make § 703(j) applicable to the interpretation of *any* provision of Title VII, including § 706(g). Therefore, when a court interprets § 706(g) as authorizing it to require an employer to adopt a racial quota, that court contravenes § 703(j) to the extent that the relief imposed as a purported remedy for a violation of Title VII's substantive provisions in fact operates to require racial preferences "on account of [a racial] imbalance." In addition, since § 703(j) by its terms limits the circumstances in which an employer or union may

be required to extend "preferential treatment to any individual *or to any group* because of . . . race," the plurality's distinction between make-whole and classwide relief is plainly ruled out insofar as § 703(j) is concerned.

The plurality's restrictive reading of § 703(j) rests largely on its view of the legislative history, which the plurality claims establishes that Congress simply did not consider the use of racial preferences to remedy past discrimination when it enacted Title VII. According to the plurality, the sole focus of concern over racial quotas involved the scope of substantive liability under Title VII: the fear was that employers or unions would be found liable for violating Title VII merely on account of a racial imbalance. This reading of the legislative history ignores authoritative statements—relied on by the Court in *Stotts*, 467 U. S., at 580–582—addressing the relief courts could order, and making plain that racial *quotas*, at least, were not among the permissible remedies for past discrimination. See, *e. g.*, 110 Cong. Rec. 6549 (1964) ("Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance") (Sen. Humphrey); *id.*, at 6566 ("[T]itle VII does not permit the ordering of racial quotas in businesses or unions . . .") (memorandum of Republican House sponsors); *id.*, at 14665 ("Under title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title") (statement of Senate sponsors in a bipartisan newsletter delivered to Senators supporting the bill during an attempted filibuster).

The plurality's reading of the legislative history also defies common sense. Legislators who objected to racial quotas obviously did so because of the harm that such quotas would impose on innocent nonminority workers as well as because

of the restriction on employer freedom that would follow from an across-the-board requirement of racial balance in every workplace. Racial quotas would inflict such harms on nonminority workers whether such quotas were imposed directly by federal law in the form of a requirement that every work force be racially balanced, or imposed as part of a court-ordered remedy for an employer's violations of Title VII. The legislative history, fairly read, indicates that such racial quotas are impermissible as a means of enforcing Title VII, and that even racial preferences short of quotas should be used only where clearly necessary if these preferences would benefit nonvictims at the expense of innocent nonminority workers.

At bottom, the plurality recognizes that this is so, although it prefers to cut the congressional rejection of racial quotas loose from any statutory moorings and make this policy simply another factor that should inform the remedial discretion of district courts. Indeed, notwithstanding its claim that § 703(j) is irrelevant to interpretation of § 706(g), the plurality tacitly concedes that racial quotas are improper, and that they are improper by virtue of § 703(j). The plurality says that in considering whether to grant race-conscious affirmative relief "the court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." *Ante*, at 475. Since this is precisely the congressional concern that the plurality locates in § 703(j), the plurality appears to recognize that § 703(j) *is* relevant, after all, to the choice of remedies under § 706(g). Moreover, the plurality indicates that a hiring or membership goal must be applied flexibly in order that the goal not be "used simply to achieve and maintain racial balance, but rather as a benchmark against which the court [can] gauge [an employer's or union's] efforts to remedy past discrimination." *Ante*, at 478. It is fair to infer that the plurality approves the use of the membership goal in this case only because, in

its view, that goal can be characterized as "a means by which [the court] can measure petitioners' compliance with its orders, rather than as a strict racial quota." *Ibid.*

The plurality correctly indicates that, as to any racial goal ordered by a court as a remedy for past discrimination, the employer *always* has a potential defense by virtue of § 706(g) against a claim that it was required to hire a particular employee, to wit, that the employee was not hired for "reasons unrelated to discrimination." *Ante*, at 474, n. 45. Although the plurality gives no clues as to the scope of this defense, it is clear that an employer would remain free to refuse to hire unqualified minority applicants, even if as a result the employer failed to meet a racial hiring goal. Thus, an employer's undoubted freedom to refuse to hire unqualified minority applicants, even in the face of a court-ordered racial hiring goal, operates as one important limitation on the extent of any racially preferential treatment that can result from such a goal.

The plurality offers little guidance as to what separates an impermissible quota from a permissible goal. Reference to benchmarks such as the percentage of minority workers in the relevant labor pool will often be entirely proper in order to *estimate* how an employer's work force would be composed absent past discrimination. But it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination. That, of course, is why there must be a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity. *Teamsters* v. *United States*, 431 U. S. 324, 339–340, and n. 20 (1977). Thus, the use of a rigid quota turns a sensible rule of thumb into an unjustified conclusion about the precise extent to which past discrimination has lingering effects, or into an unjustified prediction about what would happen in the future in the

absence of continuing discrimination. The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance, in contravention of § 703(j)'s clear policy against such requirements.

To be consistent with § 703(j), a racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions. To hold an employer or union to achievement of a particular percentage of minority employment or membership, and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose an impermissible quota. By contrast, a permissible goal should require only a good-faith effort on the employer's or union's part to come within a range demarcated by the goal itself.

This understanding of the difference between goals and quotas essentially comports with the definitions jointly adopted by the EEOC and the Departments of Justice and Labor in a 1973 memorandum, and reaffirmed on several occasions since then by the EEOC and the Department of Labor. Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices (Mar. 23, 1973), reprinted in 2 CCH Employment Practices ¶ 3776 (1985) (hereinafter Memorandum); see 41 Fed. Reg. 38815 (1976) (EEOC Policy Statement on Affirmative Action Programs for State and Local Government Agencies); *Office of Federal Contract Compliance Programs* v. *Priester Construction Co.*, No. 78–OFCCP–11 (Feb. 22, 1983), summarized in OFCCP Order No. 970a3, reprinted in 2 BNA AACM D:9121 (1983). In the view of these federal agencies, which are charged with responsibility for enforcing equal employment opportunity laws, a quota "would impose a fixed number or percentage which must be attained, or which cannot be exceeded," and would do so "regardless of the number

of potential applicants who meet necessary qualifications." Memorandum, 2 CCH Employment Practices, at 3856. By contrast, a goal is "a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market." *Ibid.* An employer's failure to meet a goal despite good-faith efforts "is not subject to sanction, because [the employer] is not expected to displace existing employees or to hire unneeded employees to meet [the] goal." *Ibid.* This understanding of the difference between goals and quotas seems to me workable and far more consistent with the policy underlying § 703(j) and § 706(g) than the plurality's forced distinction between make-whole relief and classwide relief. If, then, some racial preferences may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be nonvictims, I would employ a distinction such as this between quotas and goals in setting standards to inform use by district courts of their remedial powers under § 706(g) to fashion such relief.

If, as the Court holds, Title VII sometimes allows district courts to employ race-conscious remedies that may result in racially preferential treatment for nonvictims, it does so only where such remedies are truly necessary. In fashioning any such remedy, including racial hiring goals, the court should exercise caution and "take care to tailor its orders to fit the nature of the violation it seeks to correct." *Ante*, at 476. As the plurality suggests, goals should generally be temporary measures rather than efforts to maintain a previously achieved racial balance, and should not unnecessarily trammel the interests of nonminority employees. Furthermore, the use of goals is least likely to be consistent with § 703(j) where the adverse effects of any racially preferential treatment attributable to the goals will be "concentrated upon a relatively small, ascertainable group of non-minority persons." *EEOC* v. *Local 638*, 753 F. 2d 1172, 1186 (CA2 1985). In sum, the creation of racial preferences by courts, even in

the more limited form of goals rather than quotas, must be done sparingly and only where manifestly necessary to remedy violations of Title VII if the policy underlying § 703(j) and § 706(g) is to be honored.

In this case, I agree with JUSTICE WHITE that the membership "goal" established by the District Court's successive orders in this case has been administered and will continue to operate "not just [as] a minority membership goal but also [as] a strict racial quota that the union was required to attain." *Post*, at 499 (dissenting). It is important to realize that the membership "goal" ordered by the District Court goes well beyond a requirement, such as the ones the plurality discusses approvingly, that a union "admit qualified minorities roughly in proportion to the number of qualified minorities in the work force." *Ante*, at 449. The "goal" here requires that the racial composition of Local 28's entire membership mirror that of the relevant labor pool by August 31, 1987, without regard to variables such as the number of qualified minority applicants available or the number of new apprentices needed. The District Court plainly stated that "[i]f the goal is not attained by that date, defendants will face fines that will threaten their very existence." App. to Pet. for Cert. A–123.

I see no reason not to take the District Court's mandatory language at face value, and certainly none is supplied by the plurality's conclusory assertion that "the District Court has been willing to accommodate *legitimate* reasons for petitioners' failure to comply with court orders." *Ante*, at 478–479, n. 49. As Judge Winter persuasively argued in dissent below, the District Court was clearly *not* willing to take due account of the economic conditions that led to a sharp decline in the demand for the union skills involved in this case. Indeed, notwithstanding that petitioners have "voluntarily indentured 45% nonwhites in the apprenticeship classes since January 1981," the District Court ordered the JAC to indenture one nonwhite apprentice for every white apprentice.

753 F. 2d, at 1189. The Court of Appeals set this portion of the District Court's order aside as an abuse of discretion, *ibid.*, but the District Court's willingness to impose such a rigid hiring quota certainly suggests that the District Court intended the membership "goal" to be equally absolute.

It is no answer to these observations that the District Court on two previous occasions postponed the final date for full compliance with the membership goal. At the time of the Court of Appeals' decision, Local 28's membership was approximately 10.8% nonwhite, *id.*, at 1187, and at oral argument counsel for petitioners represented that Local 28's membership of about 3,100 workers is now approximately 15.5% nonwhite. See Tr. of Oral Arg. 13. Absent an enormous expansion in the size of the apprentice program—which would be feasible only if the demand for the services of Local 28's members were dramatically to increase—it is beyond cavil that neither the "voluntary" 45% minority ratio now employed for apprenticeship classes nor the District Court's 1-to-1 order could achieve the 29.23% membership goal by Aug. 31, 1987. Indeed, at oral argument counsel for respondents conceded as much. See *id.*, 31–32.

I do not question that petitioners' past violations of Title VII were egregious, or that in some respects they exhibited inexcusable recalcitrance in the face of the District Court's earlier remedial orders. But the timetable with which petitioners were ordered to comply was quite unrealistic and clearly could not be met by good-faith efforts on petitioners' part. In sum, the membership goal operates as a rigid membership quota, which will in turn spawn a sharp curtailment in the opportunities of nonminorities to be admitted to the apprenticeship program. Indeed, in order for the District Court's timetable to be met, this fixed quota would appear to require "the replacement of journeymen by apprentices on a strictly racial basis." 753 F. 2d, at 1195 (Winter, J., dissenting).

Whether the unequivocal rejection of racial quotas by the Congress that enacted Title VII is said to be expressed in § 706(g), in § 703(j), or in both, a "remedy" such as this membership quota cannot stand. For similar reasons, I believe that the Fund order, which created benefits for minority apprentices that nonminority apprentices were precluded from enjoying, operated as a form of racial quota. Accordingly, I would reverse the judgment of the Court of Appeals on statutory grounds insofar as the membership "goal" and Fund order are concerned, without reaching petitioners' constitutional claims.

JUSTICE WHITE, dissenting.

As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination. But I agree that § 706(g) does not bar relief for nonvictims in all circumstances. Hence, I generally agree with Parts I through III of the Court's opinion and with Parts IV–A through IV–D of the plurality opinion. It may also be that this is one of those unusual cases where nonvictims of discrimination were entitled to a measure of the relief ordered by the District Court and affirmed by the Court of Appeals. But Judge Winter, in dissent below, was correct in concluding that critical parts of the remedy ordered in this case were excessive under § 706(g), absent findings that those benefiting from the relief had been victims of discriminatory practices by the union. As Judge Winter explained and contrary to the Court's views, the cumulative effect of the revised affirmative-action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota that the union was required to attain. We have not heretofore approved this kind of racially discriminatory hiring practice, and I would not do so now. Beyond this, I am convinced, as Judge Winter was, that holding the union in contempt for failing to attain the membership quota during a time of economic doldrums in the construction industry and a

declining demand for the union skills involved in this case was for all practical purposes equivalent to a judicial insistence that the union comply even if it required the displacement of nonminority workers by members of the plaintiff class. The remedy is inequitable in my view, and for this reason I dissent from the judgment affirming the Court of Appeals.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Today, in *Firefighters* v. *Cleveland*, *post*, p. 501 (REHNQUIST, J., dissenting), I express my belief that § 706(g) forbids a court to order racial preferences that effectively displace nonminorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination. Although the pervasiveness of the racial discrimination practiced by a particular union or employer is likely to increase the number of victims who are entitled to a remedy under the Act, § 706(g) does not allow us to go further than that and sanction the granting of relief to those who were not victims at the expense of innocent nonminority workers injured by racial preferences. I explain that both the language and the legislative history of § 706(g) clearly support this reading of § 706(g), and that this Court stated as much just two Terms ago in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). Because of this, I would not reach the equal protection question, see *ante*, at 479–481 (opinion of BRENNAN, J.), *ante*, at 484–489 (opinion of POWELL, J.), but would rely solely on § 706(g) to reverse the Court of Appeals' judgment approving the order of class-based relief for petitioners' past discrimination.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL–CIO, C. L. C. *v.* CITY OF CLEVELAND ET AL.

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

No. 84–1999. Argued February 25, 1986—Decided July 2, 1986

The Vanguards, an organization of black and Hispanic firefighters employed by respondent city of Cleveland, filed a class action in Federal District Court charging the city and various city officials with discrimination on the basis of race and national origin in hiring, assigning, and promoting firefighters in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964. Petitioner labor union, which represents a majority of the city's firefighters, was permitted to intervene as a party-plaintiff. Over petitioner's objection, the court adopted a consent decree that provided for the use of race-conscious relief and other affirmative action in promoting firefighters. The Court of Appeals affirmed.

Held: Section 706(g) of Title VII does not preclude entry of a consent decree, such as was entered in this case, that may benefit individuals who were not the actual victims of the defendant's discriminatory practices; whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, it does not apply to relief awarded in a consent decree. Pp. 515–530.

(a) Congress intended that voluntary compliance be the preferred means of achieving Title VII's objectives. Voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who are not actual victims of that discrimination. *Steelworkers* v. *Weber*, 443 U. S. 193. Absent some contrary indication, there is no reason why such voluntary action is rendered impermissible by Title VII simply because it is incorporated into a consent decree. No such contrary indication is provided by § 706(g)'s last sentence, which precludes a district court from entering an order requiring the hiring or promotion of an individual who was refused employment or promotion for any reason other than discrimination. Whatever the extent of the limits Congress placed in § 706(g)'s last sentence on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, § 706(g) by itself does not restrict the ability of employers or unions to enter into voluntary agreements providing race-conscious relief. Because the voluntary nature of a consent decree is its most fundamental

characteristic, it is apparent that consent decrees are not included among the "orders" referred to in § 706(g). The party's agreement, rather than the force of law upon which the complaint was originally based, creates the obligations embodied in a consent decree. Pp. 515–524.

(b) A federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. Inasmuch as the limits placed by § 706(g) on the remedial authority of a federal court—whatever these may be—are not implicated by voluntary agreements, there is no conflict with or violation of § 706(g) when a federal court enters a consent decree that provides such relief. *Firefighters* v. *Stotts*, 467 U. S. 561, and *Railway Employees* v. *Wright*, 364 U. S. 642, distinguished. Pp. 524–528.

(c) The fact that the consent decree in this case was entered without petitioner's consent does not affect its validity. While an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. The consent decree here does not bind petitioner to do or not do anything. It imposes no legal duties or obligations on petitioner and does not purport to resolve any other claims petitioner might have under the Fourteenth Amendment, § 703 of Title VII, or as a matter of contract. Whether it is too late to raise such claims, or, if not, whether the claims have any merit are questions that must be presented in the first instance to the District Court, which has retained jurisdiction to hear such challenges. Pp. 528–530.

753 F. 2d 479, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 530. WHITE, J., filed a dissenting opinion, *post*, p. 531. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 535.

William L. Summers argued the cause for petitioner. With him on the briefs was *Robert A. Dixon*.

Assistant Attorney General Reynolds argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Kuhl, Samuel A. Alito, Jr., Walter W. Barnett,* and *David K. Flynn*.

Edward R. Stege, Jr., argued the cause and filed a brief for respondent Vanguards of Cleveland. *John D. Maddox* argued the cause and filed a brief for respondents city of Cleveland et al.*

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*Briefs of *amici curiae* urging reversal were filed for the Anti-Defamation League of B'nai B'rith et al. by *Justin J. Finger*, *Jeffrey P. Sinensky*, *Abigail T. Kelman*, *Meyer Eisenberg*, *Allen L. Rothenberg*, and *Dennis Rapps;* for the International Association of Fire Fighters, AFL–CIO, C. L. C., by *Edward J. Hickey, Jr.*, and *Thomas A. Woodley;* for Local 542, International Union of Operating Engineers, et al. by *Robert M. Weinberg*, *Michael H. Gottesman*, *Jeremiah A. Collins*, *Edward D. Foy, Jr.*, and *George H. Cohen;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Marian M. Johnston*, Deputy Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert M. Spire*, Attorney General of Nebraska, *W. Cary Edwards*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *David Frohnmayer*, Attorney General of Oregon, *Charles G. Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Elisabeth S. Shuster;* for the city of Atlanta et al. by *Anthony W. Robinson;* for the city of Birmingham, Alabama, by *James P. Alexander*, *Linda A. Friedman*, and *James K. Baker;* for the city of Detroit by *Daniel B. Edelman*, *John H. Suda*, *Charles L. Reischel*, *Frederick N. Merkin*, and *Robert Cramer;* for the Affirmative Action Coordinating Center et al. by *Frank E. Deale* and *Jules Lobel;* for the International Association of Black Professional Fire Fighters by *Lembhard G. Howell;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Paul C. Saunders*, *Harold R. Tyler*, *James Robertson*, *Norman Redlich*, *William L. Robinson*, *Richard T. Seymour*, *Grover G. Hankins*, *Charles E. Carter*, *E. Richard Larson*, and *Burt Neuborne;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius L. Chambers*, *Ronald L. Ellis*, *Clyde E. Murphy*, *Eric Schnapper*, *Grover G. Hankins*, *Antonia Hernandez*, and *Kenneth Kimerling;* for the National Conference of Black Mayors, Inc., by *Conrad K. Harper;* for the National Institute of Municipal Law Officers by *Roy D. Bates*, *William I. Thornton, Jr.*, *John W. Witt*, *Roger F. Cutler*,

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 706(g) of Title VII of the Civil Rights Act of 1964, 78 Stat. 261, as amended, 42 U. S. C. § 2000e–5(g), precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices.

I

On October 23, 1980, the Vanguards of Cleveland (Vanguards), an organization of black and Hispanic firefighters employed by the City of Cleveland, filed a complaint charging the City and various municipal officials (hereinafter referred to collectively as the City) with discrimination on the basis of race and national origin "in the hiring, assignment and promotion of firefighters within the City of Cleveland Fire Department." App. 6. The Vanguards sued on behalf of a class of blacks and Hispanics consisting of firefighters already employed by the City, applicants for employment, and "all blacks and Hispanics who in the future will apply for employment or will be employed as firemen by the Cleveland Fire Department." *Id.*, at 8.

The Vanguards claimed that the City had violated the rights of the plaintiff class under the Thirteenth and Fourteenth Amendments to the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and 42 U. S. C. §§ 1981 and 1983. Although the complaint alleged facts to establish discrimination in hiring and work assignments, the primary allegations charged that

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George Agnost, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, Charles S. Rhyne, J. Lamar Shelley, Robert J. Alfton, James K. Baker, Frank B. Gummey III, and *Barbara Mather;* for the National League of Cities et al. by *Benna Ruth Solomon* and *David A. Strauss;* and for the NOW Legal Defense and Education Fund et al. by *Marsha Levick* and *Emily J. Spitzer.*

Robert E. Williams, Douglas S. McDowell, and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

black and Hispanic firefighters "have . . . been discriminated against by reason of their race and national origin in the awarding of promotions within the Fire Department." App. 11.[1] The complaint averred that this discrimination was effectuated by a number of intentional practices by the City. The written examination used for making promotions was alleged to be discriminatory. The effects of this test were said to be reinforced by the use of seniority points and by the manipulation of retirement dates so that minorities would not be near the top of promotion lists when positions became available. In addition, the City assertedly limited minority advancement by deliberately refusing to administer a new promotional examination after 1975, thus cancelling out the effects of increased minority hiring that had resulted from certain litigation commenced in 1973.

As just noted, the Vanguards' lawsuit was not the first in which the City had to defend itself against charges of race discrimination in hiring and promotion in its civil services. In 1972, an organization of black police officers filed an action alleging that the Police Department discriminated against minorities in hiring and promotions. See *Shield Club* v. *City of Cleveland*, 370 F. Supp. 251 (ND Ohio 1972). The District Court found for the plaintiffs and issued an order enjoining certain hiring and promotion practices and establishing mi-

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[1] The Cleveland Fire Department has six ranks of officers. From the lowest to the highest rank, these are: Lieutenant, Captain, Battalion Chief, Assistant Chief, and Chief. To obtain a promotion, a firefighter must satisfy minimum experience requirements and pass a written examination. The examination is apparently quite difficult; approximately 80% of the applicants failed the 1984 promotional examination. Tr. of Oral Arg. 28. Firefighters who pass the written examination are assigned a place on a promotion eligibility list. Although rankings on the lists are based primarily on test scores, additional points are assigned on the basis of seniority. There is a separate list for each rank. These lists are to remain effective for one year, but may be extended for an additional year, and, as a practical matter, lists are ordinarily used for the full 2-year period. Promotions are made from the lists as positions become available.

nority hiring goals. In 1977, these hiring goals were adjusted and promotion goals were established pursuant to a consent decree. Thereafter, litigation raising similar claims was commenced against the Fire Department and resulted in a judicial finding of unlawful discrimination and the entry of a consent decree imposing hiring quotas similar to those ordered in the *Shield Club* litigation. See *Headen* v. *City of Cleveland*, No. C73–330 (ND Ohio, Apr. 25, 1975). In 1977, after additional litigation, the *Headen* court approved a new plan governing hiring procedures in the Fire Department.

By the time the Vanguards filed their complaint, then, the City had already unsuccessfully contested many of the basic factual issues in other lawsuits. Naturally, this influenced the City's view of the Vanguards' case. As expressed by counsel for the City at oral argument in this Court:

> "[W]hen this case was filed in 1980, the City of Cleveland had eight years at that point of litigating these types of cases, and eight years of having judges rule against the City of Cleveland.
>
> "You don't have to beat us on the head. We finally learned what we had to do and what we had to try to do to comply with the law, and it was the intent of the city to comply with the law fully . . . ." Tr. of Oral Arg. 41–42.

Thus, rather than commence another round of futile litigation, the City entered into "serious settlement negotiations" with the Vanguards. See Letter dated December 24, 1980, from Edward R. Stege, Jr., and Mark I. Wallach to Hon. Thomas J. Lambros.

On April 27, 1981, Local Number 93 of the International Association of Firefighters, AFL–CIO, C. L. C. (Local 93 or Union), which represents a majority of Cleveland's firefighters, moved pursuant to Federal Rule of Civil Procedure 24(a)(2) to intervene as a party-plaintiff. The District Court granted the motion and ordered the Union to submit its complaint in intervention within 30 days.

Local 93 subsequently submitted a three-page document entitled "Complaint of Applicant for Intervention." Despite its title, this document did not allege any causes of action or assert any claims against either the Vanguards or the City. It expressed the view that "[p]romotions based upon any criterion other than competence, such as a racial quota system, would deny those most capable from their promotions and would deny the residents of the City of Cleveland from maintaining the best possible fire fighting force," and asserted that "Local #93's interest is to maintain a well trained and properly staffed fire fighting force and [Local 93] contends that promotions should be made on the basis of demonstrated competency, properly measured by competitive examinations administered in accordance with the applicable provisions of Federal, State, and Local laws." App. 27, 28. The "complaint" concluded with a prayer for relief in the form of an injunction requiring the City to award promotions on the basis of such examinations. *Id.*, at 28.

In the meantime, negotiations between the Vanguards and the City continued, and a proposed consent decree was submitted to the District Court in November 1981. This proposal established "interim procedures" to be implemented "as a two-step temporary remedy" for past discrimination in promotions. *Id.*, at 33. The first step required that a fixed number of already planned promotions be reserved for minorities: specifically, 16 of 40 planned promotions to Lieutenant, 3 of 20 planned promotions to Captain, 2 of 10 planned promotions to Battalion Chief, and 1 of 3 planned promotions to Assistant Chief were to be made to minority firefighters. *Id.*, at 33–34. The second step involved the establishment of "appropriate minority promotion goal[s]," *id.*, at 34, for the ranks of Lieutenant, Captain, and Battalion Chief. The proposal also required the City to forgo using seniority points as a factor in making promotions. *Id.*, at 32–33. The plan was to remain in effect for nine years, and could be extended

upon mutual application of the parties for an additional 6-year period. *Id.*, at 36.

The District Court held a 2-day hearing at the beginning of January to consider the fairness of this proposed consent decree. Local 93 objected to the use of minority promotional goals and to the 9-year life of the decree. In addition, the Union protested the fact that it had not been included in the negotiations. This latter objection particularly troubled the District Judge. Indeed, although hearing evidence presented by the Vanguards and the City in support of the decree, the Judge stated that he was "appalled that these negotiations leading to this consent decree did not include the intervenors . . . ," and refused to pass on the decree under the circumstances. Tr. 134 (Jan. 7, 1982). Instead, he concluded: "I am going to at this time to defer this proceeding until another day and I am mandating the City and the [Vanguards] to engage the Fire Fighters in discussions, in dialogue. Let them know what is going on, hear their particular problems." *Id.*, at 151. At the same time, Judge Lambros explained that the Union would have to make its objections more specific to accomplish anything: "I don't think the Fire Fighters are going to be able to win their position on the basis that, 'Well, Judge, you know, there's something inherently wrong about quotas. You know, it's not fair.' We need more than that." *Id.*, at 153.

A second hearing was held on April 27. Local 93 continued to oppose any form of affirmative action. Witnesses for all parties testified concerning the proposed consent decree. The testimony revealed that, while the consent decree dealt only with the 40 promotions to Lieutenant already planned by the City, the Fire Department was actually authorized to make up to 66 offers; similarly, the City was in a position to hire 32 rather than 20 Captains and 14 rather than 10 Battalion Chiefs. After hearing this testimony, Judge Lambros proposed as an alternative to have the City make a high number of promotions over a relatively short period of time. The

Judge explained that if the City were to hire 66 Lieutenants rather than 40, it could "plug in a substantial number of black leadership that can start having some influence in the operation of this fire department" while still promoting the same nonminority officers who would have obtained promotions under the existing system. Tr. 147–148 (Apr. 27, 1982). Additional testimony revealed that this approach had led to the amicable resolution of similar litigation in Atlanta, Georgia. Judge Lambros persuaded the parties to consider revamping the consent decree along the lines of the Atlanta plan. The proceedings were therefore adjourned and the matter was referred to a United States Magistrate.

Counsel for all three parties participated in 40 hours of intensive negotiations under the Magistrate's supervision and agreed to a revised consent decree that incorporated a modified version of the Atlanta plan. See App. 79 (Report of Magistrate). However, submission of this proposal to the court was made contingent upon approval by the membership of Local 93. Despite the fact that the revised consent decree actually increased the number of supervisory positions available to nonminority firefighters, the Union members overwhelmingly rejected the proposal.[2]

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[2] The vote was 660 to 89. This rejection was anticipated in the Magistrate's Report to the District Court:

"Acceptance by the general membership has always been recognized as a touch and go propòsition. It was, however, believed that a favorable recommendation by Mr. Summers [counsel for the Union] and the Union's Executive Board would be given serious consideration by the general membership. Unfortunately, recent events having no bearing on this lawsuit, pertaining to the proposed closing of fire stations, have again strained relations between the firefighters and the City. Counsel fear that these feelings may rebound in a negative vote on this issue. It can only be hoped that the general membership will realize that voting down this proposal is not a way of getting back at the City and that rejection based upon such reasoning will simply delay the day when firefighters can stand together, without regard to race, and pursue their common interests and goals rather than wasting available resources, financial or otherwise, by engag-

On January 11, 1983, the Vanguards and the City lodged a second amended consent decree with the court and moved for its approval. This proposal was "patterned very closely upon the revised decree negotiated under the supervision of [the] Magistrate . . . ," App. to Pet. for Cert. A31, and thus its central feature was the creation of many more promotional opportunities for firefighters of all races. Specifically, the decree required that the City immediately make 66 promotions to Lieutenant, 32 promotions to Captain, 16 promotions to Battalion Chief, and 4 promotions to Assistant Chief. These promotions were to be based on a promotional examination that had been administered during the litigation. The 66 initial promotions to Lieutenant were to be evenly split between minority and nonminority firefighters. However, since only 10 minorities had qualified for the 52 upper-level positions, the proposed decree provided that all 10 should be promoted. The decree further required promotional examinations to be administered in June 1984 and December 1985. Promotions from the lists produced by these examinations were to be made in accordance with specified promotional "goals" that were expressed in terms of percentages and were different for each rank. The list from the 1985 examination would remain in effect for two years, after which time the decree would expire. The life of the decree was thus shortened from nine years to four. In addition, except where necessary to implement specific requirements of the consent decree, the use of seniority points was restored as a factor in ranking candidates for promotion. *Id.*, at A29–A38.

Local 93 was mentioned twice in the proposal. Paragraph 16 required the City to submit progress reports concerning compliance to both the Union and the Vanguards. *Id.*, at A36. In paragraph 24, the court reserved exclusive jurisdiction with respect to applications or claims made by "any

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ing in intramural battles. Realistically, however, there is little room for optimism at this time." App. 78.

party, including Intervenor." *Id.*, at A38. The decree imposed no legal duties or obligations on Local 93.

On January 19, the City was ordered to notify the members of the plaintiff class of the terms of the proposed decree. In addition, persons who wished to object to the proposal were ordered to submit their objections in writing. Local 93 filed the following formal objection to the proposed consent decree:

> "Local #93 has consistently and steadfastly maintained that there must be a more equitable, more fair, more just way to correct the problems caused by the [City]. Many alternatives to the hopefully soon to be unnecessary 'remedial' methods embodied in the law have been explored and some have been utilized.
>
> "Local #93 reiterates it's *[sic]* absolute and total objection to the use of racial quotas which must by their very nature cause serious racial polarization in the Fire Service. Since this problem is obviously the concern of the collective representative of all members of the fire service, Intervenors, Local #93. *[sic]* We respectfully urge this court not to implement the 'remedial' provisions of this Decree." App. 98.

Apart from thus expressing its opinion as to the wisdom and necessity of the proposed consent decree, the Union still failed to assert any legal claims against either the Vanguards or the City.[3]

The District Court approved the consent decree on January 31, 1983. Judge Lambros found that "[t]he documents, statistics, and testimony presented at the January and April 1982 hearings reveal a historical pattern of racial discrimination in the promotions in the City of Cleveland Fire Depart-

[3] In addition to Local 93, three individual members of the Union voiced objections to the proposed consent decree in personal letters to the District Court. The basis of their objections was the same as the Union's. App. to Brief in Opposition of City of Cleveland A3 (memorandum opinion and order of District Court).

ment." App. to Brief in Opposition of City of Cleveland A3–A4. He then observed:

> "While the concerns articulated by Local 93 may be valid, the use of a quota system for the relatively short period of four years is not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department. It is neither unreasonable nor unfair to require non-minority firefighters who, although they committed no wrong, benefited from the effects of the discrimination to bear some of the burden of the remedy. Furthermore, the amended proposal is more reasonable and less burdensome than the nine-year plan that had been proposed originally." *Id.*, at A5.

The Judge therefore overruled the Union's objection and adopted the consent decree "as a fair, reasonable, and adequate resolution of the claims raised in this action." *Ibid.* The District Court retained exclusive jurisdiction for "all purposes of enforcement, modification, or amendment of th[e] Decree upon the application of any party . . . ." App. to Pet. for Cert. A38.

The Union appealed the overruling of its objections. A panel for the Court of Appeals for the Sixth Circuit affirmed, one judge dissenting. *Vanguards of Cleveland* v. *City of Cleveland*, 753 F. 2d 479 (1985). The court rejected the Union's claim that the use of race-conscious relief was "unreasonable," finding such relief justified by the statistical evidence presented to the District Court and the City's express admission that it had engaged in discrimination. The court also found that the consent decree was "fair and reasonable to non-minority firefighters," emphasizing the "relatively modest goals set forth in the plan," the fact that "the plan does not require the hiring of unqualified minority firefighters or the discharge of any non-minority firefighters," the fact that the plan "does not create an absolute bar to the advancement

of non-minority employees," and the short duration of the plan. *Id.*, at 485.

After oral argument before the Court of Appeals, this Court decided *Firefighters* v. *Stotts*, 467 U. S. 561 (1984). "Concerned with the potential impact of *Stotts*," the Court of Appeals ordered the parties to submit supplemental briefs, 753 F. 2d, at 485–486, but ultimately concluded that *Stotts* did not affect the outcome of the case. The court noted that the District Court in *Stotts* had issued an injunction requiring layoffs over the objection of the City, while in this case the City of Cleveland had agreed to the plan. The court reasoned that even if *Stotts* holds that Title VII limits relief to those who have been actual victims of discrimination, "[t]he fact that this case involves a consent decree and not an injunction makes the legal basis of the *Stotts* decision inapplicable." 753 F. 2d, at 486.[4]

Local 93 petitioned this Court for a writ of certiorari. The sole issue raised by the petition is whether the consent decree is an impermissible remedy under § 706(g) of Title VII.[5]

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[4] The Court of Appeals also distinguished *Stotts* on the ground that the injunction imposed by the District Court in that case "had the direct effect of abrogating a valid seniority system to the detriment of non-minority workers," while "[i]n this case, the consent decree assured the integrity of the existing seniority system." 753 F. 2d, at 486.

[5] The petition for certiorari sets forth two questions:

"1. May a District Court adopt provisions in a consent decree purporting to remedy a Title VII violation that it would have had no authority to order as a remedy if the matter had gone to trial?

"2. May a municipal employer voluntarily adopt an affirmative action promotional scheme over the objections of an intervenor union duly elected to represent all employees when said promotional scheme adversely affects the rights and interests of the employees and awards relief to minority employees regardless of whether they were actual victims of past racial discrimination?"

The first of these questions plainly asks only whether Title VII precludes the entry of this consent decree. Although the second question can conceivably be read to embody a more general challenge respecting the effect of the consent decree on petitioner's legal rights, neither the petition for

Local 93 argues that the consent decree disregards the express prohibition of the last sentence of § 706(g) that

> "*[n]o order of the court shall require* the admission or reinstatement of an individual as a member of a union, or *the hiring, reinstatement, or promotion of an individual as an employee*, or the payment to him of any back pay, *if such individual* was refused admission, suspended, or expelled, or *was refused employment or advancement* or was suspended or discharged *for any reason other than discrimination on account of race*, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title." 42 U. S. C. § 2000e–5(g) (emphasis added).

According to Local 93, this sentence precludes a court from awarding relief under Title VII that may benefit individuals who were not the actual victims of the employer's discrimination. The Union argues further that the plain language of the provision that "[n]o order of the court" shall provide such relief extends this limitation to orders entered by consent in addition to orders issued after litigation. Consequently, the Union concludes that a consent decree entered in Title VII litigation is invalid if—like the consent decree approved in this case—it utilizes racial preferences that may benefit individuals who are not themselves actual victims of an employer's discrimination. The Union is supported by the United States as *amicus curiae*.[6]

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certiorari nor the brief on the merits discusses any issue other than whether this consent decree was prohibited by § 706(g) of Title VII. Moreover, petitioner limited its challenge below to whether the consent decree was "reasonable," and then, after *Stotts* was decided, to whether the consent decree was permissible under § 706(g). Finally, the District Court's retention of jurisdiction leaves it open for petitioner to press whatever other claims it might have before that court, see *infra*, at 530. Therefore, we deem it necessary to decide only the question whether § 706(g) precluded the District Court from entering this consent decree.

[6] The United States took exactly the opposite position in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979). See Brief for United States and EEOC, O. T. 1978, Nos. 78–432, 78–435, and 78–436, pp. 26–38.

We granted the petition in order to answer this important question of federal law. 474 U. S. 816 (1985). The Court holds today in *Sheet Metal Workers* v. *EEOC*, *ante*, p. 421, that courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices. We need not decide whether this is one of those cases, however. For we hold that whether or not § 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree.[7] We therefore affirm the judgment of the Court of Appeals.

II

We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975) (quoting *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (CA8 1973)) (Title VII sanctions intended to cause employers "'to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'"). See also *Teamsters* v. *United States*, 431 U. S. 324, 364 (1977); *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 228 (1982); *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 770–771 (1983). This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding that "Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems

[7] We emphasize that, in light of this holding, nothing we say here is intended to express a view as to the extent of a court's remedial power under § 706(g) in cases where that provision does apply. That question is addressed in *Sheet Metal Workers* v. *EEOC*, *ante*, at 444–479.

which constituted barriers to equal employment opportunity . . . ." 29 CFR § 1608.1(b) (1985). According to the EEOC:

> "The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII." § 1608.1(c) (footnote omitted).

It is equally clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination. This was the holding of *Steelworkers* v. *Weber*, 443 U. S. 193 (1979). In *Weber*, an employer and a union agreed in collective bargaining to reserve for black employees 50% of the openings in an in-plant, craft-training program until the percentage of black craftworkers in the plant was commensurate with the percentage of blacks in the local labor force. After considering both the purposes of Title VII and its legislative history, we concluded that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.*, at 204 (citation omitted). Accordingly, we held that Title VII permits employers and unions voluntarily to make use of reasonable race-conscious affirmative action, although we left to another day the task of

"defin[ing] in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id.*, at 208.

Of course, *Weber* involved a purely private contractual agreement rather than a consent decree. But, at least at first blush, there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation.[8] Indeed, in *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88, n. 14 (1981), we held that a District Court's order denying entry of a consent decree is appealable under 28 U. S. C. § 1292(a)(1) because such an order undermines Congress' "strong preference for encouraging voluntary settlement of employment discrimination claims" under Title VII. Moreover, the EEOC's guidelines concerning "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964," 29 CFR pt. 1608 (1985), plainly contemplate the

[8] Unlike *Weber*, which involved a private employer, this case involves a public employer whose voluntary actions are subject to the strictures of the Fourteenth Amendment as well as to the limitations of § 703 of Title VII. In the posture in which this case comes to us, we have no occasion to address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 would nonetheless be barred by the Fourteenth Amendment. Rather, as is explained *infra*, at 530, we leave questions regarding the application of the Fourteenth Amendment to the underlying agreement to further proceedings before the District Court. Nor need we decide what limits § 703 places on an employer's ability to agree to race-conscious relief in a voluntary settlement that is not embodied in a consent decree, or what showing the employer would be required to make concerning possible prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703. Cf. *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). In any event, there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in *Wygant* and § 703 as interpreted in *Weber*, could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose. The only issue before us is whether, assuming, *arguendo*, that § 706(g) would bar a court from ordering such race-conscious relief after trial in some of these instances, § 706(g) also bars a court from approving a consent decree entered into by the employer and providing for such relief.

use of consent decrees as an appropriate form of voluntary affirmative action. See, *e. g.*, § 1608.8.[9] True, these guidelines do not have the force of law, *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141 (1976), but still they "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.*, at 142 (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). Therefore, absent some contrary indication, there is no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it is incorporated into a consent decree.

Local 93 and the United States find a contrary indicator in § 706(g), which governs the courts' remedial power under Title VII. They contend that § 706(g) establishes an independent limitation on what *courts*—as opposed to employers or unions—can do, prohibiting any "order of the court" from providing relief that may benefit nonvictims. They argue that a consent decree should be treated as an "order" within the meaning of § 706(g) because it possesses the legal force and character of a judgment decreed after a trial. They rely for this conclusion on several characteristics of consent decrees: first, that a consent decree looks like and is entered as a judgment; second, that the court retains the power to modify a consent decree in certain circumstances over the objection of a signatory, see *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932) *(Swift II);* third, that noncompliance with a consent decree is enforceable by citation for contempt of court, see *United States* v. *City of Miami*, 664 F. 2d 435, 440, and n. 8 (CA5 1981) (opinion of Rubin, J.).

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[9] The EEOC has not joined the brief for the United States in this case. The United States' brief has been filed only on behalf of the Attorney General, who has some limited enforcement responsibility under Title VII, see 42 U. S. C. § 2000e–5(f)(1), and the Federal Government in its capacity as an employer, § 2000e–16.

To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. See *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 235–237 (1975); *United States* v. *Armour & Co.*, 402 U. S. 673 (1971). More accurately, then, as we have previously recognized, consent decrees "have attributes both of contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes. *United States* v. *ITT Continental Baking Co.*, *supra*, at 235–237, and n. 10. The question is not whether we can label a consent decree as a "contract" or a "judgment," for we can do both. The question is whether, given their hybrid nature, consent decrees implicate the concerns embodied in § 706(g) in such a way as to require treating them as "orders" within the meaning of that provision.

Because this Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes, we think that the language of § 706(g) does not so clearly include consent decrees as to preclude resort to the voluminous legislative history of Title VII. The issue is whether, when Congress used the phrase "[n]o order of the court shall require" in § 706(g), it unmistakably intended to refer to *consent* decrees. In addition to the fact that consent decrees have contractual as well as judicial features, the use of the verb "require" in § 706(g) suggests that it was the coercive aspect of a judicial decree that Congress had in mind. We turn therefore to the legislative history, since the language of § 706(g) does not clearly settle the matter.

The conclusion in *Weber* that "Congress chose not to forbid all voluntary race-conscious affirmative action" when it enacted Title VII was largely based upon the legislative history, which shows that Congress was particularly concerned to avoid undue federal interference with managerial discretion. *Weber*, 443 U. S., at 205–207. As originally enacted,

Title VII regulated only private enterprises; the liberal Republicans and Southern Democrats whose support was crucial to obtaining passage of the bill expressed misgivings about the potential for Government intrusion into the managerial decisions of employers and unions beyond what was necessary to eradicate unlawful discrimination. *Id.*, at 206. Their votes were obtained only after they were given assurances that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). See also, 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler); *id.*, at 11471 (remarks of Sen. Javits); *id.*, at 14314 (remarks of Sen. Miller); *id.*, at 15893 (remarks of Rep. McCulloch). As one commentator points out, rather than seeking to outlaw voluntary affirmative action, the more conservative proponents of Title VII who held the balance of power in 1964 "were far more concerned to avoid the intrusion into business autonomy that a rigid color-blind standard would entail." Note, Preferential Relief Under Title VII, 65 Va. L. Rev. 729, 771, n. 224 (1979). See also, *Weber*, *supra*, at 207–208, n. 7 (quoting 110 Cong. Rec. 15893 (1964) (remarks of Rep. MacGregor)) (Congress was not legislating about "'preferential treatment or quotas in employment'" because it believed that "'the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves'").

The legislative history pertaining specifically to § 706(g) suggests that it was drafted with this concern in mind and, in fact, that a principal purpose of the last sentence of § 706(g) was to protect managerial prerogatives of employers and unions.[10] See H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1,

[10] Title VII was expanded to cover municipalities by the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103. Although the legislative history of the 1972 amendments does not reflect the same concern with preserving the managerial discretion of governmental employers

p. 11 (1963) (first version of § 706(g) preserving employer defense of "cause"); 110 Cong. Rec. 2567–2571 (1964) (amending this version to substitute for "any reason other than discrimination" in place of "cause"); *id.*, at 2567 (remarks of Rep. Celler, the amendment's sponsor, that the amendment's purpose was "to specify cause"); *id.*, at 6549 (remarks of Sen. Humphrey that § 706(g) makes clear "that employers may hire and fire, promote and refuse to promote for any reason, good or bad" except when such decisions violate the substantive provisions of Title VII). Thus, whatever the extent of the limits § 706(g) places on the power of the federal courts to compel employers and unions to take certain actions that the employers or unions oppose and would not otherwise take, § 706(g) by itself does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action. The limits on such agreements must be found outside § 706(g).[11]

From this, it is readily apparent that consent decrees are not included among the "orders" referred to in § 706(g), for the voluntary nature of a consent decree is its most funda-

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that was evident in 1964 with respect to the private sector, there is also no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector when Title VII was originally enacted. See generally Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. (Comm. Print 1972).

[11] Thus, we do not suggest that voluntary action by employers or unions is outside the ambit of Title VII regardless of its effect on nonminorities. We already rejected such arguments in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976), and *Steelworkers* v. *Weber*, 443 U. S. 193 (1979). Section 706(g), by its own terms, limits courts, not employers or unions, and focuses on preserving certain management prerogatives from interference by the federal courts. The rights of nonminorities with respect to action by their employers are delineated in § 703 of Title VII, 42 U. S. C. § 2000e–2, and, in cases involving governmental employees, by the Fourteenth Amendment. See *Weber*, *supra*; *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986).

mental characteristic. See *United States* v. *ITT Continental Baking Co.*, 420 U. S., at 235–237; *United States* v. *Armour & Co.*, 402 U. S. 673 (1971); *Hughes* v. *United States*, 342 U. S. 353 (1952); *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959); *Ashley* v. *City of Jackson*, 464 U. S. 900, 902 (1983) (REHNQUIST, J., dissenting from denial of certiorari). As we observed in *United States* v. *Armour & Co.*:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." 402 U. S., at 681–682 (emphasis in original) (footnote omitted).

Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. See *United States* v. *Ward Baking Co.*, 376 U. S. 327 (1964) (cannot enter consent decree to which one party has not consented); *Ashley* v. *City of Jackson*, *supra*, at 902 (REHNQUIST, J., dissenting from denial of certiorari). More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. Consequently, whatever the limitations Congress placed in § 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of

Title VII, these simply do not apply when the obligations are created by a consent decree.

The features of consent decrees designated by the Union and the United States do not require a contrary result. The fact that a consent decree *looks* like a judgment entered after a trial obviously does not implicate Congress' concern with limiting the power of federal courts unilaterally to require employers or unions to make certain kinds of employment decisions. The same is true of the court's conditional power to modify a consent decree; the mere *existence* of an *unexercised* power to modify the obligations contained in a consent decree does not alter the fact that those obligations were created by agreement of the parties rather than imposed by the court.[12] Finally, we reject the argument that a consent decree should be treated as an "order" within the meaning of § 706(g) because it can be enforced by a citation for contempt. There is no indication in the legislative history that the availability of judicial enforcement of an obligation, rather than the creation of the obligation itself, was the focus of congressional concern. In fact, judicial enforcement is available whether race-conscious relief is provided in a collective-bargaining agreement (as in *Weber*) or in a consent decree; only the form of that enforcement is different. But the difference between contractual remedies and the contempt power is not significant in any relevant sense with respect to § 706(g). For the choice of an enforcement scheme—whether to rely on contractual remedies or to have an agreement entered as a consent decree—is itself made voluntarily by the parties.[13] Thus, it does not implicate

[12] However, as is discussed below, the court's *exercise* of the power to modify the decree over the objection of a party to the decree does implicate § 706(g). *Infra*, at 527–528.

[13] Parties may choose to settle their disputes by consent decree rather than by private contract for a number of reasons. As one commentator points out, "[p]ublic law settlements are often complicated documents designed to be carried out over a period of years, . . . so any purely out-of-court settlement would suffer the decisive handicap of not being subject to

Congress' concern that federal courts not impose unwanted obligations on employers and unions any more than the decision to institute race-conscious affirmative action in the first place; in both cases the parties have themselves created obligations and surrendered claims in order to achieve a mutually satisfactory compromise.

III

Relying upon *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), and *Railway Employees* v. *Wright*, 364 U. S. 642 (1961), Local 93—again joined by the United States—contends that we have recognized as a general principle that a consent decree cannot provide greater relief than a court could have decreed after a trial. They urge that even if § 706(g) does not directly invalidate the consent decree, that decree is nonetheless void because the District Court "would have been powerless to order [such an injunction] under Title VII, had the matter actually gone to trial." Brief for Petitioner 17.

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continuing oversight and interpretation by the court." Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L. J. 887, 899. In addition to this advantage, the National League of Cities and its joining *amici* add:

"A consent decree has several other advantages as a means of settling litigation. It is easier to obtain enforcement of a consent decree because it will be unnecessary to prove many facts that would otherwise have to be shown in order to establish the validity of an ordinary contract. A court that maintains continuing jurisdiction over a consent decree will have a more flexible repertoire of enforcement measures. And it is likely to be easier to channel litigation concerning the validity and implications of a consent decree into a single forum—the court that entered the decree—thus avoiding the waste of resources and the risk of inconsistent or conflicting obligations." Brief for National League of Cities *et al.* as *Amici Curiae* 25.

For all of these reasons, consent decrees have become widely used as devices to facilitate settlement. Indeed, we have little doubt that the interpretation of § 706(g) proposed by the Union and the United States would make it substantially more difficult to settle Title VII litigation, contrary to the expressed congressional preference for voluntary remedial action.

We concluded above that voluntary adoption in a consent decree of race-conscious relief that may benefit nonvictims does not violate the congressional objectives of § 706(g). It is therefore hard to understand the basis for an independent judicial canon or "common law" of consent decrees that would give § 706(g) the effect of prohibiting such decrees anyway. To be sure, a federal court is more than "a recorder of contracts" from whom parties can purchase injunctions; it is "an organ of government constituted to make judicial decisions . . . ." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.409[5], p. 331 (1984) (hereinafter Moore). Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289, 297 (1880), and must further the objectives of the law upon which the complaint was based, *EEOC* v. *Safeway Stores, Inc.*, 611 F. 2d 795, 799 (CA10 1979), cert. denied *sub nom. Courtwright* v. *EEOC*, 446 U. S. 952 (1980); *Citizens for a Better Environment* v. *Gorsuch*, 231 U. S. App. D. C. 79, 87, 90, 718 F. 2d 1117, 1125, 1128 (1983), cert. denied *sub nom. Union Carbide Corp.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 1219 (1984). However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. See *Pacific R. Co.* v. *Ketchum*, *supra; Citizens for a Better Environment* v. *Gorsuch*, *supra*, at 89–90, 718 F. 2d, at 1127–1128; Note, The Consent Judgment as an Instrument of Compromise and Settlement, 72 Harv. L. Rev. 1314, 1317 (1959). Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. See, *e. g.*, *Pacific R. Co.* v. *Ketchum*, *supra*, at 295–297; *Swift & Co.* v. *United States*, 276 U. S. 311, 327–331 (1928) *(Swift I)* (Brandeis, J.); *EEOC* v. *Safeway*

Stores, Inc., supra, at 799–800; *Citizens for a Better Environment* v. *Gorsuch, supra*, at 89–91, 718 F. 2d, at 1127–1130; *Sansom Committee* v. *Lynn*, 735 F. 2d 1535, 1538–1539 (CA3), cert. denied, 469 U. S. 1017 (1984); *Turner* v. *Orr*, 759 F. 2d 817, 825–826 (CA8 1985).

This is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based. As noted above, the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII or the Fourteenth Amendment. However, inasmuch as the limits placed by § 706(g) on the remedial authority of a federal court—whatever these may be—are not implicated by voluntary agreements, there is no conflict with or violation of § 706(g) when a federal court enters a consent decree that provides such relief. Accordingly, to the extent that the consent decree is not otherwise shown to be unlawful, the court is not barred from entering a consent decree merely because it might lack authority under § 706(g) to do so after a trial.

This simply was not the case in either *Railway Employees* v. *Wright* or *Firefighters* v. *Stotts*, in both of which the Court found conflicts between a judicial decree and the underlying statute. In *Wright*, a railroad and the unions representing most of its employees were charged with discriminating against nonunion employees in violation of the Railway Labor Act, 45 U. S. C. § 151 *et seq.* The parties entered a consent decree that prohibited, among other things, the establishment of a union shop, a restriction that was also contained in the Railway Labor Act at the time. When the Act was amended several years later to permit union shops, the unions moved to modify the consent decree; their motion was opposed by the plaintiffs and by the railroad. This Court reversed the District Court's denial of this motion, holding that refusal to modify the consent decree constituted an abuse of discretion under the circumstances. The Court recognized

that the District Court retained power to modify the consent decree and that "a sound judicial discretion" may call for such modification "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." 364 U. S., at 646–647. Because it viewed the intervening amendment of the Railway Labor Act as rendering the consent decree incompatible with the terms of the Act, the Court regarded as "established" the conclusion that, had the decree represented relief awarded after trial, it would have been an abuse of discretion to deny modification. *Id.*, at 648–650. This left only the question whether "th[e] result [is] affected by the fact that we are dealing with a consent decree." *Id.*, at 648–650. Citing *Swift II* for the proposition that the power to modify a consent decree is the same as the power to modify a litigated decree, the Court held that a District Court "must . . . be free to modify the terms of the consent decree when a change in law brings those terms in conflict with statutory objectives." 364 U. S., at 650–651.

Firefighters v. *Stotts*, 467 U. S. 561 (1984), also involved a consent decree that the Court concluded was in conflict with the underlying statute, in that case Title VII. The plaintiffs and the city of Memphis entered into a consent decree that included the use of racial preferences for hiring and promoting firefighters. After the decree had been in effect for just over a year, budget deficits forced Memphis to lay off a number of firefighters. Because layoffs pursuant to Memphis' "last hired, first fired" rule would undo the gains made by minority firefighters under the decree, the plaintiffs sought and obtained an injunction requiring Memphis to modify its seniority rules to protect new black employees. We reversed. We held first that the injunction could not be upheld as merely enforcing the terms of the consent decree. *Id.*, at 572–576. The plaintiffs argued in the alternative that the injunction was justified by the change in circumstances brought about by the budget deficits and that it thus constituted a proper modification of the decree. We rejected this argu-

ment, reasoning that "the District Court's authority to impose a modification of a decree is not wholly dependent on the decree," but must also be consistent with the underlying statute. *Id.*, at 576, n. 9. Noting that the Court in *Wright* "held that when a change in the law brought the terms of the decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree," we reasoned: "By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute." 467 U. S., at 576, n. 9. Because we concluded that the District Court would have been precluded by Title VII from issuing an injunction such as the one it had issued after a trial, *id.*, at 577–583, we rejected the plaintiffs' argument and held that "the District Court was precluded from granting such relief over the City's objection" by modifying the consent decree, *id.*, at 576–577, n. 9.

Because § 706(g) is not concerned with voluntary agreements by employers or unions to provide race-conscious relief, there is no inconsistency between it and a consent decree providing such relief, although the court might be barred from ordering the same relief after a trial or, as in *Stotts*, in disputed proceedings to modify a decree entered upon consent.

IV

Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that because the Union was permitted to intervene as of right, its consent was required before the court could approve a consent decree. This argument misconceives the Union's rights in the litigation.

A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that

one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 392, 400 (1982); *Kirkland* v. *New York State Dept. of Correctional Services*, 711 F. 2d 1117, 1126 (CA2 1983), cert. denied, 465 U. S. 1005 (1984). Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that [it] was due . . . ." *Zipes*, *supra*, at 400.

Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. 3B Moore ¶24.16[6], p. 181; see also, *United States Steel Corp.* v. *EPA*, 614 F. 2d 843, 845–846 (CA3 1979); *Wheeler* v. *American Home Products Corp.*, 563 F. 2d 1233, 1237–1238 (CA5 1977). And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. See, *e. g.*, *United States* v. *Ward Baking Co.*, 376 U. S. 327 (1964); *Hughes* v. *United States*, 342 U. S. 353 (1952); *Ashley* v. *City of Jackson*, 464 U. S., at 902 (REHNQUIST, J., dissenting from denial of certiorari); 1B Moore ¶0.409[5], p. 326, n. 2. However, the consent decree entered here does not

bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. See *United States* v. *Armour & Co.*, 402 U. S., at 676–677. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, see *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), under § 703 of Title VII, see *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976); *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), or as a matter of contract, see *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983). Indeed, despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims. Whether it is now too late to raise such claims, or—if not—whether the Union's claims have merit are questions that must be presented in the first instance to the District Court, which has retained jurisdiction to hear such challenges. The only issue before us is whether § 706(g) barred the District Court from approving this consent decree. We hold that it did not. Therefore, the judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion. I write separately to emphasize that the Court's holding is a narrow one. The Court holds that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by § 706(g), whatever those limits may be. Rather, the validity of race-conscious relief provided in a consent decree is to be assessed for consistency with the provisions of § 703, such as § 703(a) and § 703(d), which were at issue in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), and, in the case of a public employer, for consistency with the Fourteenth Amendment. As the Court explains, nonminority employees therefore remain free to challenge the race-conscious measures contemplated by a proposed consent decree as violative of their rights under

§ 703 or the Fourteenth Amendment. Even if nonminority employees do not object to the consent decree, a court should not approve a consent decree that on its face provides for racially preferential treatment that would clearly violate § 703 or the Fourteenth Amendment. Finally, the Court refrains from deciding "what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703." *Ante*, at 517, n. 8.

It is clear, then, that the Court's opinion does not hold or otherwise suggest that there is no "necessary predicate for race-conscious practices . . . favoring one race over another," *post*, at 532 (WHITE, J., dissenting), when those practices are embodied in a voluntary settlement or in a consent decree rather than ordered by the court over the objection of an employer or union. If *Weber* indicates that an employer's or union's "prior discriminatory conduct" is the necessary "predicate for a temporary remedy favoring black employees," *post*, at 532, the Court's opinion leaves that requirement wholly undisturbed. The Court leaves open the question whether the race-conscious measures provided for in the consent decree at issue here were permissible under § 703. I agree with the Court that it is not necessary to decide that question in the present posture of this case, and that any challenge petitioner may make to the consent decree on substantive grounds, whether based on § 703 or the Fourteenth Amendment, should be left for resolution on remand.

JUSTICE WHITE, dissenting.

For several reasons, I am unable to join either the Court's opinion or judgment.

Title VII forbids racially discriminatory employment practices. The general proscription of § 703 is that an employer may not discriminate against either blacks or whites in either hiring or promotion. An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace

employees of any race to make room for employees of another race. Even without displacing any present employees, Title VII would forbid quota hiring or promotion such as reserving every third vacancy or promotion for a black, or for a white for that matter. And if this is the case, it must be wholly untenable to permit a court to enter a consent decree requiring conduct that would violate Title VII.

Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or promotion practices favoring actual or putative employees of a particular race only as a remedy for its own prior discriminatory practices disfavoring members of that race. The Court's opinion pays scant attention to this necessary predicate for race-conscious practices, whether judicially imposed or voluntarily adopted, favoring one race over another. Instead, the Court seeks to avoid the issue whether the consent decree at issue violates the Title VII rights of nonminority employees by limiting itself to holding that § 706(g), which deals with remedies for violations of Title VII, has no application whatsoever to agreements and consent decrees such as are involved in this case. In so doing, the Court not only ignores the fact that the intervenor in this case has never restricted its claims to those based on § 706(g), see Pet. for Cert. 7, but also adopts an unduly restricted view of the place of § 706(g) in the statute.

The Court purports to find support for its position in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), but this is not my understanding of that case. There, it was clear that the company had been hiring only those craftworkers with prior experience and that the craft unions had excluded blacks. Hence, the company's craftworkers were almost totally white. The company and the union negotiated a contract to break this discriminatory pattern, and we held that there was no violation of Title VII. But the company's prior discriminatory conduct provided the predicate for a temporary remedy favoring black employees. The *Weber* opinion

stated that the agreement was a voluntary, private, race-conscious effort to abolish traditional patterns of segregation and hierarchy, *id.*, at 204, and held that the agreement was not an undue attempt to overcome these racial barriers. The case did not hold that without such a predicate, an employer, alone or in agreement with the union, may adopt race-conscious hiring practices without violating Title VII.

Under current law, an employer who litigates a Title VII case to judgment cannot lose unless it is proved that it has discriminated within the meaning of § 703. It is therefore untenable to conclude, as the Court does, that a district court may nevertheless enter a consent decree ordering an employer to hire or promote on a racial basis in a way that could not be ordered after a contested trial. Title VII was not enacted to protect employers against themselves, but to protect applicants and employees from racially discriminatory practices. There is no statutory authority for concluding that if an employer desires to discriminate against a white applicant or employee on racial grounds he may do so without violating Title VII but may not be ordered to do so if he objects. In either case, the harm to the discriminatee is the same, and there is no justification for such conduct other than as a permissible remedy for prior racial discrimination practiced by the employer involved. The Court should not deprecate that requirement and in effect make Title VII's proscription a one-way racial street, thus disserving the goal of ending racial discrimination in this country.

I agree with JUSTICE REHNQUIST that the consent decree in this case was not immune from examination under § 706(g). I also agree with JUSTICE BRENNAN's opinion in *Sheet Metal Workers* v. *EEOC*, *ante*, p. 421, that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for nonvictims being reserved for particularly egregious conduct that a district court concludes cannot be cured by injunctive relief alone. I disagree, however, with the Court in this case

that we need not decide whether the remedy conforms to the limitations of § 706(g); and for the reasons stated below, I am convinced that the remedy imposed in this case exceeds the limits of a permissible remedy for the discriminatory practices that were recited in the consent decree and that required a remedy consonant with the provisions of Title VII. Even if I agreed that § 706(g) is beside the point in the case, the Court itself concedes that there are limits to the racial discrimination that an employer and a union may voluntarily visit upon nonminorities, *ante*, at 520–521, n. 10, and those limits, which in my view run parallel to those placed on judicial decrees by § 706(g), are exceeded in this case.

This case primarily concerns promotions in the Cleveland Fire Department. Reciting that there had been discrimination against minorities in promotions, but identifying no actual victims of such discrimination, the decree required that those proved eligible for promotion after examination be divided into two lists, one list comprising minority eligibles and one list made up of nonminority eligibles. Promotions were to proceed two at a time, one from the minority list and one from the nonminority roster. Of course, the names on each list were ranked in accordance with seniority and examination results. It is also evident, and it is conceded, that under the decree minority eligibles would be promoted who would not have been promoted had the lists been merged; that is, black and Hispanic firefighters who would have ranked below white firefighters eligible for promotion actually displaced and were preferred over the latter on a strictly racial basis. This kind of leapfrogging minorities over senior and better qualified whites is an impermissible remedy under Title VII, just as in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), laying off senior whites was an excessive remedy for an employer's prior discrimination, and just as in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), the Equal Protection Clause did not require or permit the layoff of white teachers

in order to maintain a particular racial balance in the work force.

Section 706(g) provides in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U. S. C. §2000e–5(g).

None of the racially preferred blacks in the present case was shown to have been a victim of discriminatory promotion practices; and none of the whites denied promotion was shown to have been responsible or in any way implicated in the discriminatory practices recited in the decree. In view of the burdens placed on nonminority employees by the decree, the remedy imposed was inequitable, could not have been ordered after a trial, and is no more valid when agreed to by the employer but contested by those who claim their right not to be discriminated against on racial grounds.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Petitioner challenges a District Court decree that ordered preferential treatment in promotions for minority firefighters at the expense of nonminority firefighters who would have been promoted under the City's existing seniority system. There was no requirement in the decree that the minority beneficiaries have been victims of the City's allegedly discriminatory policies. One would have thought that this question was governed by our opinion only two Terms ago in

Firefighters v. *Stotts*, 467 U. S. 561, 578–579 (1984), in which we said:

> "If individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster. This much is clear from *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), and *Teamsters* v. *United States*, [431 U. S. 324 (1977)]. *Teamsters*, however, also made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. . . . Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It therefore seems to us that in light of *Teamsters*, the Court of Appeals imposed on the parties as an adjunct of settlement something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed."

But a majority of the Court today holds that the District Court properly entered the decree in this case because it was a consent decree, whereas *Stotts* involved the *modification* of a consent decree. The Court apparently views a consent decree as one which may be structured almost entirely by the parties, even though the statute which the decree enforces may not authorize any such relief, and, indeed, may actually prohibit such relief.

To support its distinction of a "consent decree" from other types of decrees, the Court finds it necessary to implicitly repudiate language in the two of our cases most closely in

point—*Stotts*, *supra*, and *Railway Employees* v. *Wright*, 364 U. S. 642 (1961), in favor of citations to cases that simply do not speak to the question presently before us, or to cases that deal only with the question whether a party that has consented to a decree may nonetheless challenge it. For the decree entered by the District Court in this case was a consent decree only between Vanguards of Cleveland, an organization of black and Hispanic firefighters employed by the City of Cleveland, and the City; the petitioner union, representing the majority of firefighters, never consented to the decree at all. And the Court's suggestion in Part IV of its opinion that "the consent decree entered here does not bind Local 93 to do or not to do anything," *ante*, at 529–530, verges on the pharisaical; the decree *does* bind the City of Cleveland to give preferential promotions to minority firefighters who have not been shown to be the victims of discrimination in such a way that nonminority union members who would otherwise have received these promotions are obviously injured.

In *Firefighters* v. *Stotts*, *supra*, at 576, n. 9, the Court said:

> "'[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree. *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961)."

The observations of Justice Harlan's opinion for the Court in *Railway Employees* v. *Wright*, *supra*, can best be understood when set forth more fully than it was in *Stotts:*

> "In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to

> modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us." 364 U. S., at 651.

The Court simply ignores the statements in *Stotts* and *Wright*, in favor of bare citations to various other cases and a commentator. But when we ask precisely what these "other cases" say about the issue presented in this case, the answer is virtually nothing. No one would dispute that a consent decree requires the consent of the parties, and that a consent decree may be an effective way to settle a lawsuit. See, *e. g.*, *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88, n. 14 (1981); *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 235–237 (1975); *United States* v. *Armour & Co.*, 402 U. S. 673 (1971). But the Court's excerpt from Moore's Federal Practice, *ante*, at 525, does not aid its conclusions, and is in fact quite misleading in what it fails to include; the full sentence from Moore's reads thus:

> "But the fact remains that the judgment is not an *inter partes* contract; the Court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶0.409[5], pp. 330–331 (1984).

The two prior cases principally relied upon by the Court are *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289 (1880), and *Swift & Co.* v. *United States*, 276 U. S. 311 (1928). No language from either of these cases is quoted to explain their citation for the proposition that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Ante*, at 525. *Ketchum* was an

equity receivership case in federal court only by reason of diversity of citizenship, and there was no question of a federal statute or federal policy to be enforced other than the policy of hearing and deciding cases in which the parties could show diversity jurisdiction. The long and short of the Court's discussion of consent decrees in *Swift & Co.*, *supra*, is that while some of the paragraphs of a decree might be objectionable if they had been challenged on appeal, "the defendants by their consent lost the opportunity of raising the question on appeal." 276 U. S., at 328. Here, of course, petitioner intervened in the District Court pursuant to Federal Rule of Civil Procedure 24(a), and never in any way consented to the entry of the decree.*

Thus the Court abandons considered and repeated observations in *Stotts* and *Wright*, not because they are inconsistent with any cases recognizing that parties may agree in a

*The Court asserts that a three-party dispute may be ended by consent decree even if one of the parties refuses to tender his consent. *Ante*, at 528–530. It cites *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), and *Kirkland* v. *New York State Dept. of Correctional Services*, 711 F. 2d 1117 (CA2 1983), cert. denied, 465 U. S. 1005 (1984), for this novel proposition. But neither of these cases make statements anywhere as broad as the proposition for which they are cited. *Zipes* involved a union that was "permitted" to intervene nine years after the litigation had commenced, after a judgment on liability had been entered and affirmed, and just before a settlement on the remedy was reached. See 455 U. S., at 388–391. *Kirkland* involved permissive intervention under Federal Rule of Civil Procedure 24(b), see 711 F. 2d, at 1124, which of course raises significantly different equitable concerns from intervention as of right. An intervenor as of right becomes a party to the action because "the disposition of the action may as a practical matter impair or impede his ability to protect that interest," Fed. Rule Civ. Proc. 24(a), whereas a permissive intervenor typically becomes a party only to ward off the potential effects of *stare decisis*. The question whether a party or an intervenor as of right may block the entry of a consent decree is therefore left unresolved by these cases. Of course, *a judicial decree* to which the parties agree may be entered over the objections of an intervenor as of right; but the question is whether such a decree is properly called a "consent decree" or a coercive court order.

consent decree to relief broader than a court would otherwise be authorized to impose, but because the statements in *Wright* and *Stotts* are inconsistent with the result which the Court is apparently determined to reach in this case. I would adhere to these well-considered observations, which properly restrain the scope of a consent decree to that of implementation of the federal statute pursuant to which the decree is entered.

Even if I did not regard the above-quoted language in *Stotts* as controlling, I would conclude—just as five Members of this Court did only two years ago in another passage from *Stotts*—that § 706(g) bars the relief which the District Court granted in this case. The critical language of § 706(g)—which is the only section of Title VII dealing with the Court's remedial authority—is:

> "No order of the Court shall require the . . . promotion of an individual . . . if such individual was refused . . . advancement . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . ."

The Court today concludes that this language simply "does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action." *Ante*, at 521. This conclusion rests on the premise that the overriding policy behind § 706(g) is to prevent courts from unduly interfering with the managerial discretion of employers or unions. Focusing on this single policy, the Court finds it natural to conclude that § 706(g) was intended *not* to apply to consent decrees to which an employer consents. But this construction flies in the face of the language just quoted, which by its terms deals with *any* "order" of the Court in a Title VII case. It also conflicts with the legislative history cited in *Stotts* which shows that § 706(g) serves the additional policy of protecting innocent nonminority em-

ployees from the evil of court-sanctioned racial quotas. In *Stotts*, 467 U. S., at 579–582, and nn. 12–15, we said:

> "Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation.[12] That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates. Opponents of the legislation that became Title VII charged that if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially balanced work force even though those persons had not been victims of illegal discrimination.[13] Responding to

"[12] Section 706(g) provides: 'If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a) of this title.' 86 Stat. 107, 42 U. S. C. § 2000e–5(g).

"[13] See H. R. Rep. No. 914, 88th Cong., 1st Sess., 72–73 (1963) (minority report); 110 Cong. Rec. 4764 (remarks of Sen. Ervin and Sen. Hill); *id.*, at 5092, 7418–7420 (remarks of Sen. Robertson); *id.*, at 8500 (remarks of Sen. Smathers); *id.*, at 9034–9035 (remarks of Sen. Stennis and Sen. Tower).

these charges, Senator Humphrey explained the limits on a court's remedial powers as follows:

"'No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [enacted without relevant change as § 706(g)] . . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial "quota" or to achieve a certain racial balance. That bugaboo has been brought up a dozen times, but it is nonexistent.' 110 Cong. Rec. 6549 (1964).

"An interpretative memorandum of the bill entered into the Congressional Record by Senators Clark and Case [14] likewise made clear that a court was not authorized to give preferential treatment to nonvictims. 'No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)] . . . .' *Id.*, at 7214.

"Similar assurances concerning the limits on a court's authority to award make-whole relief were provided by supporters of the bill throughout the legislative process. For example, following passage of the bill in the House, its Republican House sponsors published a memorandum describing the bill. Referring to the remedial powers given the courts by the bill, the memorandum stated: 'Upon conclusion of the trial, the Federal court may en-

"[14] Senators Clark and Case were the bipartisan 'captains' of Title VII. We have previously recognized the authoritative nature of their interpretative memorandum. *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 73 (1982); *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977).

join an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But title VII does not permit the ordering of racial quotas in businesses or unions . . . .' Id.*, at 6566 (emphasis added). In like manner, the principal Senate sponsors, in a bipartisan newsletter delivered during an attempted filibuster to each Senator supporting the bill, explained that '[u]nder title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.' *Id.*, at 14465.[15]"

"[15]The dissent suggests that Congress abandoned this policy in 1972 when it amended § 706(g) to make clear that a court may award 'any other equitable relief' that the court deems appropriate. [467 U. S.], at 619–620. As support for this proposition the dissent notes that prior to 1972, some federal courts had provided remedies to those who had not proved that they were victims. It then observes that in a section-by-section analysis of the bill, its sponsors stated that 'in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.' 118 Cong. Rec. 7167 (1972).

"We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters*, *supra*, at 354, n. 39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law.

"'The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present § 706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice com-

> plained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice* be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.' 118 Cong. Rec., at 7168 (emphasis added).
>
> "As we noted in *Franks*, the 1972 amendments evidence 'emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination.*' 424 U. S., at 764 (emphasis added)."

The Court today repeats arguments made by the dissenters in *Stotts*, which did not command a majority two years ago, and also suggests that a restriction such as § 706(g) should apparently be narrowly construed because, if it were to limit the authority of the court to enter a consent decree, it might hinder settlement of some cases. It would be just as sensible to say that the Norris-LaGuardia Act should be narrowly construed so as not to prevent a consent decree which would violate the Norris-LaGuardia Act since more consent decrees might be entered under that construction of the statute. Congress undoubtedly expressed a preference for conciliation in cases arising under Title VII, but not conciliation reached by violation of its express statutory commands.

Legislative history can obviously be mustered in support of the Court's interpretation of § 706(g), just as *Stotts* referred to the legislative history supporting the construction adopted in that case. But while the legislative history may be fairly apportioned among both sides, the language of the statutes is clear. *No order of the Court* shall require promotion of an individual whose failure to receive promotion was for a reason other than discrimination prohibited by the statute. Here the failure of the District Court to make any finding that the minority firefighters who will receive preferential promotions were the victims of racial discrimination requires us to conclude on this record that the City's failure to advance them was *not* "on account of race, color, religion, sex, or national origin."

Section 706(g) is the one section in the entire text of Title VII which deals with the sort of relief which a court may order in a Title VII case; it is simply incredible that the Court today virtually reads it out of existence. Surely an order of the court entered by the consent of the parties does not become any less an order of the court; in the very words of the sentence quoted by the Court from 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.409[5], pp. 330–331 (1984):

> "[T]he fact remains that the judgment is not an *inter partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication."

Just as it has made an adjudication, it has also entered an order, and that order is by definition subject to the prohibitions of § 706(g).

PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL.

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

No. 85–5. Argued March 3, 1986—Decided July 2, 1986

Section 304(d) of the Clean Air Act provides that "in any action" to enforce the Act the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." In 1977, respondent Delaware Valley Citizens' Council for Clean Air (hereafter respondent) and the United States each filed suit in Federal District Court to compel Pennsylvania to implement a vehicle emission inspection and maintenance program (I/M program) as required by the Act. Pursuant to a consent decree approved in 1978, the State agreed to establish an I/M program for certain counties. The decree required the Pennsylvania Department of Transportation (PennDOT) to seek legislation instituting a franchise I/M program, but, if such legislation was not approved, to promulgate regulations allowing the State to certify private garage facilities to perform the inspections. Implementation of the I/M program, however, did not proceed smoothly. The factual developments following entry of the consent decree divided into several phases, including Phase II in which respondent, after PennDOT had published proposed regulations, continued to monitor the State's performance under the consent decree and submitted comments on the proposed regulations; Phase V in which the Pennsylvania Legislature enacted a statute prohibiting the expenditure of state funds for an I/M program, respondent successfully opposed the State's motion to stay the consent decree, the District Court held the State in contempt and ordered the United States Secretary of Transportation to refrain from approving any projects or award grants for highways in the area covered by the consent decree, with certain exceptions, and the Court of Appeals upheld the District Court; and Phase IX that involved work done by respondent in hearings before the Environmental Protection Agency, during which the State unsuccessfully sought that agency's approval of an I/M program covering a smaller geographic area than was called for in the consent decree. Respondent, pursuant to § 304(d), sought attorney's fees and costs for the work performed after issuance of the consent decree. The District Court awarded respondent attorney's fees that included time spent by counsel in Phases II and IX, holding, over the State's objection, that because the proposed regulations would

have affected respondent's rights under the consent decree, it had a unique interest in the state and federal administrative proceedings that made its counsel's work sufficiently related to the litigation to be compensable. As to Phase V, the District Court, based on the "superior quality" of counsel's performance in that phase, applied a multiplier of two to adjust the lodestar amount (the product of reasonable hours times a reasonable rate) of attorney's fees. The Court of Appeals affirmed the fee awards for Phases II, V, and IX.

Held:

1. Section 304(d) authorizes attorney's fees for time spent by counsel in Phases II and IX. The fact that the work done by counsel in those phases did not occur in the context of traditional judicial litigation does not preclude an award of reasonable attorney's fees under § 304(d) for that work. Participation in the administrative proceedings was crucial to the vindication of respondent's rights under the consent decree, and compensation for these activities was entirely proper and well within the "zone of discretion" afforded the District Court. Pp. 557–561.

2. The lower courts erred in increasing the attorney's fee award to respondent for Phase V based on the "superior quality" of counsel's performance. Pp. 561–568.

(a) The lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to receive legal assistance. Pp. 561–566.

(b) Here, the evidence submitted by respondent to support its petition for attorney's fees does not indicate why the lodestar figure did not provide a reasonable fee award reflecting the quality of representation provided during Phase V. Respondent presented no evidence as to what made the results it obtained during that phase so "outstanding" or why the lodestar figure was far below awards made in similar cases. Neither the District Court nor the Court of Appeals made findings as to why the lodestar amount was unreasonable. In the absence of such evidence and findings, there was no reason to increase the fee award in Phase V for the quality of representation. Pp. 566–568.

762 F. 2d 272, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, and in Part II of which BRENNAN, J., joined, *post*, p. 568.

Jay C. Waldman argued the cause for petitioners. With him on the briefs were *Henry G. Barr*, *Spencer A. Manthorpe*, *John M. Hrubovcak*, and *John P. Krill*.

Kathryn A. Oberly argued the cause for the United States as respondent under this Court's Rule 19.6 in support of petitioners. With her on the brief were *Solicitor General Fried*, *F. Henry Habicht II*, and *Deputy Solicitor General Geller*.

James D. Crawford argued the cause for respondents. With him on the brief was *Joyce S. Meyers*.*

JUSTICE WHITE delivered the opinion of the Court.

The questions presented in this case are first, whether the Clean Air Act, 42 U. S. C. § 7401 *et seq.*, authorizes attorney's fees awards for time spent by counsel participating in regulatory proceedings; second, whether a court may enhance an award to reflect superior quality of representation rendered by plaintiff's counsel; and third, whether enhance-

*A brief of *amici curiae* was filed for the State of Arizona et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, and *Suzanne E. Durrell*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Joseph I. Lieberman*, Attorney General of Connecticut, *Michael J. Bowers*, Attorney General of Georgia, *Richard G. Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, and *Louis J. Caruso*, Solicitor General, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Stephen E. Merrill*, Attorney General of New Hampshire, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael C. Turpen*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Jeffrey L. Amestoy*, Attorney General of Vermont, *William Broaddus*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles G. Brown*, Attorney General of West Virginia, and *A. G. McClintock*, Attorney General of Wyoming.

ment of the fee is proper because of plaintiff's risk of not prevailing on the merits.

I

In 1977, the Delaware Valley Citizens' Council for Clean Air (Delaware Valley) and the United States each filed suit to compel the Commonwealth of Pennsylvania to implement a vehicle emission inspection and maintenance program (I/M program) as required by the Clean Air Act. See 42 U. S. C. § 7410. Pursuant to a consent decree approved in 1978, the Commonwealth agreed to establish an I/M program for 10 counties in the Philadelphia and Pittsburgh areas by August 1, 1980. The decree called for the Pennsylvania Department of Transportation (PennDOT) to seek legislation instituting a franchise I/M system under which the Commonwealth would contract with garage owners for the establishment of inspection stations. If the legislature failed to approve such a system, then the decree required PennDOT to promulgate regulations allowing Pennsylvania to certify a number of private garage facilities to perform the inspections. In addition, the decree provided for Pennsylvania to pay Delaware Valley $30,000 for attorney's fees and costs incurred prior to the entry of the consent decree.

Entry of the consent decree marked only the beginning of this story, for implementation of the I/M program did not proceed smoothly. For simplicity's sake, we will summarize the relevant factual developments into nine phases, with each phase relating to a different aspect of the litigation. Not only is this the method used by the parties and followed by both lower courts, but it is a system for analyzing requests for attorney's fees and costs that appears to be useful in protracted litigation.

Phase I. After entry of the consent decree, the Pennsylvania Legislature refused to enact a franchise system. Under the decree, PennDOT then had until July 1, 1979 to publish the necessary regulations. When PennDOT failed to comply, Delaware Valley moved to have the Commonwealth

held in contempt; PennDOT published the proposed regulations, however, before the scheduled hearing on the motion. The court thus refrained from finding the Commonwealth in contempt, but ordered the parties to establish a revised schedule for implementation of the I/M program approved by the consent decree.

Phase II. After PennDOT published the proposed I/M program regulations, Delaware Valley continued to monitor the Commonwealth's performance under the consent decree, and submitted comments on the regulations which were published in the Pennsylvania Bulletin.

Phase III. In late 1979, the Commonwealth requested a modification of the decree delaying implementation of the I/M program until May 1981. With Delaware Valley's approval, the District Court approved the extension in March 1980.

Phase IV. By February 1981, the Commonwealth still had not published final regulations covering the type of equipment which private garages needed to have in order to become certified inspection stations. The Commonwealth thus asked Delaware Valley to consent to a further postponement of the implementation date to January 1, 1983. The Commonwealth argued that the United States Environmental Protection Agency had recommended a type of emission analyzer different from the one required under the consent decree, but at that time no manufacturer had produced even a prototype of such machinery.

After extensive negotiations over this extension request, the parties failed to reach an agreement. The Commonwealth then filed a motion asking the District Court to grant the second extension and delay the starting date of the I/M program until January 1, 1983. In response, Delaware Valley sought to have the court declare the Commonwealth to be in violation of the consent decree, and requested numerous modifications to the consent decree. On May 20, 1981, the court issued an order finding the Commonwealth in violation of the decree, denying the motion for a further extension, and

denying the modifications submitted by Delaware Valley. App. 25a–28a. On June 16, the court denied the Commonwealth's motion for reconsideration, but approved May 1, 1982, as the new deadline for implementation of the I/M program. *Id.*, at 44a–49a. The Commonwealth appealed both the May 20 and June 16 orders, both of which were affirmed by the Court of Appeals. *Delaware Valley Citizens' Council for Clean Air* v. *Commonwealth*, 674 F. 2d 976 (CA3), cert. denied, 459 U. S. 905 (1982).

Phase V. Following the District Court's order of June 16, the Pennsylvania General Assembly enacted a statute, H. B. 456, over the Governor's veto, which prohibited the expenditure of state funds by the Executive Branch for the implementation of the I/M program. Act of Oct. 5, 1981, No. 99, 1981 Pa. Laws 4. PennDOT and the remainder of the Executive Branch promptly ceased all activities related to implementing the I/M program, except for publication of the final regulations establishing specifications for the emissions analysis equipment to be used by garage owners wishing to participate as inspection locations. 11 Pa. Bull. 3519 (Oct. 10, 1981).

The Commonwealth moved to stay implementation of the consent decree in light of H. B. 456. Delaware Valley opposed that motion, and sought to have the court declare the Commonwealth in contempt and apply sanctions. The court denied the Commonwealth's motion for a stay and held the Commonwealth in civil contempt. *Delaware Valley Citizens' Council for Clean Air* v. *Commonwealth*, 533 F. Supp. 869 (ED Pa. 1982). As a sanction, the court ordered the United States Secretary of Transportation to refrain from approving any projects, or awarding any grants, for highways in the two areas covered by the consent decree, except for projects required for purposes of safety, mass transit, or air quality improvement. *Id.*, at 884–885. Once again, the Commonwealth appealed, and once again, the Court of Appeals up-

held the District Court's orders. 678 F. 2d 470 (CA3), cert. denied, 459 U. S. 969 (1982).

Phase VI. After the filing of the consent decree, the city of Pittsburgh and several groups of Pennsylvania legislators attempted to intervene in the litigation. Delaware Valley successfully opposed all of these attempts. *Delaware Valley Citizens' Council for Clean Air* v. *Commonwealth*, 674 F. 2d 970 (CA3), stay denied, 458 U. S. 1125 (1982).

Phase VII. As noted above, a portion of the District Court's contempt order prevented the United States Secretary of Transportation from authorizing the expenditure of any federal funds for federal highway projects in Pennsylvania that did not fall into certain categories. In late 1982, the United States approved seven projects for funding, certifying that they would either improve safety or improve air quality. These certifications were submitted to both Delaware Valley and the District Court. The court found that five of the projects did not qualify as exemptions under the terms of its prior order, and only approved two proposals for federal funding. *Delaware Valley Citizens' Council for Clean Air* v. *Commonwealth*, 551 F. Supp. 827 (ED Pa. 1982).

Phase VIII. On May 3, 1983, the Pennsylvania General Assembly finally passed legislation authorizing the Commonwealth to proceed with implementation of the I/M program, and the Governor signed the bill into law the next day. 75 Pa. Cons. Stat. §§ 4706–4707 (1984). Subsequently, Delaware Valley and the Commonwealth negotiated a new compliance schedule, under which the I/M program would begin by June 1, 1984. The District Court approved of this new schedule, and vacated its earlier contempt sanctions.

Phase IX. This phase includes work done by Delaware Valley in hearings before the Environmental Protection Agency, during which, *inter alia*, the Commonwealth unsuc-

cessfully sought that agency's approval of an I/M program covering a smaller geographic area.[1]

Delaware Valley then sought attorney's fees and costs for the work performed after issuance of the consent decree in 1978. App. 50a–86a. The District Court awarded Delaware Valley $209,813 in attorney's fees and an additional $6,675.03 in costs. 581 F. Supp. 1412, 1433 (ED Pa. 1984). To calculate the legal fee award, the District Court first determined:

> "[T]he number of hours reasonably necessary to perform the legal services for which compensation is sought. The reasonable number of hours is then multiplied by a reasonable hourly rate for the attorney providing the services, the latter being based on the court's determination of the attorney's reputation, status and type of activity for which the attorney is seeking compensation. The sum of the two figures is the 'lodestar' which can then be adjusted upward or downward based on the contingency of success, and the quality of an attorney's work. In all instances plaintiffs have the burden of establishing entitlement to the award claimed and any

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[1] This phase also includes work done by Delaware Valley in related state-court litigation. *Burd* v. *Pennsylvania Dept. of Transportation*, 66 Pa. Commw. 129, 443 A. 2d 1197 (1982), rev'd on other grounds *sub nom. Scanlon* v. *Pennsylvania Dept. of Transportation*, 502 Pa. 577, 467 A. 2d 1108 (1983), was brought by a group of state legislators to challenge the Executive Branch's authority to implement an I/M program. On appeal, Delaware Valley submitted an *amicus* brief supporting the Commonwealth. The Pennsylvania Supreme Court determined that state officials had no authority to enter into the federal consent decree in 1978, held the decree to be a "nullity," *id.*, at 590, 467 A. 2d, at 1115, and remanded the case to the Commonwealth Court, which later enjoined PennDOT from following the terms of the decree. The Commonwealth then moved to vacate the consent decree pursuant to Federal Rule of Civil Procedure 60(b). The District Court denied the motion, and the Court of Appeals affirmed. *Delaware Valley Citizens' Council for Clean Air* v. *Commonwealth*, 755 F. 2d 38 (CA3), cert. denied, 474 U. S. 819 (1985).

adjustment to the 'lodestar.'" *Id.*, at 1419 [citations omitted].

The court used three separate hourly rates in making its award. Work which the court found to be "most difficult" was compensated at an hourly rate of $100. For work that could have been done "by an attorney working at the associate level," the hourly rate was set at $65. And for work "which required little or no legal ability," the court allowed an hourly rate of $25. *Id.*, at 1422.

For the most part, the hours for which Delaware Valley sought compensation were those spent on the postdecree litigation itself.[2] In Phases II and IX, however, Pennsylvania objected that Delaware Valley was seeking compensation for work done in only tangentially related state and federal administrative proceedings. The District Court rejected this argument, and found that because the proposed regulations would have affected Delaware Valley's rights under the consent decree, it had a unique interest in the proceedings that made its work sufficiently related to the litigation to be compensable. See *id.*, at 1423, 1429–1430.

After determining the "lodestar" amounts for all phases of the litigation, the court next considered Delaware Valley's request for "multipliers" to adjust these figures for "the con-

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[2] In determining the lodestar amounts, the District Court eliminated more than one-third of all of the hours submitted by Delaware Valley. Some of these hours were eliminated because they were not documented in sufficient detail. 581 F. Supp., at 1420–1421. Additional hours were excluded because the court disallowed all time spent by attorneys in preparing for or in attending hearings in which another attorney for Delaware Valley was the principal advocate. *Id.*, at 1421. The court also denied a certain number of hours for activities in related proceedings that it found were not necessary to protect Delaware Valley's rights under the consent decree. *Id.*, at 1430. Finally, a significant number of hours were eliminated based on the court's conclusion that the time spent on the particular activity was "excessive," or that a less amount of time was "reasonable." See *e. g.*, *id.*, at 1423, 1425, 1429.

tingent nature of the case, the quality of the work performed and the results obtained." *Id.*, at 1431, citing *Hensley* v. *Eckerhart*, 461 U. S. 424, 434–435 (1983). Given that the case involved new legal theories with little precedent, and that Delaware Valley was forced to go up against both the Federal Government and the Commonwealth of Pennsylvania to obtain the consent decree initially and then to protect it from being overturned, the court found "[t]he contingent nature of [Delaware Valley's] success [to have] been apparent throughout this litigation." 581 Supp., at 1431. The court also found that Delaware Valley's work during Phase V was "superior," and that an "[a]n increase based on the quality of work which culminated in an outstanding result is fully justified." *Ibid.* (citation omitted).

Accordingly, the District Court applied a multiplier of two to the awards in Phases IV, V, and VII to reflect the low likelihood of success Delaware Valley faced in those stages of the litigation. In addition, the court added a separate multiplier of two to Phase V to adjust the lodestar for the high quality of representation provided in that phase. The court's final calculation of the fee award for each of the nine phases was as follows:[3]

	Lodestar	*Multiplier*	*Total*
Phase I	$ 4,478.50	—	$ 4,478.50
Phase II	1,722.50	—	1,722.50
Phase III	1,745.00	—	1,745.00
Phase IV	36,711.50	2	73,423.00
Phase V	27,372.50	4	109,490.00
Phase VI	1,820.00	—	1,820.00
Phase VII	5,370.50	2	10,741.00
Phase VIII	1,560.00	—	1,560.00
Phase IX	1,453.00	—	1,453.00

[3]The District Court also awarded Delaware Valley an additional $3,380 in legal fees for the work done preparing the fee petition itself. 581 F. Supp., at 1431.

The Court of Appeals for the Third Circuit affirmed. 762 F. 2d 272 (1985). The court analogized § 304(d) of the Clean Air Act, which provides for counsels' fees, to other statutory attorney's fee provisions, and held that "the jurisprudence regarding the calculation of reasonable attorneys fees developed in connection with other attorneys fees statutes—particularly [42 U. S. C.] § 1988—is applicable to cases brought pursuant to § 304(d)." 762 F. 2d, at 275.

The court affirmed the award of fees for time spent commenting on the Commonwealth's proposed regulations in Phase II for the reasons stated by the District Court. *Id.*, at 276–277. The Court of Appeals also agreed that the fee award for the time devoted by Delaware Valley in Phase IX was proper "because adoption of the state plan modification would have impaired the rights won by [Delaware Valley] in the consent decree." *Id.*, at 277. The court took note of *Webb* v. *Board of Ed. of Dyer County*, 471 U. S. 234 (1985), in which this Court held that time spent on "optional administrative proceedings" may be compensable under § 1988 if the work was "both useful and of a type ordinarily necessary to advance the . . . litigation" to the point where the party succeeded. *Id.*, at 243. The Court of Appeals found that the work of counsel in Phases II and IX "was useful and necessary for securing full enforcement of the decree," and that the District Court's fee awards for these two phases were consistent with *Webb*. 762 F. 2d., at 277, n. 7.

With respect to the use of multipliers, the Court of Appeals concluded that "this was 'the rare case where the fee applicant offer[ed] specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."'" *Id.*, at 280, quoting *Blum* v. *Stenson*, 465 U. S. 886, 899 (1984). The court also approved the use of "contingency" multipliers to compensate Delaware Valley for the risk of not prevailing. The court stated:

> "Unlike *Blum*, [Delaware Valley] specifically identified the risks inherent in this litigation in its brief to the district court and, although the Supreme Court considers it an open question whether contingency of success can properly justify a lodestar increase, we have resolved the question in this court. *See Hall* v. *Borough of Roselle*, 747 F. 2d 838 (3d Cir.1984); *Lindy [Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.]*, 540 F. 2d [102,] 117 [(CA3 1976) (en banc)]." 762 F. 2d, at 282.

The court also rejected the Commonwealth's arguments that the District Court failed to make specific findings of fact in awarding the multipliers, and that the court abused its discretion in determining the size of the multipliers. *Ibid.*[4] We granted certiorari, 474 U. S. 815 (1985), and now affirm in part and reverse in part.

II

Section 304(d) of the Clean Air Act, 84 Stat. 1706, 42 U. S. C. § 7604(d), provides, in pertinent part, as follows:

> "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

The Commonwealth argues that the plain language of the statute clearly limits the award of fees to "costs of litigation"

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[4] Judge Becker dissented from the court's affirmance of the award of multipliers. The risk of not prevailing in Phases IV and VII was "simply insufficient to justify the very substantial multiplier awarded by the district court," because in both phases, the Commonwealth had the burden of proof in seeking to modify the consent decree. 762 F. 2d, at 282, n. 12. As for the multiplier of four used in Phase V, Judge Becker concluded that, "even assuming an award of quality and contingency multipliers is appropriate . . . , the multipliers must be recalculated because the case was not so very rare as to justify in light of *Blum* the award of this extraordinary multiplier." *Ibid.* (citations omitted).

for "action[s] brought" under the Act, and that the lower courts erred in awarding attorney's fees for Delaware Valley's activities in Phases II and IX, both of which involved the submission of comments on draft regulations to administrative agencies. The United States echoes these assertions, and contends that the "actions" contemplated by § 304(d) are judicial actions, not administrative proceedings. We reject these limiting constructions on the scope of § 304(d).

Although it is true that the proceedings involved in Phases II and IX were not "judicial" in the sense that they did not occur in a courtroom or involve "traditional" legal work such as examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree. This case did not involve a single tortious act by the Commonwealth that resulted in a discrete injury to Delaware Valley, nor was the harm alleged the kind that could be remedied by a mere award of damages or the entry of declaratory relief. Instead, Delaware Valley filed suit to force the Commonwealth to comply with its obligations under the Clean Air Act to develop and implement an emissions inspection and maintenance program covering 10 counties surrounding two major metropolitan areas. To this end, the consent decree provided detailed instructions as to how the program was to be developed and the specific dates by which these tasks were to be accomplished.

Protection of the full scope of relief afforded by the consent decree was thus crucial to safeguard the interests asserted by Delaware Valley; and enforcement of the decree, whether in the courtroom before a judge, or in front of a regulatory agency with power to modify the substance of the program ordered by the court, involved the type of work which is properly compensable as a cost of litigation under § 304. In a

case of this kind, measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the matters upon which Delaware Valley prevailed in securing the consent decree.

Several courts have held that, in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, postjudgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee. See, *e. g.*, *Garrity* v. *Sununu*, 752 F. 2d 727, 738–739 (CA1 1984); *Bond* v. *Stanton*, 630 F. 2d 1231, 1233 (CA7 1980); *Miller* v. *Carson*, 628 F. 2d 346, 348 (CA5 1980); *Northcross* v. *Board of Ed. of Memphis City Schools*, 611 F. 2d 624, 637 (CA6 1979), cert. denied, 447 U. S. 911 (1980). Although § 1988 authorizes fees in "any action or proceeding" brought to enforce the Civil Rights Acts, and § 304(d) applies only to "any action" brought under the Clean Air Act, this distinction is not a sufficient indication that Congress intended § 304(d) to apply only to judicial, and not administrative, proceedings.

First, in several instances in the legislative history of this section, Congress used the words "action" and "proceeding" interchangeably. See, *e. g.*, S. Rep. No. 91–1196, p. 37 (1970); 1 Legislative History of the Clean Air Amendments of 1970 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–18, p. 136 (1974) (Senate Consideration of the Report of the Conference Committee, Dec. 18, 1970) (Leg. Hist.). The lack of the phrase "or proceedings" on the face of § 304(d) is not necessarily indicative of the intended scope of the section.

Second, and more importantly, the purposes behind both § 304(d) and § 1988 are nearly identical, which lends credence to the idea that they should be interpreted in a similar manner. *Northcross* v. *Memphis Board of Ed.*, 412 U. S. 427, 428 (1973). Section 1988 was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts. *Hensley* v.

Eckerhart, 461 U. S., at 429. See S. Rep. No. 94–1011, p. 2 (1976). "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens," and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed. H. R. Rep. No. 94–1558, p. 1 (1976).

Similarly, § 304(a) authorizes private citizens to sue any person violating the Clean Air Act, and § 304(d) provides for reasonable attorney's fees whenever appropriate. Congress enacted § 304 specifically to encourage "citizen participation in the enforcement of standards and regulations established under this Act," S. Rep. No. 91–1196, p. 36 (1970), and intended the section "to afford . . . citizens . . . very broad opportunities to participate in the effort to prevent and abate air pollution." 1 Leg. Hist., p. 138 (Senate Consideration of the Report of the Conference Committee, Dec. 18, 1970) (remarks of Sen. Eagleton). Congress found that "Government initiative in seeking enforcement under the Clean Air Act has been restrained," S. Rep. No. 91–1196, at 36, and urged the courts to "recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." *Id.*, at 38.

Given the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner. We hold, therefore, that the fact that the work done by counsel in Phases II and IX did not occur in the context of traditional judicial litigation does not preclude an award of reasonable attorney's fees under § 304(d) for the work done during these portions of the present action.[5]

[5] We express no judgment on the question whether an award of attorney's fees is appropriate in federal administrative proceedings when there is no connected court action in which fees are recoverable.

This conclusion is consistent with our opinion in *Webb* v. *Board of Ed. of Dyer County*, 471 U. S. 234 (1985). There, we noted that for the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation. *Id.*, at 243. Application of this standard is left to the discretion of the district court. *Id.*, at 243–244.

Here, the District Court found that, as for Phase II, Delaware Valley had a unique interest in the proposed regulation "based on a desire to ensure compliance with the consent decree and to protect [its] rights thereunder. The usefulness of [Delaware Valley's] comments was manifested in the revisions that were made to the original regulations." 581 F. Supp., at 1423. Similarly, the court found that counsel's work during Phase IX helped to protect the relief awarded under the consent decree, as any modification of the I/M program by the Environmental Protection Agency would have adversely affected Delaware Valley's rights under the decree. *Id.*, at 1430. We agree that participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree and find that compensation for these activities was entirely proper and well within the "zone of discretion" afforded the District Court. *Hensley*, *supra*, at 442 (BRENNAN, J., concurring in part and dissenting in part). We thus affirm the award of fees for work done in Phases II and IX.

III

A

It is well established that, under the "American Rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). There are exceptions to this principle, the major one being

congressional authorization for the courts to require one party to award attorney's fees to the other.[6] There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be "reasonable."

Courts have struggled to formulate the proper measure for determining the "reasonableness" of a particular fee award. One method, first employed by the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (1974), involved consideration of 12 factors.[7] *Johnson* was widely followed by other courts, and was cited with approval by both the House and the Senate when § 1988 was enacted into law. H. R. Rep. No. 94–1558, p. 8 (1976); S. Rep. No. 94–1011, p. 6 (1976).

This approach required trial courts to consider the elements that go into determining the propriety of legal fees and

[6] In addition to this statutory exception, courts traditionally have recognized three other other exceptions to the "American Rule." First, courts can enforce their own orders by assessing attorney's fees for the wilfull violation of a court order. *Alyeska*, 421 U. S., at 258. Second, courts are empowered to award fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.*, at 258–259. And finally, a court's equitable powers allow it to award fees in commercial litigation to plaintiffs who recovered a "common fund" for themselves and others through securities or antitrust litigation. *Id.*, at 257. None of these situations are involved in the present case.

[7] The 12 factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717–719. These factors were taken from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2–106 (1980).

was intended to provide appellate courts with more substantial and objective records on which to review trial court determinations. See *Johnson*, *supra*, at 717. This mode of analysis, however, was not without its shortcomings. Its major fault was that it gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results.

For this reason, the Third Circuit developed another method of calculating "reasonable" attorney's fees. This method, known as the "lodestar" approach, involved two steps. First, the court was to calculate the "lodestar," determined by multiplying the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved. *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 167 (CA3 1973) *(Lindy I)*. Second, using the lodestar figure as a starting point, the court could then make adjustments to this figure, in light of "(1) the contingent nature of the case, reflecting the likelihood that hours were invested and expenses incurred without assurance of compensation; and (2) the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained." *Merola* v. *Atlantic Richfield Co.*, 515 F. 2d 165, 168 (CA3 1975); *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator & Standard Sanitary Corp.*, 540 F. 2d 102, 117 (CA3 1976) *(Lindy II)*. This formulation emphasized the amount of time expended by the attorneys, and provided a more analytical framework for lower courts to follow than the unguided "factors" approach provided by *Johnson*. On the other hand, allowing the courts to adjust the lodestar amount based on considerations of the "riskiness" of the lawsuit and the quality of the attorney's work could still produce inconsistent and arbitrary fee awards.

We first addressed the question of the proper manner in which to determine a "reasonable" attorney's fee in *Hensley*

v. *Eckerhart*, 461 U. S. 424 (1983). We there adopted a hybrid approach that shared elements of both *Johnson* and the lodestar method of calculation. "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. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U. S., at 433. To this extent, the method endorsed in *Hensley* follows the Third Circuit's description of the first step of the lodestar approach. Moreover, we went on to state: "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward. . . ." *Id.*, at 434. We then took a more expansive view of what those "other considerations" might be, however, noting that "[t]he district court also may consider [the] factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717–719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.*, at 434, n. 9 (citation omitted).

We further refined our views in *Blum* v. *Stenson*, 465 U. S. 886 (1984). *Blum* restated that the proper first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.*, at 888. We emphasized, however, that the figure resulting from this calculation is more than a mere "rough guess" or initial approximation of the final award to made. Instead, we found that "[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee" to which counsel is entitled. *Id.*, at 897 (emphasis added).

Blum also limited the factors which a district court may consider in determining whether to make adjustments to

the lodestar amount. Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar, we specifically held in *Blum* that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. 465 U. S., at 898–900. Although upward adjustments of the lodestar figure are still permissible, *id.*, at 901, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts. See *id.*, at 898–901.

A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. Hence, if plaintiffs, such as Delaware Valley, find it possible to engage a lawyer based on the statutory assurance that he will be paid a "reasonable fee," the purpose behind the fee-shifting statute has been satisfied.

Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly

rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

B

With this teaching from our prior cases in mind, we sustain the Commonwealth's contention that the lower courts erred in increasing the fee award to Delaware Valley in Phase V based on the "superior quality" of counsel's performance. Relying on the statement in *Blum* that an upward adjustment may be justified in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional," the Third Circuit affirmed both the District Court's findings concerning the "superior quality" of Delaware Valley's counsel's work in Phase V, and the "outstanding result" obtained in this phase and its holding that an increase in this portion of the lodestar by a factor of two was appropriate. 762 F. 2d, at 280–282.

We cannot agree. Because considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of "double counting."

Furthermore, we are unpersuaded that the lodestar amount determined for Phase V in this case did not fully reflect the quality and competence of the legal services rendered by Delaware Valley's lawyers. For this portion of the litigation, counsel sought compensation for approximately 620 hours of work. 581 F. Supp., at 1427. Of these, the District Court allowed compensation for 324 hours. The Dis-

trict Court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of "superior quality."

We also note that of the 324 hours compensated, 26 hours were compensated at $25 per hour, 88 hours were billed at an hourly rate of $65, and the remaining 210 hours were paid at $100 per hour. Id., at 1427–1428. By the court's own definition, the $25 rate was applied to work "which required little or no legal ability," and the $65 rate was proper for work "that could have been done by an attorney working at the associate level." *Id.*, at 1422. Given that nearly one-third of all of the hours reasonably spent on this phase were not compensated at the hourly rate for work which the court found to be "most difficult," it is hard to see what made the quality of representation for those hours so "superior" that it was not reflected in the hourly rate used to determine the lodestar amount. This conclusion is reinforced by the fact that the Third Circuit expressly found that the $100 hourly rate for the attorney compensated for the 210 hours was "plainly appropriate" given that he was an "inexperienced attorne[y]" without "any prior significant litigation experience." 762 F. 2d, at 279, n. 10. See also 581 F. Supp., at 1422 (District Court set fees based on evaluation of "the status, reputation and experience of the individual attorneys who performed the activity").

In sum, viewing the evidence submitted by Delaware Valley to support its petition for attorney's fees, there is no indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation provided during Phase V of the litigation. Clearly, Delaware Valley was able to obtain counsel without any promise of reward for extraordinary performance. Furthermore, Delaware Valley presented no specific evidence as to what made the results it obtained during this phase so "outstanding," nor did it pro-

vide any indication that the lodestar figure for this portion of the case was far below awards made in similar cases where the court found equally superior quality of performance. Finally, neither the District Court nor the Court of Appeals made detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate. In the absence of such evidence and such findings, we find no reason to increase the fee award in Phase V for the quality of representation.

IV

There remains the question of upward adjustment, by way of multipliers or enhancement of the lodestar, based on the likelihood of success, or to put it another way, the risk of loss. This is the question that we left open in *Blum* and on which the Courts of Appeals are not entirely in accord. We are of the view that our resolution of the issue would be benefited by reargument and hence we do not decide it now. Accordingly, an order will issue restoring the case to the argument docket insofar as it raises the question whether attorney's fees chargeable to a losing defendant under the Clean Air Act and the comparable statutes may be enhanced based on the risk of loss, and if so, to what extent.

The judgment below is therefore affirmed insofar as it upheld the award of attorney's fees for the work done in Phases II and IX and, except for the multiplier for risk, is otherwise reversed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BRENNAN joins as to Part II, concurring in part and dissenting in part.

I

I dissent from the piecemeal adjudication of the issues in this case. I would set the entire case, and not just a part of

it, for reargument next Term. This rush to judgment on certain issues will serve only to confuse the federal courts until the entire case is decided. But the Court insists on covering the merits in part, and so I turn to them.

II

I join only Parts I and II of the Court's opinion. In Part III, the Court purports to follow *Blum* v. *Stenson*, 465 U. S. 886 (1984), in which we held that an adjustment for quality was available "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.*, at 899, citing *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983). The Court today, however, improperly heightens the showing required to the point where it may be virtually impossible for a plaintiff to meet. Compare *Blum*, *supra*, at 899, with *ante*, at 567–568.

Although the District Court's decision was issued before *Blum*, its quality adjustment in Phase V was in full accord with the standards subsequently laid down in *Blum*. Compare 581 F. Supp. 1412, 1431 (ED Pa. 1984), with 465 U. S., at 899. The proper standard of review of an attorney's fee award is abuse of discretion. *Evans* v. *Jeff D.*, 475 U. S. 717, 742–743 (1986); *Blum*, *supra*, at 896. I do not think the District Court abused its discretion in multiplying by two the lodestar for Phase V in order to adjust for quality. If the majority applied the proper, deferential standard of review on the quality issue rather than substituting its judgment for that of the District Court, see *ante*, at 566–567, it may have reached the same result as I do.

ROSE, WARDEN *v.* CLARK

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

No. 84-1974. Argued March 24, 1986—Decided July 2, 1986

Respondent was charged with the murder of two persons arising from the same incident. At his trial in a Tennessee state court he defended on the ground, *inter alia*, that he was either insane or incapable of forming the requisite intent to kill the victims. The court instructed the jury on both first-degree murder, which requires proof of premeditation and deliberation under Tennessee law, and second-degree murder, which requires proof of malice but not of planning and premeditation. The court then instructed the jury that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption" and that "if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously." The jury found respondent guilty of first-degree murder of one victim and of second-degree murder of the other. The Tennessee Court of Appeals affirmed, rejecting respondent's argument that the malice instruction impermissibly shifted the burden of proof as to malice. Respondent then sought habeas corpus relief in Federal District Court, which held that the malice instruction was unconstitutional under *Sandstrom* v. *Montana*, 442 U. S. 510, wherein it was held that a jury instruction creating a presumption of malice that has the effect of either eliminating intent as an issue, or of shifting the burden of proof as to intent to the defendant, violates due process. The District Court then went on to find that the error could not be deemed harmless because respondent had "relied upon a *mens rea* defense." The United States Court of Appeals affirmed.

Held:

1. The harmless-error standard of *Chapman* v. *California*, 386 U. S. 18, under which a reviewing court should not set aside an otherwise valid conviction if the court may confidently say, on the whole record, that the constitutional error in question was harmless beyond a reasonable doubt, applies to the erroneous malice instruction in this case. Respondent had an opportunity to present evidence and argue in support of his innocence, he was tried by an impartial jury, supervised by an impartial judge, and, aside from the malice instruction, the jury was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element of both first- and second-degree murder.

In this context, the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction. The error in the instruction of impermissibly shifting the burden of proof on malice was not "so basic to a fair trial" that it could never be harmless. The purpose behind the *Sandstrom* rule of ensuring that only the guilty are punished supports this conclusion. Nor is a *Sandstrom* error equivalent to a directed verdict for the State, since when a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. Pp. 576–582.

2. Although this Court has authority to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, it does so sparingly. Accordingly, since the United States Court of Appeals has not yet applied *Chapman* to the facts of this case, the case is remanded to that court to determine whether the error in question was harmless beyond a reasonable doubt. Pp. 583–584.

762 F. 2d 1006, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 584. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 585. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 590.

W. J. Michael Cody, Attorney General of Tennessee, argued the cause for petitioner. With him on the briefs were *Jerry L. Smith*, Deputy Attorney General, and *Kymberly Lynn Anne Hattaway*, Assistant Attorney General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Scott Daniel argued the cause and filed a brief for respondent.*

**John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, and *Ronald E. Niver* and *David D. Salmon*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Burt Neuborne* and *Charles S. Sims;* and

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985).[1]

I

On December 30, 1978, Charles Browning and Joy Faulk were shot to death while they sat in Browning's pickup truck in a remote area of Rutherford County, Tennessee. Respondent Stanley Clark, Faulk's former boyfriend, was charged with the murders.

The evidence introduced at trial showed that Browning, Faulk, and Faulk's two young children (aged 6 and 3) had been driving in Rutherford County on the night of the murders. According to the older child, another vehicle followed Browning's truck for about an hour. Browning pulled his truck into a private driveway, apparently to let the other ve-

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for the National Association of Criminal Defense Lawyers et al. by *Kim Robert Fawcett* and *Stephen A. Saltzburg*.

[1] In *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), the Court was equally divided on the question whether ordinary harmless-error analysis was appropriate in cases of *Sandstrom* error. Compare 460 U. S., at 84–87 (plurality opinion) (such error "is the functional equivalent of a directed verdict" on intent, and is therefore harmless only when the defendant concedes intent), with *id.*, at 95–99 (POWELL, J., dissenting) (*Chapman* standard applies to *Sandstrom* error). Cf. 460 U. S., at 88 (STEVENS, J., concurring in judgment) (joining affirmance of state-court decision that *Sandstrom* error could not be harmless, but on the ground that the decision was actually one of state law). The *Johnson* plurality noted that state and federal courts were in conflict on this issue. 460 U. S., at 75, n. 1 (collecting cases). Due in part to the divided views in *Johnson*, that conflict has persisted. Compare, *e. g.*, *Tucker* v. *Kemp*, 762 F. 2d 1496, 1501–1503 (CA11 1985) (en banc) (applying *Chapman* harmless-error analysis), cert. denied, *post*, p. 1022, with *In re Hamilton*, 721 F. 2d 1189, 1190–1191 (CA9 1983) (holding that *Sandstrom* error would be harmless only if intent was not contested at trial).

hicle pass. The driver of the second vehicle then pulled in behind Browning, thereby blocking any exit. The driver left his vehicle, walked up to the cab of Browning's truck, and fired four shots at point-blank range. One shot struck Browning in the head, two others struck Faulk in the head, and the fourth struck Faulk in the left shoulder. The killer left the scene in his vehicle. Both Browning and Faulk died.

Faulk's children, who had not been shot, went for help, telling a local resident that "Clicker" (the nickname by which the children knew respondent) had shot Browning and their mother. Earlier that night, police had seen respondent following Browning's truck. Police soon located respondent, but apprehended him only after a high-speed chase. Police found the murder weapon, a .25-caliber pistol that respondent had borrowed from a friend, near respondent's home. At trial, the State relied on the foregoing evidence and on evidence showing that respondent and Joy Faulk had a stormy love affair that Faulk ended in the fall of 1978. Several times after their breakup, respondent threatened to kill Faulk if he ever found her with another man.

Respondent offered two lines of defense. First, he contended that Sam Faulk, Joy's ex-husband, killed the victims because of a dispute concerning custody of the two Faulk children. The State rebutted this contention by introducing evidence that no such dispute existed, and that Sam Faulk was elsewhere when the murders were committed. Second, respondent argued that he was either insane or incapable of forming the requisite criminal intent. To support this argument, respondent introduced evidence that he was suffering from amnesia and could not remember the events of the night of the murders. In addition, some testimony suggested that respondent had been drinking heavily the entire day before the murders. Finally, two defense psychiatrists testified that respondent was legally insane at the time the murders were committed because his depression concerning his recent

breakup with Joy Faulk made it impossible for him to conform his conduct to the law.

At the close of trial, the court instructed the jury on the elements of both first- and second-degree murder. Under Tennessee law, first-degree murder requires proof of premeditation and deliberation, while second-degree murder requires proof of malice. The court's instructions defined malice as "an intent to do any injury to another, a design formed in the mind of doing mischief to another." App. 186. Malice did not require proof of planning or premeditation; a killing "upon a sudden impulse of passion" sufficed if committed with intent to harm another. *Id.*, at 187. The court then charged the jury:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." *Ibid.*

The jury found respondent guilty of first-degree murder for killing Faulk and of second-degree murder for killing Browning.

The Tennessee Court of Criminal Appeals affirmed the convictions, rejecting respondent's argument that the jury instructions had impermissibly shifted the burden of proof as to malice.[2] Respondent then sought habeas corpus relief in

[2] The Court of Criminal Appeals noted that, almost immediately following the "presumption" instruction, the judge charged:

"The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has . . . proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing

the Middle District of Tennessee. The District Court held that the malice instruction had violated respondent's right to have his guilt proved beyond a reasonable doubt, as that right was defined in *Sandstrom* v. *Montana*.[3] The court went on to find that the error could not be deemed harmless because respondent had "relied upon a *mens rea* defense" in contesting his guilt. 611 F. Supp. 294, 302 (1983).

The Court of Appeals for the Sixth Circuit affirmed.[4] The court agreed that the malice instruction was unconstitutional under *Sandstrom*. Turning to the question whether the error was harmless, the court reasoned that because respondent contested malice at his trial, an erroneous burden-shifting instruction could not be harmless under governing precedent. App. to Pet. for Cert. A–5 (citing *Engle* v. *Koehler*, 707 F. 2d 241, 246 (CA6 1983), aff'd by an equally divided Court, 466 U. S. 1 (1984)). The court reached this conclusion "despite the substantial evidence of petitioner's guilt," and added:

> "Were we writing on a clean slate, we would direct our inquiry to that suggested by Justice Powell (dissenting) in *Connecticut* v. *Johnson*, 460 U. S. at 97 n. 5:
>
> "'the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reason-

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was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense." App. 188.

The Court of Criminal Appeals reasoned that this instruction adequately informed the jurors that the burden of proof on malice remained on the State at all times. App. to Pet. for Cert. A–37 to A–39.

[3] In *Sandstrom* we held that an instruction creating a presumption of malice that has the effect of shifting the burden of proof on intent to the defendant violates due process under the rule of *In re Winship*, 397 U. S. 358 (1970). *Sandstrom* v. *Montana*, 442 U. S., at 523–524. *Sandstrom* was decided shortly before respondent's trial commenced. 611 F. Supp. 294, 296, n. 3 (1983).

[4] The Court of Appeals' judgment is reported at 762 F. 2d 1006 (1985). The court's opinion is unpublished.

able doubt that the jury would have found it unnecessary to rely on the presumption.'

"If that were the question in this case . . . we might be able to respond in the affirmative." App. to Pet. for Cert. A–6.

The court nevertheless affirmed the order granting habeas corpus relief. We granted certiorari limited to the question whether the Court of Appeals' harmless-error analysis was correct.[5] 474 U. S. 816 (1985).

II

A

In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. And since *Chapman*, "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). That principle has been applied to a wide variety of constitutional errors. *E. g.*, *id.*, at 684 (failure to permit cross-examination concerning witness bias); *Rushen* v. *Spain*, 464 U. S. 114, 118 (1983) *(per curiam)* (denial of right to be present at trial); *United States* v. *Hasting*, 461 U. S. 499, 508–509 (1983) (improper comment on defendant's failure to testify); *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U. S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Chambers* v. *Maroney*, 399 U. S. 42, 52–53 (1970)

[5] We thus do not consider whether, taken in context, the instructions were permissible under our decisions in *Sandstrom* and in *Francis* v. *Franklin*, 471 U. S. 307 (1985). For purposes of our harmless-error analysis, we assume that the Court of Appeals properly held that the instructions were unconstitutional.

(admission of evidence obtained in violation of the Fourth Amendment). See also *Hopper* v. *Evans*, 456 U. S. 605, 613–614 (1982) (citing *Chapman* and finding no prejudice from trial court's failure to give lesser included offense instruction). Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term:

> "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States* v. *Nobles*, 422 U. S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ('Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it')." *Delaware* v. *Van Arsdall*, *supra*, at 681.

Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U. S., at 23, n. 8, citing *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (introduction of coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, *Tumey* v. *Ohio*, *supra*, with counsel to help the accused defend against the State's charge, *Gideon* v. *Wainwright*, *supra*. Compare *Holloway* v. *Arkansas*, 435 U. S. 475, 488–490 (1978), with *Cuyler* v. *Sullivan*, 446 U. S. 335, 348–350 (1980). Without these basic protections, a criminal trial cannot reliably serve

its function as a vehicle for determination of guilt or innocence, see *Powell* v. *Alabama*, 287 U. S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.[6] See *Delaware* v. *Van Arsdall*, *supra*, at 681 (constitutional errors may be harmless "in terms of their effect on *the factfinding process at trial*") (emphasis added); *Chapman*, *supra*, at 24 (error is harmless if, beyond a reasonable doubt, it "did not *contribute to the verdict* obtained") (emphasis added).

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977) (citations omitted). Accord, *Carpenters* v. *United States*, 330 U. S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

We have emphasized, however, that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. *United States* v. *Hasting*, *supra*,

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[6] Each of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, *Payne* v. *Arkansas*, 356 U. S. 560 (1958) (use of coerced confession), or denied it altogether, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased adjudicator).

at 509. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U. S., at 681; *United States* v. *Hasting*, 461 U. S., at 508–509.

B

Applying these principles to this case is not difficult. Respondent received a full opportunity to put on evidence and make argument to support his claim of innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element of both first- and second-degree murder. See also n. 2, *supra*. Placed in context, the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction.[7] We

[7] Unlike errors such as judicial bias or denial of counsel, the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 490–491 (1978). Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case. See *United States* v. *Frady*, 456 U. S. 152, 171–174 (1982) (evaluating *Sandstrom* error for prejudice under the "cause and actual prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

therefore find that the error at issue here—an instruction that impermissibly shifted the burden of proof on malice—is not "so basic to a fair trial" that it can never be harmless. Cf. *Chapman*, 386 U. S., at 23.

The purpose behind the rule of *Sandstrom* v. *Montana* supports this conclusion. *Sandstrom* was a logical extension of the Court's holding in *In re Winship*, 397 U. S. 358 (1970), that the prosecution must prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *Id.*, at 364; see *Sandstrom*, 442 U. S., at 520, 523; *Francis* v. *Franklin*, 471 U. S., at 313. The purpose of that rule is to ensure that only the guilty are criminally punished. As the Court stated last Term in *Francis* v. *Franklin*, the rule "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.'" *Ibid.*, quoting *Winship*, *supra*, at 372 (Harlan, J., concurring). When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves.

Nor is *Sandstrom* error equivalent to a directed verdict for the State.[8] When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v. *Johnson*, 460 U. S. 73, 96–97 (1983) (POWELL, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant com-

[8] "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Connecticut* v. *Johnson*, 460 U. S., at 95, n. 3 (POWELL, J., dissenting). Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

mitted the relevant criminal act but did not *intend* to cause injury. See, *e. g.*, *Lamb* v. *Jernigan*, 683 F. 2d 1332, 1342–1343 (CA11 1982), cert. denied, 460 U. S. 1024 (1983). In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt. See *Connecticut* v. *Johnson*, *supra*, at 97 (POWELL, J., dissenting); Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1388, n. 192 (1979).

No one doubts that the trial court properly could have instructed the jury that it could *infer* malice from respondent's conduct. See *Francis* v. *Franklin*, *supra*, at 314–315; *Ulster County Court* v. *Allen*, 442 U. S. 140, 157–163 (1979). Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established.[9] For purposes of deciding this case, it is enough to recognize that in some cases that inference is overpowering. See *Hopper* v. *Evans*, 456 U. S., at 613.[10] It would further neither justice

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[9] See *Brooks* v. *Kemp*, 762 F. 2d 1383, 1423 (CA11 1985) (Kravitch, J., concurring and dissenting) (emphasizing that juries are free to infer intent from conduct).

[10] In *Hopper* v. *Evans*, we held that States are not constitutionally required to instruct juries about lesser included offenses where such instructions are not warranted by the evidence. The defendant in that case claimed that the trial court should have instructed the jury as to unintentional homicide during the commission of a robbery. We concluded:

"It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back . . . . The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted." 456 U. S., at 613 (citation omitted).

As *Hopper* suggests, it would defy common sense to conclude that an execution-style killing or a violent torture-murder was committed unintentionally. See *Connecticut* v. *Johnson*, 460 U. S., at 99, n. 7 (POWELL, J.,

nor the purposes of the *Sandstrom* rule to reverse a conviction in such a case.[11] We accordingly hold that *Chapman*'s harmless-error standard applies in cases such as this one.[12]

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dissenting). It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases. *Id.*, at 97, and n. 5.

[11] We think the dissent, and not the Court, "asks and answers the wrong question" in this case. *Post*, at 596 (opinion of BLACKMUN, J.). We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. See *post*, at 593. Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? This question applies not merely to *Sandstrom* violations, but to other errors that may have affected either the instructions the jury heard or the record it considered—including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and therefore all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument—that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome, *post*, at 593–594—logically implies that all such errors are immune from harmless-error analysis. Yet this Court repeatedly has held to the contrary. *E. g.*, *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986) (limitation on defendant's cross-examination); *United States* v. *Hasting*, 461 U. S. 499 (1983) (improper comment on defendant's failure to testify); *Moore* v. *Illinois*, 434 U. S. 220 (1977) (admission of improperly obtained witness identification). Indeed, *Chapman* v. *California*, 386 U. S. 18 (1967), the beginning of this line of cases, applied harmless-error analysis to an error that placed an improper argument before the jury. *Id.*, at 24–25 (finding comment on defendant's silence harmful). See also *Hopper* v. *Evans*, 456 U. S., at 613–614 (citing *Chapman*, and finding error in jury instructions harmless). These decisions, ignored by the dissent, strongly support application of harmless-error analysis in the context of *Sandstrom* error.

[12] The dissent contends that the jury's decision to convict respondent of only one count of premeditated murder "aptly illustrate[s] why harmless-error analysis is inappropriate" in cases where intent is at issue. *Post*, at 594 (opinion of BLACKMUN, J.). This argument is without merit. The jury determined that respondent was guilty beyond a reasonable doubt of

III

Although the Court of Appeals acknowledged that *Sandstrom* error might in some cases be harmless, its analysis of the issue cannot square with *Chapman*. The court concluded that a *Sandstrom* error could never be harmless where a defendant contests intent. App. to Pet. for Cert. A–5. But our harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States* v. *Hasting*, 461 U. S., at 509, n. 7. The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Id.*, at 510. See also *Chapman*, 386 U. S., at 24 ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"); *Connecticut* v. *Johnson*, 460 U. S., at 97, n. 5 (POWELL, J., dissenting) (in cases of *Sandstrom* error, "the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption"). Thus, the fact that respondent denied that he had

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"intend[ing] to take the life" of Joy Faulk "with cool purpose." App. 185 (trial court's charge defining premeditation). The jury then determined that respondent was guilty of the malicious, but not premeditated, murder of Charles Browning. The only alleged error in these instructions was the trial court's instruction that the jury could presume *malice* from a killing. Respondent's (and the dissent's) theory is that a proper instruction on the burden of proof on malice might have led the jury to find *neither* malice *nor* premeditation as to Faulk's killing. This argument is implausible on its face.

We leave the question whether the error in this case was harmless beyond a reasonable doubt to the Court of Appeals on remand. We do suggest that the different verdicts for the two killings in no way support respondent's contention that the *Sandstrom* error in this case was prejudicial.

"an intent to do any injury to another," App. 186, does not dispose of the harmless-error question.

Although we "plainly have the authority" to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, we "do so sparingly." *United States* v. *Hasting, supra,* at 510. The Court of Appeals has not yet applied *Chapman* to the facts of this case. We therefore remand to that court for determination of whether the error committed in this case was harmless beyond a reasonable doubt.[13]

IV

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

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, although I see no need for remanding for application of harmless-error analysis.

The evidence in this case showed that respondent stalked the victims by car for about an hour. After trapping the victims' truck in a private driveway, respondent fired four shots at point-blank range killing both victims. Two young girls, aged 3 and 6, were in the truck and witnessed the slaying. Their mother was one of the victims. After the murder, respondent left the scene but was apprehended by the police after a high-speed chase. In my view, such evidence overwhelmingly demonstrates that respondent acted with malice.

[13] The parties disagree as to the scope of the relevant evidence that must be assessed under *Chapman*. In particular, petitioner argues that evidence of amnesia, of respondent's drunkenness on the day of the murders, and of insanity is irrelevant to malice. Respondent disagrees. These are, of course, issues of Tennessee law in the first instance, and we need not resolve them here. Nor do we express any view as to whether, assuming all the evidence in question is relevant to malice, the error in this case was nevertheless harmless beyond a reasonable doubt.

JUSTICE STEVENS, concurring in the judgment.

The Court correctly concludes that the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967), applies to the erroneous jury instructions in this case. I do not agree, however, with the Court's dictum regarding the nature of harmless-error analysis.

I

According to the Court, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Ante*, at 579. This statement stands in sharp contrast with the Court's analysis in *Chapman* itself.

The principal question presented in *Chapman* was "whether there can ever be harmless constitutional error," 386 U. S., at 20. Without questioning the view that constitutional error is always sufficiently serious to create a presumption in favor of reversal, the Court refused "to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.*, at 21. Far from announcing any general principle that harmless-error analysis is the rule rather than the exception, the Court stated its holding in this language: "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 22.

Thereafter in its opinion, the Court emphasized that the burden of showing that constitutional error is harmless is heavier than the burden of showing that ordinary trial error is harmless. The Court noted that "the original common-law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a

reversal of his erroneously obtained judgment." *Id.*, at 24. It then fashioned its constitutional rule by reference to its earlier decision in *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), stating:

> "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case." 386 U. S., at 24.

Rather than creating a broad, new presumption in favor of harmless-error analysis, then, *Chapman* merely rejected the notion that such analysis was always impermissible and articulated a rigorous standard for determining whether a presumptively prejudicial error could, in fact, be deemed harmless.

II

The Court's statement about the "rule" of harmless-error review, and the reasons for it, is neither an adequate explanation of our current case law nor a sound judgment about what harmless-error jurisprudence should be.

As the Court recognizes, harmless-error inquiry remains inappropriate for certain constitutional violations no matter

how strong the evidence of guilt may be. *Ante*, at 577–578. See also *Chapman*, 386 U. S., at 23, n. 8. The Court suggests that the inapplicability of harmless error to these violations rests on concerns about reliability and accuracy, and that such concerns are the only relevant consideration in determining the applicability of harmless error. *Ante*, at 579. In fact, however, violations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial. Thus, racial discrimination in the selection of grand juries is intolerable even if the defendant's guilt is subsequently established in a fair trial.[1] Racial discrimination in the selection of a petit jury may require a new trial without any inquiry into the actual impact of the forbidden practice.[2] The admission of a

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[1] See *Vasquez* v. *Hillery*, 474 U. S. 254, 262 (1986) ("[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century—the only effective remedy for this violation—is not disproportionate to the evil that it seeks to deter"). In *Vasquez*, the Court explicitly rejected the dissent's suggestion that grand jury discrimination should be subject to harmless-error analysis because of a general principle that "a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution." *Id.*, at 269 (POWELL, J., dissenting). See also *Rose* v. *Mitchell*, 443 U. S. 545 (1979).

[2] See *Batson* v. *Kentucky*, 476 U. S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed"). See also *Turner* v. *Murray*, 476 U. S. 28, 37 (1986) (plurality opinion) ("The inadequacy of *voir dire* [about the possibility of racial prejudice] in this case requires that petitioner's death sentence be vacated. . . . Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*"). In *Turner*, the Court explicitly rejected the dissent's suggestion that the death sentence should stand because no actual jury prejudice was evident from the record. See

coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.[3] In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination.[4] A coherent harmless-error jurisprudence should similarly respect those values.

In addition to giving inadequate respect to constitutional values besides reliability, adopting a broad presumption in favor of harmless error also has a corrosive impact on the administration of criminal justice. An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the in-

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id., at 47 (POWELL, J., dissenting) ("Nothing in this record suggests that racial bias played any role in the jurors' deliberations").

[3] See *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958) ("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment"); *Chapman*, 386 U. S., at 23, n. 8 (citing *Payne* as "coerced confession" case and example of constitutional error that may not be deemed harmless). See also *Miller* v. *Fenton*, 474 U. S. 104, 109 (1985) ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment").

[4] See *Allen* v. *Hardy*, *ante*, at 259 ("By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed to 'serve multiple ends,' only the first of which may have some impact on truthfinding"); *Allen* v. *Illinois*, *ante*, at 375 ("The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons").

terest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.[5] It is particularly striking to compare the Court's apparent willingness to forgive constitutional errors that redound to the prosecutor's benefit with the Court's determination to give conclusive effect to trivial errors that obstruct a defendant's ability to raise meritorious constitutional arguments.[6]

Both a proper respect for a range of constitutional values and the interest in an evenhanded approach to the administration of justice convince me that the Court's dictum about a sweeping presumption in favor of harmless-error review is not only unnecessary, but also unsound.

III

In this particular case, however, the primary constitutional value protected by our holdings in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985), is an accurate determination of the defendant's guilt or innocence. In my opinion, this is also not the kind of error with such an inherently imprecise effect that harmless-error inquiry is ill advised.[7] It follows that the Federal Constitution does not command a rule of automatic reversal, and that the Court of Appeals should review the entire rec-

[5] Cf. *United States* v. *Jackson*, 429 F. 2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce *Miranda* to the letter and the police obey it with like diligence; otherwise the courts may have to act to correct a presently alarming situation"). See also *United States* v. *Lane*, 474 U. S. 438, 450–451, nn. 13 and 14 (1986) (STEVENS, J., dissenting) (collecting authorities criticizing the impact of the Court's recent expansive harmless-error jurisprudence).

[6] See, *e. g.*, *Smith* v. *Murray*, 477 U. S. 527 (1986).

[7] Cf. *Holloway* v. *Arkansas*, 435 U. S. 475, 491 (1978) (harmless-error analysis inappropriate in assessing the constitutional error of joint representation in part because such an inquiry requires "'unguided speculation'"); *United States* v. *Lane*, 474 U. S., at 474, and n. 16 (STEVENS, J., dissenting).

ord to determine whether it is able to declare a belief that the constitutional error was harmless beyond a reasonable doubt.[8]

Accordingly, I concur in the judgment.

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

Stanley Clark was deprived of two rights: the right guaranteed by the Due Process Clause of the Fourteenth Amendment to compel the State of Tennessee to prove beyond a reasonable doubt every element of the crimes with which he was charged, and the right guaranteed by the Sixth Amendment to have a jury of his peers determine whether the State had met that burden. Today, the Court focuses entirely on the former right and disregards totally the latter. A reviewing court's conclusion that the record would support a conviction by a properly instructed jury has no bearing on the question whether a defendant was denied the right to have the jury that actually tried him make that determination. "To conform to due process of law, [defendants are] entitled to have the validity of their convictions appraised on consideration of the case . . . as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U. S. 196, 202 (1948). A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence. I therefore dissent from the Court's holding that harmless-error analysis should be applied.

[8] A State, of course, remains free not to apply harmless-error review as a matter of state constitutional protections. See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 701 (1986) (STEVENS, J., dissenting); *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (STEVENS, J., concurring in judgment). Because the Court of Appeals for the Sixth Circuit is more familiar with Tennessee law than we are, it is appropriate for that court to consider the state of Tennessee law on this subject.

I

Stanley Clark was indicted on charges of the first-degree murder of Joy Faulk and Charles Browning. He pleaded not guilty to both charges. At trial, Clark contested every element of the crime. He argued that he had not committed the killings, that he could not recall, due to amnesia, any event connected with the killings, and, alternatively, that he was incapable of forming any culpable intent due to mental illness and intoxication. Defense counsel's opening statement and the testimony of psychiatric experts and persons close to Clark put the question whether Clark possessed the requisite mental state directly before the jury.

At the close of trial, the court instructed the jury that malice, "an intent to do any injury to another," was a necessary element of first- as well as second-degree murder. App. 186. The trial court then instructed the jury, which for three days had heard testimony raising doubts about Clark's capacity to form the requisite intent, that "if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted . . . ." *Id.*, at 187.[1] The trial court went on to instruct the jury that voluntary manslaughter is a killing without malice. *Id.*, at 188.

The District Court found, and the Court of Appeals for the Sixth Circuit agreed, that the jury instructions were constitutionally infirm under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979).[2] App. to Pet. for Cert. A–1, A–7. The sole

[1] The trial court's wording of the definition of malice and of the presumption of malice for first-degree murder differed slightly from that it gave for second-degree murder, presented in the text. Because these differences are immaterial, the courts below treated the instructions as if they were identical, see App. to Pet. for Cert. A–10, A–12, as does the majority.

[2] Under *Sandstrom*, both mandatory conclusive presumptions, which remove the presumed element from the case once the State has proved the predicate fact, and mandatory rebuttable presumptions, which require the jury to find the presumed element unless the defendant rebuts the pre-

question before the Court is whether such error can ever be harmless. See *ante*, at 576. In *Sandstrom*, the Court held that burden-shifting jury instructions on the question of intent, like the instructions here, violate the due process requirement recognized in *In re Winship*, 397 U. S. 358 (1970), that a conviction is valid only if the State has proved beyond a reasonable doubt every element of the crime. 442 U. S., at 521. Thus, as the majority assumes, there was clear constitutional error in Clark's trial, see *ante*, at 576, n. 5, and the question before the Court is only whether that error was harmless.

II

The harmless-error rule stems from this Court's recognition that some trial errors are sufficiently tangential to the trial process that they fairly may be overlooked. *Chapman* v. *California*, 386 U. S. 18, 22 (1967). But the Court also has recognized the existence of a class of constitutional errors that "necessarily render a trial fundamentally unfair," *ante*, at 577, and thus are not amenable to harmless-error analysis. "Harmless-error analysis," according to the majority, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Ante*, at 578. Thus, errors that deny a defendant "the basic trial process" can "never be harmless." *Ante*, at 578, n. 6. The archetypal examples of such acts are denial of the right to counsel and trial before a biased judge. See *ante*, at 577–578; *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Tumey* v. *Ohio*, 273 U. S. 510 (1927). The salient feature these examples share is that effective defense counsel and an impartial judge play central roles in the basic trial process. The Sixth and Fourteenth Amendments clearly establish the jury as an equally central entity. Cf. *ante*, at 578. What the Court's opinion today fails to

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sumption, are unconstitutional. See *Sandstrom* v. *Montana*, 442 U. S. 510, 517–518 (1979); *Francis* v. *Franklin*, 471 U. S. 307, 314, n. 2 (1985). This case involves the latter type.

comprehend is that the instruction in this case interfered so fundamentally with the jury's performance of its constitutionally mandated role that the error involved is analytically indistinguishable from those errors the Court finds inappropriate for harmless-error analysis.

The Framers chose to protect defendants, not primarily by regulating the substance of the criminal law, but by establishing certain trial procedures to be followed in a criminal case. See Underwood, The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299, 1317–1318 (1977). The jury's central obligation under the Due Process Clause is to determine whether the State has proved each element of the offense charged beyond a reasonable doubt. See *Sandstrom* v. *Montana, supra; In re Winship, supra.* The Constitution assigns this function "solely to the jury." *Sandstrom*, 442 U. S., at 523. This duty cannot be interfered with, see *Ulster County Court* v. *Allen*, 442 U. S. 140, 169 (1979) (POWELL, J., dissenting), nor delegated to another entity. "Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut* v. *Johnson*, 460 U. S. 73, 95, and n. 3 (1983) (POWELL, J., dissenting)." *Cabana* v. *Bullock*, 474 U. S. 376, 384–385 (1986); see also *Cole* v. *Arkansas*, 333 U. S., at 202. The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.

A jury that receives a constitutionally flawed, burden-shifting instruction on intent is, in effect, directed to return a verdict against the defendant. *Connecticut* v. *Johnson*, 460 U. S., at 84 (plurality opinion). Because a jury is the primary finder of fact, "'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.'" *Ibid.*, quot-

ing *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977). The erroneous instruction invites the jury to abdicate its constitutional responsibility to decide for itself whether the State has proved every element of the offense beyond a reasonable doubt. It is likely that the jury will accept this invitation because "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence of intent, when offered the opportunity simply to rely on a presumption, *Sandstrom*, 442 U. S., at 526, n. 13; *Connecticut* v. *Johnson*, 460 U. S., at 85 (plurality opinion). When a defendant contests the issue of intent, a reviewing court will rarely be capable of deciding whether the error contributed to the verdict: it will have no way of knowing how the jury treated the question of intent. See *Sandstrom*, 442 U. S., at 526; *Ulster County Court* v. *Allen*, 442 U. S., at 175–176 (POWELL, J., dissenting).[3]

The verdicts reached in this case aptly illustrate why harmless-error analysis is inappropriate in cases where a defendant contests the element of *mens rea*. Clark was charged with the first-degree murders of two people, who were together in a truck when they were killed. The State used the same evidence to prove that Clark killed Faulk as to prove that he killed Browning. Yet the jury found Clark guilty of the first-degree murder of Faulk and the second-degree murder of Browning. That the jury reached distinct verdicts shows that it focused closely on the question of Clark's mental culpability, the precise issue on which the court gave the constitutionally defective charge. A reviewing court simply cannot determine whether this jury in fact relied on the flawed instruction. It certainly is possible that it did: perhaps the jury did not find sufficient intent to convict

[3] Where, of course, a defendant has conceded intent, the use of an erroneous presumption as to intent may be superfluous, and a "reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict." See *Connecticut* v. *Johnson*, 460 U. S., at 87 (plurality opinion).

Clark of second-degree murder, and but for the presumption of malice would have convicted him of voluntary manslaughter, for which malice was not required. It is of no value to point to any evidence presented at trial of Clark's intent; "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." *Connecticut* v. *Johnson*, 460 U. S., at 85 (plurality opinion). The ordinary view is that a jury adheres to the instructions, *Parker* v. *Randolph*, 442 U. S. 62, 73 (1979) (plurality opinion), and there is no reason to believe that the "lay jury will know enough to disregard the judge's bad law if in fact he misguides them." *Bollenbach* v. *United States*, 326 U. S. 607, 613–614 (1946).

It is true that "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Ante*, at 580. But that truism is beside the point here, where the only fact that the jury was required to find in order to trigger the presumption was that "a killing has occurred." App. 187. The jury was instructed to presume criminal intent, the *sine qua non* of criminal responsibility, from the fact of a dead body. The jury may have found the fact that there was a body, but this jury has not met *In re Winship*'s requirement of finding, beyond a reasonable doubt, "every fact necessary to constitute the crime," 397 U. S., at 364: this jury may never have found that Clark acted with malice, an essential element of the crimes of which he was convicted.

III

The Court recognized 40 years ago that the question a reviewing court must ask "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards" required by the Constitution. *Bollenbach* v. *United States*, 326 U. S., at 614. When a jury has not been properly instructed concern-

ing an essential element of the offense that has been charged, the danger exists that the defendant has been deprived of his Sixth and Fourteenth Amendment right to have the jury determine whether the State has proved each element of the offense beyond a reasonable doubt. Faced with an incorrect instruction and a general verdict of guilty, a reviewing court simply lacks any adequate basis for deciding whether the jury has performed its constitutionally required function. Because I believe the Court today asks and answers the wrong question, I dissent.

UNITED STATES *v.* JAMES ET AL.

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

No. 85–434. Argued April 21, 1986—Decided July 2, 1986

This litigation arose from serious accidents that occurred in the reservoirs of federal flood control projects in Arkansas and Louisiana. In both accidents, recreational users (water-skiers in Arkansas and a fisherman in Louisiana) of the reservoirs were injured or drowned when they were swept through retaining structures after those structures were opened by the United States Corps of Engineers to control flooding. Separate actions were brought in Federal District Court against the United States under the Federal Tort Claims Act. In the Arkansas case, the court held that although Government agents had willfully and maliciously failed to warn of a known danger, the Government was immune from damages under 33 U. S. C. § 702c, which provides in part that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." In the Louisiana case, the court similarly granted summary judgment for the United States despite the Government's concession that it negligently failed to warn of the danger from the current caused by open gates. In a consolidated appeal, the Court of Appeals reversed the judgments, holding that Congress intended § 702c to immunize the Government from liability for damage resulting directly from construction of flood control projects and for flooding caused by factors beyond the Government's control, but had not intended to shield the negligent or wrongful acts of Government employees either in the construction or continued operation of flood control projects, including the failure to warn the public of hazards to their use of reservoirs.

Held: Section 702c bars recovery against the Government in these cases. Pp. 604–612.

(a) On its face, § 702c's language covers the accidents at issue. The ordinary meaning of the word "damage" covers injury to both property and person and cannot be considered ambiguous in that it might refer only to damage to property. Moreover, the language "*any* damage" and "liability of *any* kind" undercuts a narrow construction. Nor do the words "flood" and "flood waters" create any uncertainty in the context of these accidents. Those words apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood

control, as well as to waters that such projects cannot control. The waters here clearly fall within the statute's ambit. Pp. 604–605.

(b) The statute's legislative history fully supports attributing to its unambiguous words their ordinary meaning. Pp. 606–608.

(c) There is little in the legislative history or otherwise to support the argument that § 702c was meant to bar only claims against the Government for damage to property acquired under § 702c's proviso (authorizing purchase of interests in certain properties bordering the Mississippi River) and under § 702d (authorizing purchase of "flowage rights"), and thus would allow recovery for damages to persons or property not connected with these acquisitions. Nor is there any merit to the argument that even if § 702c is intended to grant immunity in connection with flood control projects, the Government is not entitled to immunity here because the injuries arose from Government employees' alleged mismanagement of recreational activities unrelated to flood control. The manner in which to convey warnings, including the negligent failure to do so, is part of the "management" of a flood control project. Finally, the legislative history does not support construing § 702c as immunizing the Government from liability *only* for property damage directly resulting from construction of flood control projects, but rather indicates Congress' intention to protect the Government from *any* liability for damages that might arise out of flood control. Pp. 608–612.

760 F. 2d 590, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 612.

Andrew J. Pincus argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, and *Deputy Solicitor General Geller*.

T. John Ward argued the cause for respondents. With him on the brief for respondents James et al. were *Peter E. Scheer* and *Joseph N. Onek*. *Sam J. D'Amico* and *J. Michael McDonald* filed a brief for respondent Clardy.

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the Flood Control Act's immunity provision in 33 U. S. C. § 702c, which states

that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars recovery where the Federal Government would otherwise be liable under the Federal Tort Claims Act, 28 U. S. C. §2671 *et seq.*, for personal injury caused by the Federal Government's negligent failure to warn of the dangers from the release of floodwaters from federal flood control projects.

I

The present case arose from serious accidents at flood control projects in Arkansas and Louisiana. In both accidents, recreational users of the reservoirs were swept through retaining structures when those structures were opened to release waters in order to control flooding.

A

The project in Arkansas, Millwood Dam, was dedicated in 1966 and is located in the southwestern corner of the State. The Millwood Reservoir behind the structure is used for fishing, swimming, boating, and waterskiing. This reservoir has marinas and launching areas for small boats. The United States Government Printing Office has printed brochures that promote the recreational features of the project and encourage the public to water-ski at the Millwood Reservoir.

Enormous underwater portals set within the Millwood Dam, called "tainter gates," allow the discharge of water from the Reservoir into a spilling basin below. On June 8, 1979, the level of the Reservoir was such that the United States Corps of Engineers designated it at "flood stage." As part of the flood control function of the Millwood facility, the Corps of Engineers began to release water through the tainter gates. This release created a swift, strong current toward the underwater discharge.

Respondents Charlotte James and Kathy Butler, who were water-skiing in that area because the water appeared to be calm, fell and began drifting toward the tainter gates. Re-

spondents' husbands, who were operating the ski boat, circled back to give them the towlines, apparently intending to pull them away from danger. Tr. 20–21, 166–167. Because of the swift currents, respondents were unable to hold on to the lines. *Ibid.* The husbands' attempts to pull respondents aboard by hand also failed because each time the current pulled the skiers out of reach. *Id.*, at 21. Eddy Butler then dove into the water in an attempt to save his wife, but all three were pulled through the tainter gates. He drowned, and respondents James and Butler were injured. The boat, still occupied by Mr. James and his daughter Sonja, became lodged in the tainter gates, and the occupants were rescued without injury.

Respondents James and Butler filed suit in the United States District Court for the Eastern District of Texas against the United States under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671 *et seq.* After a bench trial, the court in an unreported opinion found that a cable strung with orange buoys delineating the area of danger near the tainter gates had broken and drifted away; that white anchor buoys marking a restricted area near the dam were also out of place and consequently offered no warning to a reasonably prudent user; that the United States "knew that the dangerous condition created would result in injury to those situated as [were respondents James and Butler] if an adequate warning was not given"; and that respondents James and Butler were not negligent. The court assessed damages at $1 million for respondent Butler, and $40,000 for respondent James, stating that the case went "beyond gross negligence" and "constitute[d] a classic classroom example of a death and injuries resulting from conscious governmental indifference to the safety of the public." App. to Pet. for Cert. 66a. At the same time, however, the court concluded that although Federal Government agents had willfully and even maliciously failed to warn of a known danger, the Federal Government was immune from damages under 33 U. S. C. § 702c, a statute left unre-

pealed by the Federal Tort Claims Act. See 60 Stat. 842, 846–847 (listing statutes specifically revoked by FTCA). The court accordingly denied relief.

B

The relevant flood control project in Louisiana, the Courtableau Drainage Structure, is located near the West Atchafalaya Basin. On May 17, 1980, the waters in the reservoir of Bayou Courtableau Basin were at flood stage, and consequently the Corps of Engineers opened the gates in the project. This created a strong current. Kenneth Clardy and his father, Joseph Clardy, were fishing in the Basin. Only two faded signs at the entrance of the drainage structure warned of the dangerous current. The boaters could not see the signs until they already had been swept past them. The boat became disabled and was drawn through the open gates of the spillway. Kenneth Clardy was thrown into the approach basin and drowned while being pulled through a 220-foot-long barrel of the drainage structure.[1] His father survived without injury.

Respondent Susan Clardy, Kenneth Clardy's wife, commenced an action in the United States District Court for the Western District of Louisiana seeking damages under the Federal Tort Claims Act, alleging that the Corps of Engineers failed to post adequate warnings of the danger from the current caused by the open gates. The Federal Government conceded that it negligently failed to warn the decedent. The District Court found, however, that under *Graci* v. *United States*, 456 F. 2d 20 (CA5 1971), and *Florida East Coast R. Co.* v. *United States*, 519 F. 2d 1184 (CA5 1975),[2]

[1] The District Court incorrectly identified Joseph Clardy as the decedent. App. to Pet. for Cert. 60a–61a.

[2] In *Graci* v. *United States* property owners in Louisiana brought suit for flooding allegedly caused by negligent design in the Mississippi River Gulf Channel Outlet, a navigation project that provides a shortcut from the Gulf of Mexico to New Orleans. The Federal Government contended that § 702c granted immunity from damages caused by any floodwaters, even those unconnected with flood control projects. The court rejected this ar-

the United States was immune under § 702c from damages for personal injury caused by floods or floodwaters in the negligent operation of flood control projects. The court found further that the Federal Government's action was within the scope of § 702c because "the gates were opened to *prevent* flooding and inundation landside of the drainage structure." App. to Pet. for Cert. 62a. The court accordingly granted summary judgment for the United States.

C

The Court of Appeals for the Fifth Circuit consolidated the cases on appeal, and a panel affirmed. 740 F. 2d 365 (1984). Although the panel believed that the legislative history of § 702c showed that Congress intended the provision to disclaim only "liability for 'takings' and not liability for consequential damages," *id.*, at 373, the panel affirmed both judgments from the District Courts because of the Circuit's earlier interpretation of the section in *Graci*, *supra*, and *Florida East Coast R. Co.*, *supra*. See n. 2, *supra*.

The Court of Appeals reheard the case en banc and reversed the District Courts' judgments. 760 F. 2d 590 (1985). The court determined that § 702c contained "latent ambiguities" that could be resolved only by reference to the legislative history. *Id.*, at 594. Analyzing that history, the court stated that in enacting § 702c as part of the Flood Control Act of 1928, "Congress was concerned with allocating the costs of a major public works program between the federal government and the state and local interests, both public and pri-

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gument, and held that the provision conferred immunity only for floods or floodwaters connected with a flood control project.

In *Florida East Coast R. Co.* v. *United States* the court denied recovery to a railroad after its tracks near a central Florida flood control project were washed out by heavy rains. The court rejected arguments that the immunity provision did not cover losses caused or aggravated by the Federal Government's own negligence, and that "washouts" caused by the rapid runoff of surface water were not "flood" damage.

vate, in the wake of a financial, administrative, and engineering debacle [from the great Mississippi River flood of 1927]." *Id.*, at 596. Departing from the panel's reading of § 702c's legislative history, the en banc court concluded that Congress intended § 702c to immunize the Federal Government from liability for damage resulting directly from construction of flood control projects and from liability for flooding caused by factors beyond the Government's control, but that Congress had not intended "to shield the negligent or wrongful acts of government employees—either in the construction or in the continued operation" of flood control projects, including the failure "to warn the public of the existence of hazards to their accepted use of government-impounded water, or nearby land." *Id.*, at 599, 603.

Judge Gee, joined by four other judges in dissent, argued that the holding was contrary to "the statute's plain words," *id.*, at 604, and that "[b]oth the language of § 702c and the legislative history [are] entirely consistent with a purpose in the Congress, poised over a half-century ago on the brink of entry into a massive public works program—one of then unprecedented scope and laden with foreseeable and unforeseeable prospects of liability—to state clearly that the federal treasury was to be placed at risk by it no further than was required by the Constitution," *id.*, at 605–606. He noted that this construction was the unanimous view of previous Courts of Appeals that had construed § 702c, and that it "has stood for three decades without any sign of Congressional dissatisfaction." *Id.*, at 606.[3]

We granted certiorari to resolve the resultant split among the Circuits.[4] 474 U. S. 978 (1985). We now reverse.

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[3] Judge Higginbotham filed a separate dissenting opinion stating that "[w]ithout clear evidence of what Congress meant to do in 1928, I would defer to the longstanding and unanimous construction placed on § 702c by this and other courts . . . ." 760 F. 2d, at 606–607.

[4] All other Courts of Appeals that have interpreted § 702c—and, prior to this case, the Court of Appeals for the Fifth Circuit, see n. 2, *supra*—have

II

The starting point in statutory interpretation is "the language [of the statute] itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). "[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982). The immunity provision in § 702c, enacted as part of the Flood Control Act of 1928, 45 Stat. 534, 33 U. S. C. § 701 *et seq.*, outlines immunity in sweeping terms: "No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place." (Emphasis added.) It is difficult to imagine broader language.[5]

On its face, this language covers the accidents here. Respondents' injuries occurred as a result of the release of waters from reservoirs that had reached flood stage. Given the nature of the accidents at issue, and given the plain terms of the statute, "it requires some ingenuity to create ambiguity." *Rothschild* v. *United States*, 179 U. S. 463, 465 (1900).

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held that § 702c grants immunity to the Federal Government from damages caused by floodwaters from a flood control project. See, *e. g.*, *Portis* v. *Folk Construction Co.*, 694 F. 2d 520, 522 (CA8 1982) (purpose of § 702c is "to assure the government of absolute immunity for [damages caused by flooding related to] flood control projects"); *Morici Corp.* v. *United States*, 681 F. 2d 645, 647–648 (CA9 1982) ("[I]f [the plaintiff's] injury resulted from the operation of [a] federal project for flood control purposes, government immunity is complete"); *Callaway* v. *United States*, 568 F. 2d 684, 686–687 (CA10 1978) (rejecting arguments that § 702c does not apply to flood damages resulting from the operation of a flood control project in view of "broad and emphatic language of § 702c"); *Parks* v. *United States*, 370 F. 2d 92, 93 (CA2 1966) (same).

[5] As the principal dissent noted, any effort to devise a provision that more plainly rules out liability "serves small purpose beyond making the enactment read like an insurance company's form [of] general release rather than a statute." 760 F. 2d, at 604. Respondents conceded as much at oral argument: "I don't believe that [§ 702c] could have been more expansive ['in its absolute terms']." Tr. of Oral Arg. 30.

Cf. *TVA* v. *Hill*, 437 U. S. 153, 173, n. 18 (1978) (assertions of ambiguity do not transform a clear statute into an ambiguous provision).

Although the Court of Appeals found, for example, that the word "damage" was ambiguous because it might refer only to damage to property and exclude damage to persons, 760 F. 2d, at 594, and n. 7, the ordinary meaning of the word carries no such limitation. Damages "have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress . . . ." *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 450 (1947).[6] Moreover, Congress' choice of the language "*any* damage" and "liability of *any* kind" further undercuts a narrow construction. (Emphasis added.)

Nor do the terms "flood" and "flood waters" create any uncertainty in the context of accidents such as the ones at issue in these cases. The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control. As both District Courts found, the waters here clearly fall within the ambit of the statute.[7]

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[6] Damages means "loss due to . . . injury or harm to person, property, or reputation." Webster's Third New International Dictionary 571 (1961); Black's Law Dictionary 351 (5th ed. 1979). Damages carried the same meaning at the time § 702c was enacted. See 4 J. Sutherland, Law of Damages §§ 1241–1252 (4th ed. 1916); 2 T. Sedgwick, Measure of Damages §§ 573–574a (9th ed. 1912).

[7] See *Morici Corp.* v. *United States*, *supra*, at 647–648 (no immunity for flooding if inundation "'wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization'"), quoting *Peterson* v. *United States*, 367 F. 2d 271 (CA9 1966); *Hayes* v. *United States*, 585 F. 2d 701, 702–703 (CA4 1978) ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility *without relation to the opera-*

III

We have repeatedly recognized that "[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances."'" *Rubin* v. *United States*, 449 U. S. 424, 430 (1981) (citations omitted). In the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Despite respondents' contentions and the reasoning of the Court of Appeals, we do not find that the legislative history of the statute justifies departure from the plain words of the statute. Indeed, on balance we think the legislative history of the Flood Control Act of 1928 *reinforces* the plain language of the immunity provision in § 702c.

The Flood Control Act enacted "a comprehensive ten-year program for the entire [Mississippi River] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds." *United States* v. *Sponenbarger*, 308 U. S. 256, 262 (1939). The Act was the Nation's response to the disastrous flood in the Mississippi River Valley in 1927. That flood resulted in the loss of nearly 200 lives and more than $200 million in property damage; almost 700,000 people were left homeless. S. Rep. No. 619, 70th Cong., 1st Sess., 12 (1928). The flood control system in the Mississippi River Valley in response to this catastrophe was the largest public works project undertaken up to that time in the United States.[8]

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tion of the dam as a flood control project, he would avoid the absolute bar of § 702c" (emphasis added)).

We have noted that here the District Court in each case found that the waters were being released from federal flood control facilities to prevent flooding. App. to Pet. for Cert. 61a, 68a. The Court of Appeals upheld these findings, 760 F. 2d, at 603, and assumed that "the waters in this [consolidated] case were floodwaters." *Id.*, at 594, n. 6.

[8] Representative Snell, Chairman of the House Rules Committee, stated in reporting the rules on debate for the Flood Control Act of 1928:

It is not surprising, in the light of the devastation wrought by the 1927 flood and the magnitude of Congress' undertaking, that the legislative history of § 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects. Numerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project. The Chairman of the House Rules Committee, in opening the discussion on the rule governing debate on the 1928 Act, stated:

> "I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years." 69 Cong. Rec. 6641 (1928) (remarks of Rep. Snell).

A number of other Congressmen unequivocally stated that the United States should not be liable for any expense other than the direct cost of constructing the project. See *id.*, at

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"[T]he legislation made in order under this rule is the most important matter that has been brought before this House since the declaration of war about 11 years ago. This legislation provides for the most gigantic undertaking in construction and engineering that any government in the civilized world has ever undertaken. . . . [I]t is much larger and will cost four times as much as the Panama Canal." 69 Cong. Rec. 6640 (1928).

The statute authorized $325 million for the program, Act of May 15, 1928, ch. 569, § 1, 45 Stat. 534–535, but estimates of the cost of the entire project ranged past $500 million. H. R. Rep. No. 1100, 70th Cong., 1st Sess., 18 (1928).

7028 (remarks of Rep. Spearing); *id.*, at 6999–7000 (remarks of Rep. Frear).[9]

These statements show that the sweeping language of § 702c was no drafting inadvertence. See *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 270 (CA8), cert. denied, 347 U. S. 967 (1954). Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from "any" liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago in *National Mfg.*, § 702c's language "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." 210 F. 2d, at 270. The equally broad and emphatic language found in the legislative history shows that Congress understood what it was saying. We therefore conclude that the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning.

IV

A

Respondents nevertheless advance several alternative readings of § 702c's seemingly clear language.

Respondents Butler and James argue that the immunity provision of § 702c was enacted as a potential bar to claims against the Government for damages to property that do not rise to the level of a constitutional taking. The provision, according to this argument, thereby assured the Federal Government control over paying for property rights that it

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[9] Respondents have argued that Congress would not have enacted § 702c if it were merely a codification of the Federal Government's sovereign immunity. The legislative history refutes this contention. One of the principal Congressmen in the debates concerning the immunity provision in § 702c remarked: "While it is wise to insert that provision in the bill, it is not necessary, because the Supreme Court of the United States has decided . . . that the Government is not liable for any of these damages." 69 Cong. Rec. 7028 (1928) (remarks of Rep. Spearing).

acquired under the proviso of § 702c (authorizing purchase of interests in certain properties bordering the Mississippi River) or under § 702d (authorizing purchase of "flowage rights"). Such a reading, it is contended, would still allow recovery for damages to persons or property not connected with these acquisitions.

We do not agree. Both § 702d and the proviso of § 702c provide for compensation by the Federal Government for the acquisition of certain kinds of property rights. We cannot see why Congress would first determine that these property rights deserved compensation, and then in the same statute give the Federal Government absolute discretion to decide whether to pay that compensation. Moreover, there is little in the legislative history to support the proposition that the immunity provision in § 702c was intended to bar only liability for the compensation described in the proviso and § 702d. Section 702c's immunity provision and proviso were introduced by different sponsors. 69 Cong. Rec. 7023 (1928). Congress unanimously accepted the immunity provision, but enacted the proviso only after debate and by a vote of 111–79. *Ibid.* The debates on the proviso, which addressed the narrow issue of whether compensation should be provided to property owners affected by the construction of levees on the opposite bank of the river, see *id.*, at 6642, contain no reference to the immunity provision, see *id.*, at 6642, 7022–7023. Similarly, the debate on § 702d does not reveal any relationship between that section and the immunity provision in § 702c. *Id.*, at 7104–7111. Finally, and most importantly, the proffered interpretation of § 702c ignores the broad language of the statute. If Congress had wished to bar actions for compensation for purchases under § 702c's proviso and § 702d, presumably it would have done so more specifically.

Respondents Butler and James also argue, in the alternative, that even if § 702c is intended to grant immunity in connection with flood control projects, the Federal Government is not entitled to immunity here because their injuries arose

from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control. In support of this argument they point to a "fundamental principle of immunity" that the "sphere or protected activity must be narrowly limited by the purpose for which the immunity was granted." We think, however, that the manner in which to convey warnings, including the negligent failure to do so, is part of the "management" of a flood control project. And as noted in n. 7, *supra*, the Court of Appeals found that the release of the waters at the Millwood Reservoir and at the Courtableau Basin was clearly related to flood control. Moreover, contrary to respondents' argument of "narrowly limited" immunity, the broad principle applicable here is that a "clear relinquishment of sovereign immunity [is required] to give justification for tort actions." *Dalehite* v. *United States*, 346 U. S. 15, 31 (1953).[10]

B

Respondent Clardy adopts the en banc Court of Appeals' reading of § 702c: Congress enacted the section to immunize the Federal Government from liability *only* for property damage resulting directly from construction of flood control projects.

To support this argument, both respondent Clardy and the Court of Appeals rely on the portion of the legislative history of § 702c that concerns the Government's acquisition of prop-

[10] The cases on which respondents Butler and James rely relate to personal immunity, not to the Federal Government's sovereign immunity. See Brief for Respondent James et al. 33, citing, *inter alia*, *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982); *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982); *Butz* v. *Economou*, 438 U. S. 478 (1978).

Respondents Butler and James have also argued that the immunity provision of § 702c applies only to projects authorized under the 1928 Act, and therefore does not extend to the Millwood Project. Section 702c is not by its terms restricted to projects constructed under the 1928 Act. Nor would it make sense for the Federal Government to have immunity only for some, but not all, of its flood control projects. We find no merit to this argument.

erty rights. According to the argument, the House of Representatives, where the provision originated, enacted § 702c solely in response to the Senate version of the Flood Control Act, which would have created broad remedies for property owners, offering "[j]ust compensation" for "all property used, taken, damaged, or destroyed in carrying out the flood control plan."[11] S. 3740, 70th Cong., 1st Sess., 54 (1928), 69 Cong. Rec. 5483 (1928). This language would have provided compensation well beyond the requirements of the Fifth Amendment's Takings Clause. It accordingly met with substantial hostility in the House, where Members feared it might "make the railroads" and other large property owners "a present of many millions of dollars." *Id.*, at 6712 (remarks of Rep. Kopp).

According to respondent Clardy, § 702c was added simply to counteract this generosity, and to prevent any excess costs for the acquisition of flowage rights or easements after the completion of the flood control project. Since none of the respondents' claims stem from property damage due to construction of a dam or reservoir, the argument goes, § 702c's immunity does not apply, and the Government may be held liable for its failure to warn the public of "the existence

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[11] Section 702c, which consists of both the immunity provision at issue and a proviso, reads:

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of . . . this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands." (Emphasis in original.)

of hazards to their accepted use of government-impounded water or nearby land." 760 F. 2d, at 603.

We find no merit to this argument. It is true that during the debates on the Act, several Congressmen used the terms "liability" and "damage" to refer only to property damage caused by the construction of the flood control projects. But, as we have noted above, there are numerous passages in the legislative history that emphasize the intention of Congress to protect the Federal Government from *any* damages liability that might arise out of flood control. *Supra,* at 607–608. We think that the "fragments of legislative history" on which respondent Clardy and the Court of Appeals relied do not constitute "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson,* 456 U. S., at 75.

V

As the facts in this case demonstrate, one can well understand why the Court of Appeals sought to find a principled way to hold the Government responsible for its concededly negligent conduct. But our role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court. We therefore follow the plain language of § 702c, a section of the 1928 Act that received careful consideration by Congress and that has remained unchanged for nearly 60 years, and hold that the Federal Government is immune from suit in this type of case. The judgment of the Court of Appeals for the Fifth Circuit is accordingly reversed.

It is so ordered.

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

As a part of the major undertaking authorized by the Mississippi Flood Control Act of 1928, Congress directed the Secretary of War and the Chief of Engineers to take special

steps to acquire lands that were subject to "overflow and damage" along the banks of the Mississippi River where it was impracticable to construct levees. In the section of the Act containing that specific direction concerning the acquisition of "lands so subjected to overflow and damage," there is a sentence stating that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[1]

According to the Court, Congress intended by this sentence to immunize the Federal Government from liability for *any* claim for personal injury, even though Congress provided expressly for compensation for property damage in excess of

[1] Section 3 of the statute, which is now codified as 33 U. S. C. § 702c, reads in full as follows:

"Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands." 45 Stat. 535–536.

that required by the Constitution.[2] In my view, neither the plain language of the statute nor the legislative history behind it supports imputing such a perverse design to the Legislature. In my opinion, this provision applies only to property damage, and the judgment below should be affirmed.[3]

The immunity provision absolves the United States of liability for any "damage" by floods or floodwaters. The word "damage" traditionally describes a harm to property (hence, "property damage"), rather than harm to the person (usually referred to as "personal injury"). As Chief Judge Cockburn explained in *Smith* v. *Brown*, 40 L. J. Rep. (n.s.) 214, 218 (Q. B. 1871):

> "The question is whether a personal injury occasioned by the collision of two vessels comes under the term 'damage' as used in the 7th section. Now the words used are undoubtedly very extensive, but it is to be observed that neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property. Still less is this term applicable to loss of life or injury resulting therefrom, to a widow or surviving relative. We speak indeed of 'damages' as compensation for injury done to the person, but the term 'damages' is not employed interchangeably with the term 'injury,' with reference to mischief wrongfully occasioned to the person. . . . [T]his distinction is not a matter of mere verbal criticism, but is of a substantial character and necessary to be attended to . . . ."

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[2] Congress rejected an amendment to § 3 to provide only such compensation as would be required by the Constitution—a measure that Congress thought excluded flowage rights. See 69 Cong. Rec. 7104–7111, 7122 (1928).

[3] My reading of the statute and its legislative history also persuades me that the immunity provision has no application to any other flood control project.

See *Seward* v. *The Owners of the Vera Cruz*, 54 L. J. Rep. 9, 13 (P. D. & A. 1884) (Lord Chancellor); *Simpson* v. *Blues*, 41 L. J. Rep. (n.s.) 121, 128 (C. P. 1872). This understanding of "damage" was not peculiar to English common-law courts, but was the preferred definition found in legal dictionaries and in legal encyclopedias in use in the United States around the time Congress drafted the Mississippi Flood Control Act. See, *e. g.*, Bouvier's Law Dictionary 749 (8th ed. 1914); 15 Am. Jur., Damages § 2, p. 388 (1938) ("A distinction is to be noted between the word 'damage' and 'damages.' 'Damage' is defined to be the loss, injury, or deterioration caused by negligence, design, or accident of one person to another *in respect of the latter's personal property*, whereas 'damages' signifies compensation in money for the loss or damage" (emphasis added)); 17 C. J., Damage 698 (1919) ("It has been held that neither in common parlance nor in legal phraseology is the word ['damage'] used as applicable to injuries done to the person, but solely as applicable to mischief done to property; and, although we speak of damages as compensation for injury done to the person, yet the term is not employed interchangeably with the term 'injury,' with reference to mischief wrongfully occasioned to the person; but there is authority to the effect that the term 'damage' includes personal injuries; and where the context shows that damage means personal injury, the term will be so construed" (footnotes omitted)).

Because the preferred definition of "damage" in 1928 excluded harm to the person, one would think that the Court—in accordance with the "plain meaning" of § 3—would construe the immunity provision to bar liability only for property damage. Surprisingly, the Court reaches precisely the opposite conclusion. Its analysis, however, relies entirely on authorities which define "*damages*"—or the monetary remedy imposed on one found liable for a legal wrong—rather than "*damage*"—which is the term Congress employed to identify the liability from which the Federal Government was thereafter excused. It is therefore quite beside the point

that "damages" have "'historically been awarded both for injury to property and injury to the person.'" *Ante*, at 605 (quoting *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 450 (1947)), for the statute bars liability for "damage," not "damages." Indeed, the Court's own authorities, see *ante*, at 605, and n. 6, distinguish between the two terms:

> "It might be noted here that there is a distinction between damage and damages. Black's Law Dictionary cautions that the word 'damage,' meaning 'Loss, injury, or deterioration,' is 'to be distinguished from its plural,—"damages,"—which means a compensation in money for a loss or damage.'" *American Stevedores, Inc.* v. *Porello*, 330 U. S., at 450, n. 6.[4]

The Court thus provides no basis for thinking that Congress used "damage" other than in its common, preferred usage to mean property damage. If "plain meaning" is our polestar, the immunity provision does not bar respondents' personal injury suits.

The remainder of the statute and its legislative history similarly provide no basis for assuming that Congress used "damage" to bar liability for personal injuries. The text of § 3—indeed, the text of the entire Mississippi Flood Control Act of 1928—contains no reference to personal injury. Moreover, when the sentence beginning "[n]o liability" is read together with the proviso appended to it, it is most

[4] The treatises on damages on which the Court relies likewise subscribe to this definition of "damages," see 1 T. Sedgwick, Measure of Damages § 29 (9th ed. 1912); 1 J. Sutherland, Law of Damages § 2, p. 4 (4th ed. 1916); *id.*, § 12, at 46, and the distinction between "damage" and "damages" appears to have been universally observed, see, *e. g.*, 15 Am. Jur., Damages § 2, p. 388 (1938); 8 American and English Encyclopaedia of Law 535 (2d ed. 1898); W. Hale, Law of Damages 9, 12–13 (2d ed. 1912). In fact, the authorities cited by the Court support the traditional interpretation of "damage"; for example, in the index to his treatise Mr. Sedgwick refers to "damage" only when referring to property damage. See 4 Sedgwick, *supra*, at 3160–3162.

readily understood as relating to the kind of harm that the paragraph as a whole describes—namely, the harm to "land subjected to overflow and damage." As the text of § 3 of the Act plainly states, see n. 1, *supra*, the Federal Government assumed certain responsibilities for areas in which the construction of levees was not practicable. Given that specific and limited undertaking, the sentence limiting liability is best understood as making it clear that the Federal Government accepted no additional responsibilities and did not intend to create a new federal judicial remedy for failing to carry out its undertaking. Indeed, a claim that the 1928 Act created a new federal remedy for property damage was advanced and rejected in *United States* v. *Sponenbarger*, 308 U. S. 256, 269–270 (1939). Thus, the text of § 3 read as a whole irresistibly implies that the sentence in question was intended merely to place a limit on the potential liability of the United States that might otherwise have arisen from the direction to the Secretary of the War and the Chief of Engineers concerning overflow damage to land.[5]

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[5] The Court, see *ante*, at 609, is simply wrong in intimating that the immunity sentence and its proviso were dissociated from each other during their consideration before Congress. The Court's observation that the immunity provision and the proviso were sponsored by different Congressmen is only trivially true: the proviso was offered by Representative Garrett of Tennessee as an amendment to the immunity provision, which was itself a pending amendment, sponsored by Representative Reid of Illinois, to the bill before the House of Representatives. 69 Cong. Rec. 7022 (1928). The sponsor of the proviso, Representative Garrett, offered his amendment as an amendment to the immunity provision *before it was added to the bill*. *Ibid.* In explaining the reason for this, Representative Garrett underscored the symbiotic relationship between the immunity provision and the proviso:

"Mr. Chairman, I am inclined to agree with the gentleman from Illinois [Mr. MADDEN] that the amendment which the gentleman from Illinois [Mr. REID] has proposed more properly would come in another section, but if it is to come now it seems to me that my amendment will *have to*

The legislative history of the statute is entirely consistent with this reading. It was a response, not only to the disastrous flood of 1927, but to the perennial threat to landowners in the alluvial valley of the Mississippi River posed by recurrent floods since at least 1717. See *United States* v. *Sponenbarger*, 308 U. S., at 260–262. During the lengthy hearings and debates on the 1928 legislation, there was extensive discussion of the allocation of the cost of property damage, both past and future, among private interests, local governmental entities, and the Federal Government. See *ante*, at 607, n. 8 (quoting estimates of the costs of construction and acquisition of property). But there was *no* discussion that I have been able to find concerning potential liability for personal injuries. If Congress meant to include personal injury "damage" in the immunity conferred by § 3, one would expect to find *some* explanation of why it authorized extraconstitutional compensation for property damage but nothing for personal injury. The expected explanation is nowhere to be found.

Construing the immunity sentence as a limit on the compensation authorized in § 3 also avoids rendering that sentence superfluous. The 70th Congress had no reason to enact a special statute to protect the Federal Government from tort liability for personal injuries for the simple reason that another decade and a half was to pass before Congress enacted the Federal Tort Claims Act in 1946[6] and "put aside its sovereign armor in cases where federal employees have

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come in connection with it at this place. I do not want to lose any rights in connection with it." *Ibid.* (emphasis added).

A short while later, the House passed Representative Garrett's amendment adding the proviso to the amendment containing the immunity provision. *Id.*, at 7023. Immediately thereafter, the House agreed to "the amendment of the gentleman from Illinois *as amended by the amendment of the gentleman from Tennessee*." *Ibid.* (remarks of the Chairman) (emphasis added). The immunity provision and the proviso were thus considered and passed as a package.

[6] 60 Stat. 842–847.

tortiously caused personal injury or property damage."[7] It is quite unrealistic to assume that in 1928 Congress enacted a special provision to avoid a liability from which it was already immune.[8]

It would be regrettable but obligatory for this Court to construe the immunity provision to bar personal injury claims if such was the intent of Congress. But when a critical term in the statute suggests a more limited construction, and when the congressional debates are not only consistent with this construction, but nowhere reveal a recognition, let alone an intention, that the immunity provision would deprive

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[7] *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 453 (1947). It is interesting to note that in the Tort Claims Act itself, Congress repeatedly referred in the alternative to claims "on account of damage to or loss of property or on account of personal injury or death," see 60 Stat. 843, 845–846.

Revealingly, the Committee Reports on the Act did not understand there to be any bar to liability for personal injuries resulting from flood control projects:

"'This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, *such as a flood control or irrigation project*, where no negligence on the part of any Government agent is shown.'" *Dalehite* v. *United States*, 346 U. S. 15, 29, n. 21 (1953) (emphasis added) (quoting H. R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess., 7 (1942); H. R. Rep. No. 1287, 79th Cong., 1st Sess., 5–6 (1945)).

[8] This construction is also consistent with 58 years of decisional law. The statute the Court construes today has been on the books for more than half a century, but prior to this case there appears to be no reported decision in which the Government successfully asserted it as a defense to a personal injury claim. See 760 F. 2d 590, 599, n. 16 (CA5 1985). It has been repeatedly and successfully invoked in property damage litigation, but the application of the statute that the Court upholds today is completely unprecedented. Given the number and the size of federal flood control projects throughout our great Nation, and given the fact that the kind of recreational use disclosed by this record is fairly common, it is telling that, until today's decision, immunity had never been upheld in defense to such a claim.

those injured by governmental negligence of any remedy, a narrower interpretation is more faithful to the objective of Congress. It defies belief—and ascribes to the Members of Congress a perverse, even barbaric, intent—to think that they spent days debating the measure of extraconstitutional compensation they would provide riparian landowners but intended—without a single word of dissent—to condemn the widows, orphans, and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

I respectfully dissent.

BAKER ET AL. *v.* GENERAL MOTORS CORP. ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN

No. 85–117. Argued April 2, 1986—Decided July 2, 1986

A Michigan statute makes an employee ineligible for unemployment compensation if he has provided "financing," by means other than the payment of regular union dues, for a strike that causes his unemployment. As authorized by their international union, appellant employees of appellee General Motors Corp. (GM) were required to pay, in addition to their regular union dues, "emergency dues" to augment the union's strike insurance fund. Although the union and GM reached an agreement on national issues at a time when negotiations for a collective-bargaining agreement were taking place, three local unions went on strike at GM foundries, and strike fund benefits were paid to the striking employees from the fund in which emergency dues had been deposited. As a result of the strikes, operations were temporarily curtailed at other GM plants, idling more than 19,000 employees, most of whom are appellants in this case. Appellants' claims for unemployment benefits were ultimately denied by the Michigan Supreme Court on the ground that the emergency dues payments constituted "financing" of the strikes that caused appellants' unemployment, thus making appellants ineligible for unemployment compensation under the Michigan statute. The court further held that its construction of the state statute was not pre-empted by federal law on the asserted ground that it inhibited the exercise of rights guaranteed by § 7 of the National Labor Relations Act (NLRA).

Held: The "financing" disqualification from receiving unemployment compensation, as construed by the Michigan Supreme Court, is not pre-empted by federal law. While in financing the local strikes appellants were exercising associational rights protected by § 7 of the NLRA, that protection does not deprive the State of the power to make the policy choice that otherwise would be authorized by Title IX of the Social Security Act, which gives the States a wide range of judgment as to the particular type of unemployment compensation program they may provide. The employers did nothing to impair the exercise of appellants' § 7 rights. Whether or not appellants were participants in the decision to strike, or to expend funds in support of the local strikes, the fact that their unemployment was entirely attributable to the voluntary use of the union's bargaining resources—untainted by any unlawful conduct by the employer—is a sufficient reason for allowing the State to decide whether or not to pay unemployment benefits. Appellants were not laid off sim-

ply because they paid emergency dues but rather became unemployed because there was a meaningful connection between the decision to pay emergency dues, the strikes that ensued, and ultimately their own layoffs. While federal law protects the employees' right to authorize a strike, it does not prohibit a State from deciding whether or not to compensate employees who thereby cause their own unemployment. An employee's decision to participate in a strike, either directly or by financing it, is not only an example of causing one's own unemployment, it is one that furthers the federal policy of free collective bargaining regardless of whether or not a State provides compensation for employees who are furloughed as a result of the labor dispute. Pp. 632–638.

420 Mich. 463, 363 N. W. 2d 602, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 638.

Jordan Rossen argued the cause for appellants. With him on the briefs was *Fred Altshuler*.

Peter G. Nash argued the cause for appellees. With him on the brief were *Dixie L. Atwater*, *J. R. Wheatley*, and *Jonathan N. Wayman*.

Deputy Solicitor General Cohen argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Fried*, *Deputy Solicitor General Kuhl*, *Jerrold J. Ganzfried*, *Norton J. Come*, and *Linda Sher*.

JUSTICE STEVENS delivered the opinion of the Court.

In Michigan an employee is ineligible for unemployment compensation if he has provided "financing"—by means other than the payment of regular union dues—for a strike that causes his unemployment.[1] The question presented by this

[1] Section 29(8) of the Michigan Employment Security Act (MESA) provides:

"(8) An individual shall be disqualified for benefits for a week in which the individual's total or partial unemployment is due to a labor dispute in active progress . . . in the establishment in which the individual is or was last employed, or to a labor dispute, other than a lockout, in active progress . . . in any other establishment within the United States which is functionally integrated with the establishment and is operated by the same

appeal is whether Michigan's statutory disqualification is implicitly prohibited by § 7 of the National Labor Relations Act.[2]

This case has a long history. Two appeals to the State Supreme Court and a series of administrative proceedings have determined the relevant facts and the meaning of the governing statutory provision. Before addressing the federal question, we shall therefore summarize the events that gave rise to the controversy and the propositions of state law that were resolved on each appeal.

The Relevant Events

The story begins in June 1967, when the international union[3] representing the work force in the automobile industry notified the three major manufacturers—General Motors, Ford, and Chrysler—that it intended to terminate all national and local collective-bargaining agreements when they expired on September 6, 1967. In August, after the UAW

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employing unit. . . . An individual shall not be disqualified under this subsection if the individual is not directly involved in the dispute.

"(a) For the purposes of this subsection an individual shall not be considered to be directly involved in a labor dispute unless it is established that any of the following occurred:

. . . . . .

"(ii) The individual is participating in or financing or directly interested in the labor dispute which causes the individual's total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph." Mich. Comp. Laws § 421.29(8) (Supp. 1986).

[2] Section 7 of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. § 157, provides in part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[3] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (referred to in the text as the UAW and the Union).

and GM had opened negotiations for a new national agreement, the members of the Union employed by GM voted to authorize strikes, if necessary, on national and local issues. When the agreements expired, the UAW began a national strike against Ford, but did not immediately strike any GM plants.

On October 8, 1967, while the Ford strike was continuing,[4] the UAW held a special convention to authorize "adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort."[5] At that convention the UAW amended its constitution to authorize the collection of "emergency dues"[6] that would be used to augment the Union's

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[4] The UAW employees of the Caterpillar Company were also on strike.

[5] The proceedings of the convention recited that its purposes were:

"'1. [To] [r]eview the status of our 1967 collective bargaining effort.

"'2. To consider revision of the dues program of the International Union, UAW, to provide adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort.

"'3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, strike fund, membership eligibility, strike insurance program and other matters related to emergencies facing the International Union, UAW.'" 420 Mich. 463, 512–513, 363 N. W. 2d 602, 624 (1984).

[6] The text of the amendments reads, in pertinent part:

"'Article 16, Section 2(a) (new): Emergency Dues

"'All dues are payable during the current month to the financial secretary of the local union.

"'Commencing with the eighth (8th) day of October 1967 until October 31, 1967, and for each month thereafter during the emergency as defined in the last paragraph of this subsection, union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be as follows:

"'1. For those working in plants where the average straight time earnings * * * is three dollars ($3.00) or more, *twenty-one dollars and twenty-five cents* ($21.25) *per month.*

"'2. For those working plants where the average straight time earnings * * * is less than three dollars ($3.00), *eleven dollars and twenty-five cents* ($11.25).

strike insurance fund. In a letter to GM employees explaining the purpose of the dues increase, the Union stated:

> "'These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our time comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members.'" 420 Mich. 463, 513, 363 N. W. 2d 602, 624–625 (1984) (footnote omitted).

The emergency dues were payable immediately and were to remain in effect during the "collective bargaining emergency." See n. 6, *supra*. They were much larger than the regular dues. Before the emergency, each UAW member paid strike insurance dues of $1.25 per month and administrative dues of $3.75. The amendment increased the contribution to the strike insurance fund to $21.25 per month for employees in plants where the average straight-time hourly earnings amounted to $3 or more, and to $11.25 in plants where the average earnings were lower. Thus, for the former group the increase of $20 was 16 times as large as the regular contribution to the strike fund; for the latter group the $10 increase was 8 times as large.

The strike against Ford was settled in October, before the first scheduled collection of the new special strike fund dues. Notwithstanding this development, emergency dues of $42 million were subsequently collected until November 30, 1967—when the UAW determined that it would not strike any GM plants "at least during the month of December 1967."[7] At this point the UAW advised its membership that

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"'*This schedule of dues shall remain in effect during the current collective bargaining emergency as determined by the International Executive Board* and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000) . . . .'" *Id.*, at 472, 363 N. W. 2d, at 606.

[7] *Baker* v. *General Motors Corp.*, 409 Mich. 639, 653, n. 5, 297 N. W. 2d 387, 392, n. 5 (1980) (emphasis omitted).

even though "the collective bargaining emergency has not yet ended," the emergency dues would be waived during December and January and dues would revert to the regular rate of $5 per month. In December, the UAW and GM reached agreement on all national issues.

In January 1968, however, three UAW local unions went on strike at three GM foundries for periods of 10, 11, and 12 days.[8] Strike fund benefits of $4 to $6 a day, totaling $247,245.31, were paid to the striking UAW employees from the fund in which the emergency dues collected in October and November had been deposited. At that time the emergency dues constituted about half of the money in the fund.[9] As a result of the strikes, operations were temporarily curtailed at 24 other functionally integrated GM plants, idling more than 19,000 employees. Most of these employees are appellants in this case. Their claims for unemployment benefits were considered at three levels of administrative review[10] and three levels of judicial review,[11] and were ultimately denied by the State Supreme Court.

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[8] See *id.*, at 653, 297 N. W. 2d, at 392.

[9] See 420 Mich., at 520, 363 N. W. 2d, at 628. See also App. to Juris. Statement 113a, 115a (decision of Michigan Employment Security Board of Review on remand from Michigan Supreme Court).

[10] The claims were originally allowed by the Michigan Employment Security Commission, but on an appeal by GM a hearing referee reversed the MESC. On appellants' appeal the referee's decision was upheld by the Michigan Employment Security Appeal Board. See 420 Mich., at 474–475, 363 N. W. 2d, at 608.

[11] Appellants appealed the denial of unemployment benefits to three County Circuit Courts, two of which reversed the decision of the Appeal Board and one of which affirmed it. On further appeal, the Michigan Court of Appeals disallowed the claims, holding that the appellants had "financed" the labor dispute which caused their unemployment by paying emergency strike fund dues and that they were disqualified under Michigan Employment Security Act § 29(8)(a)(ii) as a consequence. See *Baker* v. *General Motors Corp.*, 74 Mich. App. 237, 254 N. W. 2d 45 (1977). The Michigan Supreme Court granted leave to appeal and disposed of certain issues before remanding to the Board of Review for further proceedings.

The First Appeal

In its first opinion in this case the Michigan Supreme Court decided two statutory questions and remanded a third for further consideration by the Board of Review.

It first held that appellants' unemployment was "due to a labor dispute in active progress" at other establishments operated by the same employing unit and functionally integrated with the establishments where appellants were employed within the meaning of the statute. It rejected the argument that the layoffs were due not only to the strikes, but also to a combination of management decisions and seniority provisions in the collective-bargaining agreement, holding instead that the strikes were a "substantial contributing cause" of the unemployment and need not be its sole cause.[12]

After finding the requisite causal connection between the strikes and the layoffs, the court considered the relationship between the emergency dues and the strikes. Appellants contended that their payments were expressly excepted from the coverage of the statute because they were "regular union dues." The State Supreme Court rejected this argument, explaining that the term "regular" had been used "to exclude from possible treatment as financing those dues payments re-

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See *Baker* v. *General Motors Corp.*, 409 Mich. 639, 297 N. W. 2d 387 (1980). See *infra* this page and 628.

[12] "The seniority provisions and management decisions which plaintiffs identify as contributing causes of their unemployment would not themselves have caused plaintiffs' unemployment or any unemployment were it not for the labor disputes in active progress at the functionally integrated foundries. But for those disputes, materials would have been available at plaintiffs' places of employment, the work force at those establishments would not have been reduced, and the seniority provisions would not have become operative. The labor disputes in active progress at the foundries were shown by competent, material and substantial evidence to have been substantial contributing causes of the layoffs which idled plaintiffs. We affirm the board's finding that plaintiffs' unemployment was 'due to a labor dispute in active progress' within the meaning of subsection 29(8)." 409 Mich., at 661–662, 297 N. W. 2d, at 396.

quired uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or disputes."[13] The exception for regular union dues thus did not encompass "unusual collections for the purpose of supporting a labor dispute."[14]

The court did not decide whether the emergency dues constituted "financing" of the local strikes. It noted that the statute did not require that the payments made by the individuals whose disqualification was in issue must be traced into the hands of the striking employees, but it indicated that there must be a "meaningful connection" between the payments and the strikes to satisfy the "financing" requirement. It therefore remanded the case to the Appeal Board's successor tribunal to consider that question.[15]

The Second Appeal

On remand, the Board of Review concluded that there was a "meaningful connection" between the emergency dues and the GM strikes. It found that the dues were intended to support local strikes at GM plants, that strikes which might affect their own employment were foreseeable at the time appellants paid the emergency dues, and that the dues were a substantial source of funding for the strikes. The Supreme Court agreed.

As a predicate to its analysis, the court explained that the term "financing" should be construed in the light of the general purpose of the statute to provide assistance to persons

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[13] *Id.*, at 666, 297 N. W. 2d, at 398.

[14] *Ibid.*

[15] "The appeal board did not give separate consideration to the meaning of 'financing,' in general or as applied to this case. We therefore remand this matter to its successor, the tribunal with the most experience and expertise in the application of the act, to reconsider, in light of its own unique familiarity with the act, practical considerations and related issues implicated by this question, whether plaintiffs' emergency dues payments were sufficiently connected with the local labor disputes which caused their unemployment to constitute 'financing' of those labor disputes." *Id.*, at 668, 297 N. W. 2d, at 399.

who are involuntarily unemployed. The disqualification applies to "persons who are 'voluntarily' unemployed by financing the labor dispute that causes their unemployment. It does so because 'financing' is one of the statutorily designated ways in which a person may evidence 'direct involvement' in a labor dispute."[16] Thus, "[t]he end result of a proper meaningful connection definition should be to delineate persons whose own activities have contributed to their unemployment so as to make them voluntarily unemployed and therefore, ineligible for unemployment compensation benefits."[17]

The Michigan Supreme Court considered and rejected appellants' argument that their emergency dues payments were not voluntary because they were required by the UAW in order to retain their union membership and their jobs at GM. The court held that employees could not use their own collective-bargaining agent as a shield to protect them from responsibility for conduct that they had authorized. It therefore specifically held that appellants' "emergency dues payments were not involuntary."[18]

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[16] 420 Mich., at 493, 363 N. W. 2d, at 616.

[17] *Ibid.* See *id.*, at 478, 363 N. W. 2d, at 609 ("Since the MESA is intended to provide benefits only to involuntarily unemployed persons, the purpose of § 29 is obvious. MESA § 29 lists the circumstances under which the Legislature holds that a person is not entitled to benefits under the MESA because he is *not* involuntarily unemployed").

[18] "As noted above, the statute does not recognize such a ploy. UAW membership is required for employment by GM because the UAW bargains for such a provision in its contract with GM. In so doing, the UAW represents its members and they must ratify any contract agreed upon by the UAW and GM. Therefore, any 'coercion' resulting from the terms of the contract does not make the plaintiffs' action in accord with the contract 'involuntary.' As the Court of Appeals said in *Applegate* v. *Palladium Publishing Co.*, 95 Mich. App. 299, 305; 290 N. W. 2d 128 (1980), and we adopt here:

"'Action taken by employees under a contract negotiated for them by their authorized agent must be considered their voluntary acts. In effect, plaintiff agreed to [act] pursuant to the collective bargaining agreement.'

"Any other holding would make all actions taken by union members pursuant to a union contract involuntary and relieve the members of responsibility for their contract-based actions. We cannot agree with such a

Those payments constituted "financing" of the strikes that had caused appellants' unemployment because there was a "meaningful connection" between the payments and the strikes. In finding that causal connection the court relied on three factors—the purpose, the amount, and the timing of the emergency dues.[19] In finding the requisite purpose, the court noted that the dues had actually provided financial support for the strikes, that the strikes were foreseeable when the dues were collected, that it was also foreseeable that such strikes would cause the unemployment which actually occurred, and that the evidence of purpose and foreseeability was sufficient without relying on hindsight after the events occurred.[20] The court also concluded that the amount of the

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rule. The plaintiffs' emergency dues payments were not involuntary." 420 Mich., at 499, 363 N. W. 2d, at 618–619.

[19] "A meaningful connection exists between the financing and the labor dispute that causes the claimant's unemployment where, for the purpose of assisting labor disputes which reasonably and foreseeably include the labor dispute that caused the claimant's unemployment, the claimant finances in significant amount and in temporal proximity the labor dispute that causes his unemployment. Where the Court finds these three elements present (purpose, amount, and timing), there is a meaningful connection between the financing and the labor dispute that causes the claimant's unemployment." *Id.*, at 506, 363 N. W. 2d, at 621–622.

Accord, *id.*, at 500–501, 363 N. W. 2d, at 619.

[20] "The final aspect of the purpose analysis focuses on whether it was foreseeable at the time of the financing that supporting the labor disputes would cause the claimant's unemployment. In this case, there is and can be no dispute on this issue. Since it was foreseeable that local GM strikes would occur and be financed by the emergency dues, and since automotive industry production is based upon a series of interrelated production units which produce only one component of the automobile, it is obvious that a local labor dispute which idles one plant might cause layoffs at other plants which rely upon the component produced at the idled plant. This 'chain reaction' can move both 'up' and 'down' the line. Therefore, layoffs at plants not presently engaged in a local labor dispute were foreseeable due to local disputes.

"In conclusion, the evidence adduced in this case supports the conclusion that the purpose of the emergency dues included supporting labor disputes

financing was significant, whether viewed in terms of the aggregate value of the emergency dues, the individual contributions by each member, or their support for the strikers.[21] Finally, it found only a "minimal" time lag between the collections of the emergency dues and their use to support the strikes that caused appellants' unemployment.[22] As a consequence, the court concluded that appellants were "not eligible for unemployment benefits because they caused their unemployment by financing, in a meaningfully connected way, the labor dispute that caused" their unemployment.[23]

Only after it had meticulously satisfied itself that the emergency dues payments constituted "financing" that made appellants ineligible for unemployment compensation under the Michigan statute, did the court turn to the question whether its construction of state law was pre-empted by federal law because it inhibited the exercise of rights guaranteed by the National Labor Relations Act (NLRA). The state court agreed with appellants that the right to support strikes by paying extraordinary dues was protected by § 7 of the NLRA, but concluded that the legislative history of the Social Security Act which was reviewed in *New York Tele-*

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including those that actually caused the plaintiffs' unemployment. Therefore, the first portion of the meaningful connection definition is met." *Id.*, at 516–517, 363 N. W. 2d, at 626.

[21] See *id.*, at 519, 363 N. W. 2d, at 627 ("By any standard, the amount of increase is significant and demonstrates a meaningful connection with the labor dispute that caused their unemployment"). Accord, *id.*, at 517–520, 363 N. W. 2d, at 626–628.

[22] "As applied to this case, we find that this portion of the meaningful connection definition is satisfied since the payment of emergency dues immediately precedes the support of the labor dispute that caused the plaintiffs' unemployment. . . . The time lag between the collection and disbursement of the strike fund benefits is minimal when it is considered that the funds were collected 'by hand' at the local level, were forwarded to the SIF, and were distributed to striking GM employees only after they had satisfied an initial waiting period requirement." *Id.*, at 521, 363 N. W. 2d, at 628.

[23] *Id.*, at 521–522, 363 N. W. 2d, at 628.

phone Co. v. *New York State Dept. of Labor*, 440 U. S. 519 (1979), demonstrated that Congress "intended to tolerate" the conflict between the state law and the federal law.[24] Accordingly, after some 15 years of litigation, the Michigan Supreme Court finally denied appellants' claim for unemployment compensation.

We noted probable jurisdiction of their appeal, 474 U. S. 899 (1985), and now affirm. We first discuss the problem presented by the case in general terms and then consider the specific contentions that appellants advance.

I

The National Labor Relations Act and the Social Security Act were both enacted in the summer of 1935. See *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S., at 527. Neither statute required any State to adopt, or to maintain, an unemployment compensation program. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 596 (1937). Title IX of the latter Act did, however, motivate the enactment of state programs throughout the Nation.[25] That Title authorized the provision of federal funds to States having

[24] *Id.*, at 541, 363 N. W. 2d, at 637.

[25] "Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11." *Steward Machine Co.* v. *Davis*, 301 U. S., at 587–588 (footnote omitted).

programs approved by the Secretary of Labor. Although certain minimum federal standards must be satisfied, the scheme is one in which a "wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." *Id.*, at 593.

The policy of allowing "broad freedom to set up the type of unemployment compensation they wish" has been a basic theme of the program since the general outlines of the legislation were first identified in the Report of the Committee on Economic Security that was prepared for "the President of the United States and became the cornerstone of the Social Security Act." *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 482 (1977). In guiding state efforts to draft unemployment compensation programs, however, that Report also stressed the importance of the distinction between voluntary and involuntary unemployment. It characterized that distinction as "the key to eligibility." *Id.*, at 483. "To serve its purposes, unemployment compensation must be paid only to workers involuntarily unemployed." *Id.*, at 482 (quoting Report of the Committee on Economic Security, as reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935)).

The involuntary character of the unemployment is thus generally a necessary condition to eligibility for compensation. But even involuntary unemployment is not always a *sufficient* condition to qualify for benefits, as we found in *Hodory*. In that case, we held that Ohio could disqualify a millwright who was furloughed when the plant where he worked was shut down because of a shortage of fuel caused by a strike at coal mines owned by his employer. Even though he was unemployed through no fault of his own, as the result of a labor dispute in which he had no interest, federal law did not require Ohio to pay him unemployment compensation.

In *Hodory* there was no claim that the National Labor Relations Act pre-empted Ohio's disqualification of unemploy-

ment caused by a labor dispute. A pre-emption argument was advanced, however, in *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519 (1979), a case in which the employer contended that federal law *prohibited* the State from giving unemployment compensation to the company's striking employees. The evidence established that the payments not only provided support for the strikers but also imposed an added burden on the company and therefore plainly "altered the economic balance between labor and management." *Id.*, at 532. Relying on the pre-emption analysis in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), the employer therefore contended that the payments were inconsistent with the federal labor policy "of allowing the free play of economic forces to operate during the bargaining process." 440 U. S., at 531. We rejected the argument, not because we disagreed with its premises, but rather because we were persuaded by our study of the legislative history of the two 1935 Acts that Congress had intended to tolerate the conflict with federal labor policy. We explained:

> "Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments." *Id.*, at 544.

See *id.*, at 547 (BRENNAN, J., concurring in result); *id.*, at 549 (BLACKMUN, J., with whom MARSHALL, J., joined, concurring in judgment).

Our conclusion that Congress did not intend to pre-empt the States' power to make the policy choice between paying or denying unemployment compensation to strikers does not directly respond to the argument advanced by appellants in this case. For they rely, not on the general policy of non-

interference with the free play of economic forces during the bargaining process, but rather on the claim that § 7 of the NLRA provides specific protection for their payment of the emergency dues required by the UAW. Nevertheless, the claim must be analyzed in the light of our conclusion in *New York Telephone Co.* that Congress expressly authorized "a substantial measure of diversity," 440 U. S., at 546, among the States concerning the payment of unemployment compensation to workers idled as the result of a labor dispute.

Thus, *New York Telephone Co.* makes it clear that a State may, but need not, compensate actual strikers even though they are plainly responsible for their own unemployment. And, on the other hand, *Hodory* makes it equally clear that a State may refuse, or provide, compensation to workers laid off by reason of a labor dispute in which they have no interest or responsibility whatsoever. In between these opposite ends of the spectrum are cases in which the furloughed employees have had some participation in the labor dispute that caused their unemployment. This is such a case, because the state court has found that appellants provided significant financial support to strikes against their employer with full knowledge that their own work might thereby suffer. It is clear, however, that in financing the local strikes, they were exercising associational rights that are expressly protected by § 7 of the NLRA. The question, then, is whether that protection deprives the State of the power to make the policy choice that otherwise would be plainly authorized by Title IX of the Social Security Act.

II

Appellants place their primary reliance on *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235 (1967), a case in which the Florida Commission had concluded that a union member was disqualified for unemployment compensation because she had filed an unfair labor practice charge against her employer. The Florida District Court of Appeal held that the Commis-

sion had properly treated the filing of the charge with the National Labor Relations Board as the initiation of a "labor dispute" within the meaning of the Florida statute disqualifying unemployment that "is due to a labor dispute." We reversed. We explained that Congress had made it clear that it wished all persons with information about unfair labor practices "to be completely free from coercion against reporting them to the Board," *id.*, at 238, and that the statute prohibited an employer from interfering with an employee's exercise of his right to file charges. Accordingly, we concluded:

> "[C]oercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. . . . Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.*, at 239.

The federal right implicated in *Nash* was the right to file an unfair labor practice charge with the Board. Arguably there are two different rights protected by § 7 that are implicated by this case—the right to contribute to a fund that will strengthen the union's bargaining position, and the right to expend money to support a strike. It would seem clear that it would be an unfair labor practice for an employer to discharge an employee for making a contribution to a strike fund or for voting in favor of a strike at another plant, just as it would be unlawful to discharge an employee for filing a charge with the Labor Board. In each such case, the unemployment would be attributable to an unlawful act by the employer rather than the foreseeable consequence of the exercise of the employee's § 7 rights.

In the actual case before us, however, the employer did nothing to impair the exercise of appellants' § 7 rights. To the extent that appellants may be viewed as participants in the decision to strike, or to expend funds in support of the

local strikes, it is difficult to see how such a decision would be entitled to any greater protection than is afforded to actual strikers. In either event, the fact that the temporary unemployment is entirely attributable to the voluntary use of the Union's bargaining resources—untainted by any unlawful conduct by the employer—is a sufficient reason for allowing the State to decide whether or not to pay unemployment benefits.

Perhaps the answer is less obvious when we focus on the payment of the emergency dues before any actual strike decision has been made, but we believe similar reasoning leads to the same conclusion. Appellants were not laid off simply because they paid emergency dues. Rather, under the meticulous analysis of the case by the Michigan Supreme Court, they became unemployed because there was a meaningful connection between the decision to pay the emergency dues, the strikes which ensued, and ultimately their own layoffs. Under the state court's narrow construction of its own statute, the emergency dues decision was tantamount to a plant-wide decision to call a strike in a bottleneck department that would predictably shut down an entire plant. As the court put it, "since the Michigan law only disqualifies those who are directly involved in the labor dispute through financing, the MESA essentially only disqualifies 'strikers.'" 420 Mich., at 540, 363 N. W. 2d, at 637. Unquestionably federal law protects the employees' right to authorize such a strike; it is equally clear, however, that federal law does not prohibit the States from deciding whether or not to compensate the employees who thereby cause their own unemployment. *New York Telephone Co.*, 440 U. S., at 540–546.

Thus, the essential distinction between the *Nash* case and this one is the distinction between involuntary and voluntary unemployment that was recognized at the inception of the Social Security Act. A decision to file an unfair labor practice charge—even though it may in fact motivate a retaliatory discharge—cannot be treated as a voluntary decision to cause

one's own unemployment without undermining an essential protection in the NLRA. But an employee's decision to participate in a strike, either directly or by financing it, is not only an obvious example of causing one's own unemployment—it is one that furthers the federal policy of free collective bargaining regardless of whether or not a State provides compensation for employees who are furloughed as a result of the labor dispute.

In reaching this conclusion, we of course express no opinion concerning the wisdom of one policy choice or another. Nor are we concerned with the possible application of the "financing" disqualification that has been adopted in numerous States other than Michigan and which, like the Florida statute involved in *Nash*, may be construed in a way that has an entirely different impact on § 7 rights. Specifically, we have no occasion to consider the circumstances, if any, in which individuals might be disqualified solely because they paid regular union dues required as a condition of their employment.[26] We merely hold that the "financing" disqualification in the Michigan statute as construed by the State Supreme Court in this case is not pre-empted by federal law.

Affirmed.

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

The State of Michigan disqualifies an individual from receiving unemployment benefits for "financing" the labor dispute that causes his unemployment. Mich. Comp. Laws § 421.29(8)(a)(ii) (Supp. 1986). As construed by the Michigan

[26] In their statement of the question presented, appellants described the statutory disqualification as one arising "solely because those individuals paid union dues," Brief for Appellants i, or, alternatively, as one arising "solely because those individuals paid union dues uniformly and lawfully required as a condition of employment," Juris. Statement i. As the Michigan Supreme Court carefully explained, however, the Michigan statute excepts the payment of regular union dues from the financing disqualification. See *supra*, at 627–628. See also n. 1, *supra*.

Supreme Court, this means that an unemployed individual is denied benefits for making a significant financial contribution to a labor organization "in temporal proximity" to the labor dispute that caused his unemployment if that contribution was "for the purpose of assisting labor disputes which reasonably and foreseeably include the dispute that caused the [individual's] unemployment." 420 Mich. 463, 506, 363 N. W. 2d 602, 621–622 (1984). Because I believe that, as so construed, this statute conflicts with the National Labor Relations Act (NLRA) in a way that Congress did not intend to permit, I respectfully dissent from the Court's opinion and judgment.

In enacting Title IX of the Social Security Act, Congress left the States a "wide range" of discretion to establish qualifications for receiving unemployment benefits. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 593 (1937); see also *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 482–489 (1977). We have previously found evidence in the legislative history of the Social Security Act indicating that Congress intended that this broad grant of authority should include power to authorize or deny unemployment benefits in ways that may interfere with the smooth operation of the federal labor laws. Thus, in *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519 (1979), we held that the States were free to authorize or to prohibit payment of unemployment benefits to striking workers notwithstanding the impact of such payments on the collective-bargaining process. We based our conclusion on evidence in the legislative history of the Social Security Act specifically indicating that Congress intended to leave the States such authority. *Id.*, at 540–546 (plurality opinion); see also, *id.*, at 546–547 (BRENNAN, J., concurring in result); *id.*, at 549 (BLACKMUN, J., concurring in judgment).

It is clear, however, that the States' discretion to fashion qualifications for unemployment compensation is not boundless, and that state laws that conflict with the NLRA in ways

that Congress did not intend to permit are pre-empted. For example, in *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235 (1967), petitioner filed an unfair labor practice charge with the National Labor Relations Board alleging that she had been laid off in retaliation for union activities. The Florida Industrial Commission determined that filing charges with the NLRB initiated a "labor dispute" within the meaning of the Florida statute denying benefits to individuals unemployed "due to a labor dispute." We concluded that the effect of such a disqualification on national labor policy was too great:

> "The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board. . . . It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.*, at 239 (footnote omitted).

As the Court recognizes, *ante*, at 635, a "financing" disqualification such as Michigan's implicates important rights that are protected by § 7 of the NLRA. In particular, such a disqualification may prevent workers from exercising their right to expend money in support of a strike, and, more generally, it will influence their willingness to contribute to a fund that will strengthen the union's position in collective bargaining. The question we must answer in this case, then, is whether—as in *New York Telephone Co.*—there is reason to think that Congress intended to tolerate the conflict between Michigan's "financing" provision and the NLRA, or

whether—like the state law struck down in *Nash*—this conflict is one that Congress did not intend to permit.

I note at the outset that it is highly unusual to interpret one law by reference to the legislative history of a different law. However, because the NLRA and the Social Security Act were considered by Congress at the same time and were passed within five weeks of one another, it is sometimes appropriate to read them *in pari materia*. See *New York Telephone Co.*, *supra*, at 540–541; *ante*, at 632–633. Nonetheless, the NLRA and the Social Security Act are distinct pieces of legislation that address very different concerns. Consequently, we cannot find that Congress intended to withdraw protections extended in the NLRA on the basis of the legislative history of the Social Security Act unless the expression of Congress' intent to do so is especially clear. In this case, the available evidence is anything but clear in support of the conclusion that Congress intended to permit States to deny unemployment benefits to individuals for "financing" a labor dispute in the manner approved by the Michigan Supreme Court. Unlike the discussion in the legislative history concerning unemployment benefits for actual strikers that was relied upon in *New York Telephone Co.*, *supra*, at 542–544, there is no comparable discussion at any point in the legislative history of benefits for individuals who "finance" a labor dispute. Nor does the Report of the Committee on Economic Security, which "'became the cornerstone of the Social Security Act,'" *ante*, at 633 (quoting *Ohio Bureau of Employment Services* v. *Hodory*, *supra*, at 482), mention the subject of a "financing" disqualification. The sole support for the use of a financing disqualification is in "draft bills" prepared by the Social Security Board one year after the Social Security Act was passed as examples of what the Act permitted the States to do. These draft bills disqualified workers from receiving benefits if their unemployment was due to a labor dispute which they were "participating in or financing or directly interested in . . . ." United States

Social Security Board, Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types §§ 5(d)(1) and (2), pp. 9, 10 (1936).

One could argue that, in light of this scant legislative history, there is no basis for concluding that Congress intended to authorize the States to utilize *any* kind of "financing" disqualification that interferes with rights protected by the NLRA. However, because the draft bills constitute a contemporaneous construction of an Act by those charged with the responsibility for setting it in motion, they are entitled to considerable deference. See *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) (quoting *Power Reactor Development Co.* v. *Electrical Workers*, 367 U. S. 396, 408 (1961)). We may therefore conclude that the States may enact *some* sort of "financing" disqualification even though this might conflict with the NLRA. The difficult question is what kind.

Unfortunately, the Social Security Board did not elaborate on its understanding of the permissible scope of its financing disqualification, so there is nothing in the draft bills from which to determine how broad the disqualification may be, consistent with the NLRA. It is at least clear, however, that the Social Security Board thought that there were limits on the scope of any financing disqualification. For within just a few years, the Board deleted this disqualification from its draft bills, explaining:

> "The provision found in some laws extending the disqualification to individuals who are financing a labor dispute is not recommended since it might operate to disqualify an individual not concerned with the dispute solely on the basis of his payment of dues to the union that is conducting the strike." United States Social Security Board, Bureau of Employment Security, Proposed State Legislation Providing for Unemployment Compensation and Public Employment Offices, Employment Security Memorandum No. 13, p. 56, note (Nov. 1940).

Insofar as the legislative history of the Social Security Act supports only the conclusion that Congress intended to leave the States authority to deny benefits to actual strikers, and does not indicate that Congress anticipated a distinct disqualification of individuals whose money is used to pay for a strike, such a disqualification can only be permitted to the extent that it is necessary to effectuate the State's decision to disqualify actual strikers. Thus, a financing disqualification may be justified as necessary to prevent unions from circumventing the State's disqualification of actual strikers, something unions might accomplish by striking a key group of employees—knowing that the resultant work stoppage will cause additional layoffs and that laid-off workers will be supported by unemployment benefits—while sharing the cost of financing the strike among all the workers.

Where this is true, *i. e.*, where workers agree to pay special dues[1] to finance a particular labor dispute that they

[1] The Michigan statute provides that "[t]he payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute . . . ." Mich. Comp. Laws § 421.29(8)(a)(ii) (Supp. 1986). The Court therefore limits its opinion approving Michigan's statute to disqualifications based on the payment of "special" dues. Although, for the reasons stated in text, I believe that Michigan's disqualification is overbroad even as limited to special dues, there is really no question that a state law denying unemployment benefits on the basis of regular dues payments is pre-empted by the NLRA. The Social Security Board's 1940 decision to delete the financing disqualification because it might operate to deny benefits solely on the basis of an individual's payment of dues to a union indicates that the Board thought that States could not deny unemployment benefits simply because unemployment is due to a labor dispute financed from a strike fund that includes contributions from the individual's ordinary union dues. Moreover, this conclusion is entirely sensible in that a disqualification based upon the payment of ordinary dues would seriously interfere with basic organizational rights protected by the NLRA: In order to bargain effectively, a union must be able to present a credible strike threat. This, in turn, requires the union to maintain an adequate strike fund, and without such a fund, the union's ability to bargain effectively would be greatly impaired. Consequently, unions typically use a portion of every member's

know will result in their own layoffs, they voluntarily cause their own unemployment in the same sense as actual strikers. Therefore, I agree with the Court that "[t]o the extent that appellants may be viewed as participants in the decision to strike, or to expend funds in support of the local strikes, it is difficult to see how such a decision would be entitled to any greater protection than is afforded to actual strikers." *Ante*, at 636–637. I also agree with the Court that, insofar as "the emergency dues decision was tantamount to a plantwide decision to call a strike in a bottleneck department that would predictably shut down an entire plant," *ante*, at 637, Michigan could disqualify workers who paid the dues. In other words, to the extent that Michigan denies benefits to workers who agree to pay special dues to finance the very strike

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ordinary dues to finance a standing fund to support strikes authorized by the union. Because the maintenance of a strike fund from ordinary dues is standard union practice, disqualifying workers whose unemployment results from a strike financed with ordinary union dues would, as a practical matter, mean disqualifying workers simply for being members of the union that authorized that labor dispute. Such a disqualification would severely impair the long-term capability of unions to organize workers. If some members of a union wanted to strike, other members having no direct stake in the strike would have a powerful incentive to oppose it, namely, the possibility that the strike might cause their own layoffs and leave them without financial resources. The union would consequently come under pressure to split into smaller units in order to avoid these conflicts—a result that is contrary to the most basic thrust of the NLRA. Moreover, this tendency would be more pronounced in industries that are functionally integrated, because strikes are more likely to cause layoffs among nonstrikers in such industries; yet it is in precisely these industries that workers have the greatest need to combine in labor organizations that can present management with a unified front. It is inconceivable that the Congress that passed the NLRA and the Social Security Act would have found such a state of affairs acceptable, and therefore, in the absence of contrary evidence in the legislative history, I conclude that States are prohibited from denying benefits to individuals on the ground that their ordinary union dues were used to finance the labor dispute that caused their unemployment.

that caused their unemployment, I agree that the Michigan statute is not pre-empted.

As interpreted by the Michigan Supreme Court, however, the Michigan statute also denies benefits to individuals whose unemployment results from a labor dispute financed with money raised for a *different* labor dispute—so long as the dispute that caused the unemployment was "foreseeable" at the time the contribution was made. Michigan's law thus denies benefits to an individual for "financing" a labor dispute even though he did not necessarily intend to finance that dispute. Yet, where this is the case, the disqualification cannot be justified as necessary to effectuate the disqualification of actual strikers. Therefore, to the extent that it interferes with rights protected by the NLRA, it is pre-empted. Moreover, in my view, an individual who did not intend to finance the labor dispute that led to his being laid off cannot be said to have "voluntarily" caused his own unemployment in the same sense as a striker; the Court's unexplained equation of the two is simply wrong.

Finally, denying benefits to an individual who paid special dues merely because the strike that caused his unemployment was foreseeable when the decision to pay the dues was made interferes with rights protected by the NLRA in a much more pervasive manner than a disqualification of actual strikers. Consider the decision that must be made by a union member asked to vote on whether to collect special dues to finance an anticipated strike. If he agrees to pay the special dues and the strike results in his being laid off, he will not receive unemployment benefits under state law. This possibility will certainly influence his decision whether or not to vote in favor of the special dues, and, to that extent, the state law conflicts with a federally protected right. However, as explained above, because the union member's decision in this regard is essentially identical to the decision of an actual striker, I agree with the Court that it is reasonable to conclude that Congress was willing to tolerate this conflict.

But under Michigan's statute, the union member must think about other "foreseeable" strikes in addition to the particular strike under consideration. Thus, it may be that the strike under consideration will not cause layoffs among nonstrikers, or that the union member feels strongly enough about that dispute that he is willing to tolerate the loss of unemployment compensation if he is laid off. But under the Michigan statute, the union member's decision whether to vote to authorize the collection of special dues is coerced still further by the *possibility* that some *other* strike, that might be financed by these dollars and that might result in layoffs, will leave him without unemployment compensation.[2] I do not see that there is any justification for this additional interference with rights protected by the NLRA; certainly the Court has offered none. It would be one thing if the legislative history showed that Congress intended to tolerate a conflict with the NLRA such as is created by Michigan's financing provision. But it does not. Therefore, I would hold that States may disqualify unemployed individuals for "financing" a labor dispute only where they agree to pay special dues specifically to finance the particular strike that caused their unemployment. To the extent that the Michigan statute exceeds this limitation, it is pre-empted by the NLRA.

Because of its construction of the Michigan statute, the Michigan Supreme Court did not find it necessary to consider whether the local foundry strikes were expressly contemplated by the UAW in its decision to collect the emergency dues. Accordingly, I would vacate the judgment below and remand the case to the Michigan Supreme Court to consider this question.

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[2] This concern is somewhat alleviated under the Michigan statute by the additional requirement that the labor dispute which causes the unemployment occur "in temporal proximity" to the making of the financial contribution.

RANDALL ET AL. *v.* LOFTSGAARDEN ET AL.

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

No. 85–519. Argued April 2, 1986—Decided July 2, 1986

In 1973, petitioners purchased interests in a limited partnership organized by the individual respondent who, together with a corporation (also a respondent) of which he was the president and sole shareholder, was to be a general partner in the venture of building and operating a motel. Petitioners purchased their interests on the basis of an offering that marketed the project as a "tax shelter" through which individual limited partners could claim deductible partnership losses in substantial amounts and offset those losses against other income. In 1976, petitioners brought a securities fraud suit against respondents in Federal District Court, tendering return of their securities to respondents shortly before trial. Petitioners asserted claims under both § 10(b) of the Securities Exchange Act of 1934 and § 12(2) of the Securities Act of 1933, which provides that an investor harmed by prospectus fraud may sue "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." After a jury found respondents liable for fraud, the court held, *inter alia*, that the remedy of rescission was proper under § 12(2) and entered judgment for petitioners in the amount of the consideration paid for their limited partnership units, together with prejudgment interest. The court rejected respondents' contention that petitioners' recovery should be offset by tax benefits received by petitioners as a result of their investments. The Court of Appeals sustained respondents' liability under § 12(2) and § 10(b), but reversed and remanded with regard to the rescissory award, holding that it must be reduced by an amount equal to any tax benefits received by petitioners under an "actual damages" principle. After the District Court, on remand, recalculated each petitioner's damages accordingly, both petitioners and respondents appealed, and the Court of Appeals adhered to its original decision with regard to the tax benefit reduction. For purposes of liability under § 10(b), the court relied on § 28(a) of the 1934 Act, which provides that a person suing for damages under that Act shall not recover "a total amount in excess of his actual damages on account of the act complained of." As to liability under § 12(2) of the 1933 Act, the court concluded that the rescission remedy

of that section should be construed as substantially equivalent to the "actual damages" permitted under § 28(a) of the 1934 Act.

Held: The Court of Appeals erred in holding that § 28(a) requires a rescissory recovery under § 12(2) or § 10(b) to be reduced by tax benefits received from a tax shelter investment. Pp. 655–667.

(a) Section 12(2) does not authorize an offset of tax benefits received by a defrauded investor against the investor's rescissory recovery, either as "income received" or as a return of "consideration," and this is so whether or not the security in question is classified as a tax shelter. The language of § 12(2) requiring a reduction for "income received" is sufficiently clear to invoke the "plain language" canon of statutory interpretation, because tax benefits received by defrauded investors by virtue of their ownership of the security cannot, under any reasonable definition, be termed "income." Section 12(2)'s legislative history does not establish that Congress intended tax benefits to be treated as "income received." Nor is there merit to the contention that the nature of the equitable remedy of rescission compels petitioners' tax benefits to be offset as a direct product of the security at common law. Moreover, the word "consideration" in § 12(2) means what the context would suggest—the money or property given by the investor in exchange for the security. Pp. 655–660.

(b) Section 28(a) of the 1934 Act does not alter the conclusion that § 12(2) of the 1933 Act does not authorize a tax benefit offset. Nor does § 28(a) require such an offset when a rescissory measure of damages is applied to a plaintiff's § 10(b) claim. To read § 28(a) as mandating a limit on the rescission remedy created in the earlier enacted § 12(2) would be to effect a disfavored partial repeal of § 12(2) by implication. Assuming, *arguendo*, that rescissory recovery may sometimes be proper on a § 10(b) claim, and that this is such a case, Congress did not specify what was meant by "actual damages" as used in § 28(a), and there is no basis for concluding that § 28(a) must be interpreted so as to limit rescissory damages under § 10(b) to the net economic harm suffered by the plaintiff. This Court has never interpreted § 28(a) as imposing a rigid requirement that every recovery on claims under the 1934 Act must be limited to the plaintiff's net economic harm. Thus, the mere fact that the receipt of tax benefits, plus a full recovery under a rescissory measure of damages, may place a § 10(b) plaintiff in a better position than he would have been in absent the fraud, does not establish that the flexible limits of § 28(a) have been exceeded. Any "windfall" gains to plaintiffs emerge more as a function of the Internal Revenue Code's complex provisions than of an unduly generous damages standard for defrauded investors. Congress' aim in enacting the 1934 Act was not confined solely to compensating defrauded investors, but also included deterrence of fraud and manipula-

tive practices in the securities markets. These goals would be ill served by a too rigid insistence on limiting plaintiffs to recovery of their "net economic loss." Section 28(a) cannot fairly be read to require a full-scale inquiry into a defrauded investor's dealings with the tax collector lest the investor escape with anything more than his "net economic loss." Tax benefits should not be treated as a separate asset that is acquired when a limited partner purchases a share in a tax shelter partnership because tax deductions and tax losses are not a form of freely transferable property created by the promoters of the partnership. Pp. 660–666.

768 F. 2d 949, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 667. BRENNAN, J., filed a dissenting opinion, *post*, p. 670.

Robert Arthur Brunig argued the cause for petitioners. With him on the brief were *Terence M. Fruth* and *Ted S. Meikle.*

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Fried, Acting Assistant Attorney General Olsen, Albert G. Lauber, Jr., Ann Belanger Durney, Teresa E. McLaughlin, Daniel L. Goelzer, Paul Gonson, Jacob H. Stillman, Richard A. Kirby*, and *Martha H. McNeely.*

John M. Friedman, Jr., argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the recovery available to a defrauded tax shelter investor, entitled under § 12(2) of the Securities Act of 1933 or § 10(b) of the Securities Exchange Act of 1934 to rescind the fraudulent transaction or obtain rescissory damages, must be reduced by any tax benefits the investor has received from the tax shelter investment.

**Lowell E. Sachnoff* and *William Gleeson* filed a brief for Hon Industries, Inc., as *amicus curiae* urging reversal.

Edward Brodsky and *Thomas H. Sear* filed a brief for Envitex Realty Corp. as *amicus curiae* urging affirmance.

I

In 1973, petitioners purchased interests in Alotel Associates (Associates), a limited partnership organized by respondent B. J. Loftsgaarden to build and operate a motel in Rochester, Minnesota. Loftsgaarden was the president and sole shareholder of respondent Alotel, Inc. (Alotel), which, together with Loftsgaarden, was to be a general partner in the venture.

Loftsgaarden marketed this $3.5 million project as a "tax shelter," which would result in "'significantly greater returns for persons in relatively high income tax brackets.'" *Austin* v. *Loftsgaarden*, 675 F. 2d 168, 173 (CA8 1982) *(Austin I)*. As a partnership, Associates would not be taxed as an entity. Rather, its taxable income and losses would pass through to the limited partners, who would then be entitled to claim their individual shares of the partnership's deductible losses to the extent of their adjusted basis in their partnership interests. 26 U. S. C. § 704(d). Especially attractive from the high-income investor's perspective was the fact that "in a real estate investment such as the one contemplated by Loftsgaarden, the limited partner's basis is not restricted to the amount of his actual investment (the amount 'at risk'); rather, it may be increased by the partner's proportional share of any nonrecourse loans made to the partnership." 675 F. 2d, at 173. See 26 U. S. C. § 465(c)(3)(D). Consequently, the individual limited partner may be able to claim deductible partnership losses in amounts greatly in excess of the funds invested, and offset those losses against other income.

The initial offering memorandum indicated that Associates would employ financing techniques designed to provide large and immediate tax savings to the limited partners: a nonrecourse loan would finance the bulk of the project, and rapid depreciation methods would be used to throw off large initial losses. Nonetheless, the initial offering was unsuccessful, and Loftsgaarden revised the plan and the offering memo-

randum to propose that Associates would rent land instead of purchasing it, thereby incurring another deductible expense. Petitioners subscribed to the second offering, investing from $35,000 to $52,500 each. Associates soon began to experience financial difficulties, and in February 1975 Loftsgaarden asked the limited partners to make additional loans to Associates; they complied, but initiated an investigation into the partnership. Associates eventually defaulted on its obligations, and in 1978 the motel was foreclosed on by its creditors.

Petitioners brought suit in the District Court in 1976, alleging securities fraud and raising federal claims under § 12(2) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77*l*(2), § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), and SEC Rule 10b–5, 17 CFR 240.10b–5 (1985), as well as pendent state law claims. The jury found that respondents had knowingly made material misrepresentations and omissions in the revised offering memorandum, and that petitioners had reasonably relied on these material misstatements, which caused their damages. Among other misstatements, respondents had mischaracterized the financing available, the terms of the land lease, and the manner and extent of their compensation for services rendered. These findings made respondents liable under § 10(b), Rule 10b–5, and state law. The District Court also accepted the jury's advisory verdict that respondents were liable under § 12(2) for knowingly making material misrepresentations and omissions in the offering memorandum which induced their purchases. App. to Pet. for Cert. E–1.

Finding that petitioners' investments were worthless by the time they discovered the fraud in 1975, the District Court held that the remedy of rescission was proper under § 12(2), which provides that an investor harmed by prospectus fraud may sue "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if

he no longer owns the security." 15 U. S. C. § 77*l*(2). Rescission was permissible, the court ruled, notwithstanding that petitioners had not made a tender of their securities to respondents until shortly before trial. App. to Pet. for Cert. E–15. Accordingly, the District Court entered judgment for petitioners in the amount of the consideration paid for the limited partnership units, together with prejudgment interest; it also noted that each of the counts found by the jury would independently support respondents' liability, but that "each plaintiff is entitled only to a single recovery." *Id.*, at E–16. The District Court rejected respondents' contention that petitioners' recovery should be offset by tax benefits received, concluding that "[a]bsent [respondents'] fraud, which induced their purchases, [petitioners] would probably have made other investments which produced temporary tax savings, but without the total loss of their investment." *Id.*, at F–9—F–10.

A panel of the Court of Appeals for the Eighth Circuit sustained respondents' liability under § 12(2) and § 10(b), but reversed the rescissory award and remanded for a new trial on that issue. The panel rejected respondents' claim that petitioners were not entitled to rescission under § 12(2) because they had made no tender of their partnership interests until shortly before trial, 675 F. 2d, at 179, agreeing with the District Court's "decision to apply what was essentially a rescissory measure of damages in this case." *Id.*, at 181. The panel held, however, that the District Court had erred in refusing to reduce "the damage award" by an amount equal to any tax benefits received by petitioners "on account of the investment." *Ibid.*

In the panel's view, an "actual damages principle," applicable both to § 12(2) and § 10(b), required that an award of rescission or of rescissory damages be "'reduced by any value received as a result of the fraudulent transaction.'" *Id.*, at 181 (quoting *Garnatz* v. *Stifel, Nicolaus & Co.*, 559 F. 2d 1357, 1361 (CA8 1977), cert. denied, 435 U. S. 951 (1978)).

The panel observed that the benefits anticipated from a successful real estate tax shelter typically include tax savings to the limited partner in the early years, followed by income in later years, and reasoned that "unlike a corporate shareholder, . . . even if the enterprise fails to become profitable, the limited partner clearly may have something of value because of the investment's unique tax treatment." 675 F. 2d, at 182. In light of "the value of the tax deductions generated by such an investment," the panel held that "the strictly compensatory nature of damages awardable in private securities fraud actions requires that such value be taken into account in determining whether and to what extent damages were inflicted upon plaintiffs." *Id.*, at 183. Finally, the panel rejected petitioners' objection that "because there are tax consequences to any investment one makes, evidence of those consequences will now figure in every securities fraud case," and asserted that its holding was limited to "cases involving investments that are expressly marketed and sold as tax shelters." *Ibid.*

On remand, the District Court held a bench trial on the issue of tax benefits, and calculated each petitioner's damages as the purchase price of his partnership interest plus simple interest, minus net tax benefits. App. to Pet. for Cert. C–5. Both petitioners and respondents appealed from the District Court's judgment, and, after a second panel ruled on various subsidiary issues, the Court of Appeals reconsidered the case en banc. *Austin* v. *Loftsgaarden*, 768 F. 2d 949 (CA8 1985) *(Austin II)*.

Relying in part on the law of the case, and noting that the Second Circuit had reached a similar result in *Salcer* v. *Envicon Equities Corp.*, 744 F. 2d 935 (1984), vacated and remanded, *post*, p. 1015, the Court of Appeals adhered to the *Austin I* panel's holding that an award of rescission or of rescissory damages to a defrauded tax shelter investor should be reduced by any tax benefits actually received. This offset, moreover, was required whether the award stemmed

from liability under § 10(b) or § 12(2). 768 F. 2d, at 953–954. As to § 10(b), the Court of Appeals relied on § 28(a) of the 1934 Act, which provides that "no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of." 15 U. S. C. § 78bb(a). As to § 12(2), the court acknowledged that "the words 'actual damages' do not appear in the 1933 Act," but suggested that the rescission remedy provided by § 12(2) had been, and should be, construed as

> "substantially equivalent to the damages permitted under section 28(a). Cf. *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 155 (1972). . . . The goal of rescission under section 12(2) is to return the parties to the status quo *ante*, 'and hence a plaintiff can recover no more than his or her "net economic loss,"' *i. e.*, 'actual damages.'" 768 F. 2d, at 954 (quoting *Salcer*, *supra*, at 940).

Although the Court of Appeals recognized that "tax benefits received" are not "a form of income in a strict accounting sense," 768 F. 2d, at 955, it nonetheless concluded, in light of its interpretation of § 28(a) and of the purposes of the rescission remedy, that tax benefits are "income received" within the meaning of § 12(2). 768 F. 2d, at 954–955.

The Court of Appeals then proceeded to engage in a detailed analysis of the manner in which petitioners' rescissory damages should be determined. The court ruled that prejudgment interest should not have been based on the total consideration paid by each petitioner, but rather on the amount by which each was "'out-of-pocket' during each year of the investment." *Id.*, at 958. The court then determined that under its theory the tax consequences flowing from petitioners' recovery of damages, as well as the tax benefits themselves, should be taken into account in determining damages. Accordingly, it doubled the total damages award, including

prejudgment interest, to reflect the fact that each petitioner was in the 50% income tax bracket. *Id.*, at 960–961. The combined effect of the *Austin II* court's several rulings was this: under the rescissory approach originally employed by the District Court, petitioners would have been entitled to total recoveries ranging from $64,610 to $96,385, App. to Pet. for Cert. B–1—B–2; under the Court of Appeals' final ruling, petitioners could recover only amounts ranging from $506 to $7,666. 768 F. 2d, at 961.

Two judges dissented from the Court of Appeals' adherence to the panel's holding in *Austin I*. In their view, tax benefits could not plausibly be viewed as "income received" within the meaning of § 12(2), and the effect of allowing a tax benefit offset was to provide "a windfall to the defendant—the fraudulent party." 768 F. 2d, at 963 (Lay, C. J., dissenting). We granted certiorari because of the question's importance to the administration of the federal tax and securities laws, and because the Courts of Appeals are divided in their treatment of tax benefits for purposes of calculating damages in federal securities fraud litigation. 474 U. S. 978 (1985). See *Burgess* v. *Premier Corp.*, 727 F. 2d 826, 838 (CA9 1984) (refusing to reduce damages by tax benefits received in an action under § 10(b)). We now reverse.

II

Section 12(2) specifies the conduct that gives rise to liability for prospectus fraud and expressly creates a private right of action in favor of the defrauded investor, who "may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U. S. C. § 77*l*(2). Thus, § 12(2) prescribes the remedy of rescission except where the plaintiff no longer owns the security. See *Wigand* v. *Flo-Tek, Inc.*, 609 F. 2d 1028, 1035 (CA2 1979). Even in

the latter situation, we may assume that a rescissory measure of damages will be employed; the plaintiff is entitled to a return of the consideration paid, reduced by the amount realized when he sold the security and by any "income received" on the security. See H. R. Rep. No. 85, 73d Cong., 1st Sess., 9 (1933) (under § 12, the buyer can "sue for recovery of his purchase price, or for damages not exceeding such price"); L. Loss, Fundamentals of Securities Regulation 1020 (1983) (hereinafter Loss) ("[W]hen the plaintiff in § 12 no longer owns the security, damages are to be measured so as to result in the substantial equivalent of rescission").

Petitioners contend that § 12(2)'s "income received" language clearly excludes tax benefits received pursuant to a tax shelter investment because tax benefits are not "a form of income in a strict accounting sense," *Austin II*, 768 F. 2d, at 955 (footnote omitted), and are not taxed as such. Accordingly, petitioners argue that tax benefits cannot offset a rescissory award under § 12(2).

Here, as in other contexts, the starting point in construing a statute is the language of the statute itself. *E. g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 477 (1977). Moreover, "if the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" *Aaron* v. *SEC*, 446 U. S. 680, 695 (1980) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214, n. 33 (1976)). Section 12(2), we think, speaks with the clarity necessary to invoke this "plain language" canon: § 12(2)'s offset for "income received" on the security does not encompass the tax benefits received by defrauded investors by virtue of their ownership of the security, because such benefits cannot, under any reasonable definition, be termed "income."

The tax benefits attributable to ownership of a security initially take the form of tax deductions or tax credits. These

have no value in themselves; the economic benefit to the investor—the true "tax benefit"—arises because the investor may offset tax deductions *against* income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income. Unlike payments in cash or property received by virtue of ownership of a security—such as distributions or dividends on stock, interest on bonds, or a limited partner's distributive share of the partnership's capital gains or profits—the "receipt" of tax deductions or credits is not itself a taxable event, for the investor has received no money or other "income" within the meaning of the Internal Revenue Code. See 26 U. S. C. § 61. Thus, we would require compelling evidence before imputing to Congress an intent to describe the tax benefits an investor derives from tax deductions or credits attributable to ownership of a security as "income received thereon."

This Court's decision in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975), lends additional support to our conclusion that the economic value of tax deductions and tax credits in the hands of a particular investor is not "income received" on a security for purposes of § 12(2). In *Forman*, the Court rejected a claim that shares in certain housing projects must be deemed to be "securities" because of "the deductibility for tax purposes of the portion of the monthly rental charge applied to interest on the mortgage," which was said to constitute "an expectation of 'income.'" *Id.*, at 854–855. To the contrary, the Court found "no basis in law for the view that the payment of interest, with its consequent deductibility for tax purposes, constitutes income or profits." *Id.*, at 855. In this case, we reject the analogous suggestion that the tax deductions petitioners were entitled to take by virtue of their partnership interests "constitut[e] income or profits." *Ibid.*

Respondents have produced no specific evidence from the sparse legislative history of § 12(2) to establish that Congress intended tax benefits to be treated as "income received."

Instead, respondents urge that we look to the nature of the equitable remedy of rescission, which they say is exclusively "an effort to restore the *status quo ante*." Brief for Respondents 27. Under this interpretation of rescission, respondents maintain, "'any person demanding the rescission of a contract to which he is a party must restore or offer to restore to the other party whatever he may have received under the contract in the way of money, property, or other consideration or benefit.'" *Ibid.* (quoting 2 H. Black, Rescission of Contracts and Cancellation of Written Instruments § 617, p. 1417 (1916)). Petitioners' tax benefits, respondents argue, constitute such "consideration or benefit."

Generalities such as these—which come to us unsupported by any instance in which a common law court treated tax benefits as consideration or property that must be returned or offset against the plaintiff's recovery in rescission—fall far short of the showing required to overcome the plain language of § 12(2). Moreover, even at common law, it is quite likely that tax benefits would be ignored for purposes of a rescissory remedy. Under the "direct product" rule, the party seeking rescission was required to credit the party against whom rescission was sought only with gains that were the "direct product" of the property the plaintiff had acquired under the transaction to be rescinded: "The phrase 'direct product' means that which is derived from the ownership or possession of the property without the intervention of an independent transaction by the possessor." Restatement of Restitution § 157, Comment *b* (1937). We agree with *amici*, the United States and the Securities and Exchange Commission, that tax benefits, because they accrue only if the tax deductions or credits the investment throws off are *combined* with income generated by the investor or taxes owed on such income, would in all likelihood not have been deemed a "direct product" of the security at common law. See Brief for United States and SEC as *Amici Curiae* 13. Cf. *Cereal Byproducts Co.* v. *Hall*, 16 Ill. App. 2d 79, 147 N. E. 2d 383,

aff'd, 15 Ill. 2d 313, 155 N. E. 2d 14 (1958) (refusing to reduce damages for an accountant's negligence in not discovering an embezzlement of plaintiff by the amount of the tax benefits plaintiff received by virtue of the theft). Respondents offer no reason to think that in enacting § 12(2) Congress intended to curtail the investor's recovery by relaxing the limit on offsets imposed by the "direct product" rule.

Respondents' view of the purposes served by § 12(2)'s rescission remedy is likewise flawed. Certainly a restoration of the plaintiff to his position prior to the fraud is *one* goal that will generally be served by § 12(2), as by common law rescission or restitution. But the 1933 Act is intended to do more than ensure that defrauded investors will be compensated: the Act also "aim[s] . . . to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation [and] to place adequate and true information before the investor." S. Rep. No. 47, 73d Cong., 1st Sess., 1 (1933). See also *United States* v. *Naftalin*, 441 U. S. 768, 775–776 (1979). We may therefore infer that Congress chose a rescissory remedy when it enacted § 12(2) in order to deter prospectus fraud and encourage full disclosure as well as to make investors whole. Indeed, by enabling the victims of prospectus fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud. See Thompson, The Measure of Recovery under Rule 10b–5: A Restitution Alternative to Tort Damages, 37 Vand. L. Rev. 349, 369 (1984) (hereinafter Thompson); Loss, at 1133. Thus, rescission adds an additional measure of deterrence as compared to a purely compensatory measure of damages.

We also reject, as did the Court of Appeals, 768 F. 2d, at 958, respondents' alternative contention that tax benefits constitute "a return of, or a reduction in, 'consideration.'" Brief for Respondents 29–30. There is no indication that

Congress intended the word "consideration" in § 12(2) to mean anything other than what the context would suggest—the money or property given by the investor in exchange for the security. And, in view of the express offset for "income received," we think any implicit offset for a return of consideration must be confined to the clear case in which such money or property is returned to the investor. Here, the consideration given by petitioners in exchange for their partnership interests took the form of money, not tax deductions, and the fact that petitioners received tax deductions from which they were able to derive tax benefits therefore cannot constitute a return of that consideration. Accordingly, we hold that § 12(2) does not authorize an offset of tax benefits received by a defrauded investor against the investor's rescissory recovery, either as "income received" or as a return of "consideration," and that this is so whether or not the security in question is classified as a tax shelter.

III

We now consider whether § 28(a) should alter our conclusion that § 12(2) does not authorize a reduction in the plaintiff's recovery in the amount of tax benefits received, and whether § 28(a) requires such an offset when a rescissory measure of damages is applied to a plaintiff's § 10(b) claim. Respondents suggest that § 12(2) and § 28(a) should be construed *in pari materia*, arguing that the Court of Appeals correctly determined that § 28(a) stands for a broad principle that recovery under the federal securities laws is strictly limited to the defrauded investor's "actual damages," and hence that anything of economic value received by the victim of fraud as a result of the investment must be used to reduce the victim's recovery. This principle, they say, requires us to construe § 12(2)'s express offset for "income received" on the security as encompassing any tax benefits received by petitioners.

The Court of Appeals relied on *Globus* v. *Law Research Service, Inc.*, 418 F. 2d 1276 (CA2 1969), cert. denied, 397 U. S. 913 (1970), which read § 17(a) of the 1933 Act *in pari materia* with § 28(a) insofar as the latter provision is deemed to bar *punitive* damages. See 768 F. 2d, at 954. Assuming, *arguendo*, that *Globus* was correctly decided, it is clearly distinguishable, for any private right of action under § 17(a) would be an implied one, and § 17(a) makes no reference to damages, whether punitive or compensatory. See 418 F. 2d, at 1283–1284. By contrast, Congress addressed the matter of prospectus fraud with considerable specificity in § 12(2), which not only antedates § 28(a), but was also left untouched by Congress when it passed the 1934 Act. See Loss, at 1024. We therefore decline to read § 28(a) as mandating a limit on the rescission remedy created by Congress in the 1933 Act by enactment of § 12(2). To hold otherwise would be to effect a partial repeal of § 12(2) by implication, and "'[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.'" *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976) (quoting *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976)). There is no "irreconcilable conflict" here between the two Acts, nor is this a case in which "'the later act covers the whole situation of the earlier one and is clearly intended as a substitute.'" 426 U. S., at 154, quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Cf. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 384 (1983) (adopting a "cumulative construction of the remedies under the 1933 and 1934 Acts").

The issue whether and under what circumstances rescission or a rescissory measure of damages is available under § 10(b) is an unsettled one. In *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 155 (1972), which involved violations of § 10(b) and Rule 10b–5 by a buyer of securities, this Court held that ordinarily "the correct measure of damages under § 28 of the Act, 15 U. S. C. § 78bb(a), is the differ-

ence between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct." Courts have also generally applied this "out-of-pocket" measure of damages in § 10(b) cases involving fraud by a seller of securities, see, *e. g.*, *Harris* v. *American Investment Co.*, 523 F. 2d 220, 225 (CA8 1975), cert. denied, 423 U. S. 1054 (1976); Thompson, at 365. But there is authority for allowing the § 10(b) plaintiff, at least in some circumstances, to choose between "undoing the bargain (when events since the transaction have not made rescission impossible) or holding the defendant to the bargain by requiring him to pay [out-of-pocket] damages." Loss, at 1133. See, *e. g.*, *Blackie* v. *Barrack*, 524 F. 2d 891, 909 (CA9 1975) ("While out of pocket loss is the ordinary standard in a 10b–5 suit, it is within the discretion of the district judge in appropriate circumstances to apply a rescissory measure"), cert. denied, 429 U. S. 816 (1976).

Respondents do not dispute that rescission or a rescissory measure of damages may sometimes be appropriate under § 10(b), nor do they dispute that in this case a rescissory recovery is appropriate on petitioners' § 10(b) claims as well as on their § 12(2) claims. Instead, they contend that § 28(a) strictly limits any such rescissory recovery to the plaintiff's net economic harm. We shall therefore assume, *arguendo*, that a rescissory recovery may sometimes be proper on a § 10(b) claim, and that this is such a case.

In enacting § 28(a), Congress did not specify what was meant by "actual damages." It is appropriate, therefore, to look to "the state of the law at the time the legislation was enacted" for guidance in defining the scope of this limitation. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U. S. 353, 378 (1982). When § 28(a) was enacted § 12(2) stood as a conspicuous example of a rescissory remedy, and we have found that Congress did not intend that a recovery in rescission under § 12(2) be reduced by tax benefits received. Accordingly, we think § 28(a) should not be read to compel a

different result where rescissory damages are obtained under § 10(b).

Even apart from the analogy furnished by § 12(2), this Court has never interpreted § 28(a) as imposing a rigid requirement that every recovery on an express or implied right of action under the 1934 Act must be limited to the net economic harm suffered by the plaintiff. To be sure, this Court has noted that "Section 28(a) of the 1934 Act . . . limits recovery in any private damages action brought under the 1934 Act to 'actual damages,'" *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 734 (1975), and *Affiliated Ute Citizens* clearly interpreted § 28(a) as governing the measures of damages that are permissible under § 10(b). 406 U. S., at 155. But the Court in *Affiliated Ute Citizens* also indicated that "where the defendant received more than the seller's actual loss . . . damages are the amount of the defendant's profit." *Ibid.* This alternative standard aims at preventing the unjust enrichment of a fraudulent buyer, and it clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the buyer's fraud. Indeed, the accepted rationale underlying this alternative is simply that "[i]t is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them." *Janigan* v. *Taylor*, 344 F. 2d 781, 786 (CA1), cert. denied, 382 U. S. 879 (1965). See also *Falk* v. *Hoffman*, 233 N. Y. 199, 135 N. E. 243 (1922) (Cardozo, J.). Thus, the mere fact that the receipt of tax benefits, plus a full recovery under a rescissory measure of damages, may place a § 10(b) plaintiff in a better position than he would have been in absent the fraud, does not establish that the flexible limits of § 28(a) have been exceeded.

In any case, respondents' contention that plaintiffs will receive undeserved "windfalls" absent an offset for tax benefits is greatly overstated. Even if tax benefits could properly be characterized as a windfall—which we doubt—the tax laws will serve to reduce, although not necessarily to eliminate,

the extent of plaintiffs' net economic gain as compared to the *status quo ante*. We are told that the "tax benefit rule" will apply in cases of rescission, thus making the recovery taxable as ordinary income. See *Hillsboro National Bank* v. *Commissioner*, 460 U. S. 370 (1983); Brief for United States and SEC as *Amici Curiae* 25. Any residual gains to plaintiffs thus emerge more as a function of the operation of the Internal Revenue Code's complex provisions than of an unduly generous damages standard for defrauded investors.

Respondents also overlook the fact that Congress' aim in enacting the 1934 Act was not confined solely to compensating defrauded investors. Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions. *Affiliated Ute Citizens*, *supra*, at 151; see also *Herman & MacLean*, 459 U. S., at 386–387. This deterrent purpose is ill served by a too rigid insistence on limiting plaintiffs to recovery of their "net economic loss." *Salcer*, 744 F. 2d, at 940. The effect of allowing a tax benefit offset would often be substantially to insulate those who commit securities frauds from any appreciable liability to defrauded investors. The resulting diminution in the incentives for tax shelter promoters to comply with the federal securities laws would seriously impair the deterrent value of private rights of action, which, we have emphasized, "provide 'a most effective weapon in the enforcement' of the securities laws and are a 'necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299, 310 (1985) (quoting *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964)).

The Court of Appeals' elaborate method for calculating damages and interest so as to offset tax benefits supplies an additional reason for rejecting its tax benefit offset rule. We need not inquire whether evidence concerning tax benefits is ordinarily so speculative as to be beyond the jury's province. Cf. *Norfolk & Western R. Co.* v. *Liepelt*, 444 U. S. 490

(1980). It is enough that there are formidable difficulties in predicting the ultimate treatment of the investor's claimed tax benefits, whether or not an audit has commenced, and that the burdens associated with reconstruction of the investor's tax history for purposes of calculating interest are substantial. We think that § 28(a) cannot fairly be read to require such a full-scale inquiry into a defrauded investor's dealings with the tax collector lest the investor escape with anything more than his "net economic loss."

Respondents' sole remaining contention is that a rule requiring the offset of tax benefits is required in view of "the economic reality of tax benefits produced by tax shelters." Brief for Respondents 14. They maintain that since "tax benefits to the partner represent an important tangible economic advantage expected to be derived from his investment," *Salcer*, *supra*, at 940, Congress must have intended that tax benefits would reduce the plaintiff's allowable recovery under § 28(a). In support of their version of "economic reality," respondents note that the return from a tax shelter investment may be analyzed as consisting of cash flow, tax benefits, and equity value, Brief for Respondents 11, and that some courts have held that investors may sue for fraud where a tax shelter investment has not produced promised tax benefits. See *Sharp* v. *Coopers & Lybrand*, 649 F. 2d 175 (CA3 1981), cert. denied, 455 U. S. 938 (1982).

We have already established that Congress did not design § 12(2) to accommodate these arguments, and that § 28(a) does not place them on a surer footing. Respondents essentially ask us to treat tax benefits as a separate asset that is acquired when a limited partner purchases a share in a tax shelter partnership. But the legal form of the transaction does not reflect this treatment. Petitioners purchased securities, thereby acquiring freely alienable rights to any income that accrued to them by virtue of their ownership. They did not, however, also acquire a separate, freely transferable bundle of tax losses that would have value apart from

petitioners' status as partners. For obvious reasons, tax deductions and tax credits are not, in the absence of a statutory provision to the contrary, freely transferable from one person to another if wholly severed from the property or activity to which they relate: "[t]he statutes pertaining to the determination of taxable income . . . disclos[e] a general purpose to confine allowable losses to the taxpayer sustaining them, *i. e.*, to treat them as personal to him and not transferable to or usable by another." *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440 (1934). Accordingly, we decline to treat these tax losses as so much property created by the promoters of the partnership. It is for Congress, not this Court, to decide whether the federal securities laws should be modified to comport with respondents' version of economic reality.

We acknowledge that, absent an offset for tax benefits, plaintiffs may have an incentive to wait to raise their § 12(2) claims until they have received the bulk of the tax benefits available from a tax shelter, since after their securities are tendered they will cease to receive tax benefits. We are not persuaded, however, that courts lack adequate means to deal with any potential for abuse on this score. In cases under § 10(b), some courts have barred plaintiffs from electing rescission, or a rescissory measure of damages, where they delayed tender or suit in order to increase their expected recovery should the market decline. See, *e. g.*, *Baumel* v. *Rosen*, 412 F. 2d 571, 574–575 (CA4 1969), cert. denied, 396 U. S. 1037 (1970); Loss, at 1133, n. 127; Thompson, at 369–370. A similar rule may well be appropriate where plaintiffs delay tender or suit in order to obtain additional tax benefits, although we need not so decide today.

We also have no occasion in this case to decide whether, assuming that a rescissory recovery may sometimes be proper under § 10(b), plaintiffs in such cases should invariably be free to elect a rescissory measure of damages rather than out-of-pocket damages. Consequently, we do not consider whether courts may ever refuse to allow a rescissory recovery

under § 10(b) where the "premium" for expected tax benefits represented a large portion of the purchase price, in which event the out-of-pocket measure might yield a significantly smaller recovery. See *Salcer*, 774 F. 2d, at 940, and n. 5. In this case, a rescissory measure of damages was determined to be proper, and respondents have abandoned their initial challenge to that ruling.

We conclude, then, that the Court of Appeals erred in holding that § 28(a) requires a rescissory recovery under § 12(2) or § 10(b) to be reduced by tax benefits received from a tax shelter investment. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's well-reasoned opinion. As the Court recognizes, this case concerns the proper measure of damages under two distinct statutory schemes—§ 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2), and §§ 10(b) and 28(a) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78j(b) and 78bb(a). See *ante*, at 649. The Court correctly concludes that, under the specific remedial formula set out in § 12(2), the tax benefits generated by an investment provide no basis for reducing a defrauded investor's recovery. *Ante*, at 655–660. Since petitioners prevailed on their § 12(2) claim as well as on their § 10(b) claim, they are entitled to select the damages remedy more favorable to them. I write separately merely to explain why it may be proper to take tax benefits into account in a case brought solely under § 10(b) and Rule 10b–5 of the SEC, 17 CFR § 240.10b–5 (1985), a question the Court leaves open. *Ante*, at 666–667.

The measure of damages in a § 12(2) case brought by an investor who still owns the security involved is rescissory: the statute permits the defrauded investor "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the

tender of such security . . . ." I agree with the Court that tax benefits cannot be considered either "income" or "consideration." *Ante*, at 656–657, 659–660. Recovery in a case brought under § 10(b) is governed by § 28(a) which, unlike § 12(2), does not set out a specific method of calculating damages. Rather, § 28(a) merely limits recovery to the "actual damages on account of the act complained of." A rescissory measure of damages may sometimes be appropriate. See *ante*, at 661–662. I agree with the Court that when rescission is the appropriate remedy tax benefits should not be taken into account. Normally, however, the proper measure of damages in a § 10(b) case is an investor's out-of-pocket loss, that is, "the difference between the fair value of all that [the plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct." *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 155 (1972); see *ante*, at 661–662.

To ascertain out-of-pocket loss requires taking into account all the elements that go into the price of a tax shelter. That price will reflect both the value of the underlying asset—here, a motel with a potential income stream and a potential for capital appreciation—and the value of the tax write-offs that the construction and operation of the underlying asset will generate. See *Salcer* v. *Envicon Equities Corp.*, 744 F. 2d 935, 938, 940 (CA2 1984), vacated and remanded, *post*, p. 1015. See also *Austin* v. *Loftsgaarden*, 675 F. 2d 168, 174 (CA8 1982) *(Austin I)* (respondent forced to increase potential tax benefits to attract investors). An investor will pay more for a share of an underlying asset when ownership will provide not only income and capital appreciation but also tax benefits.[1]

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[1] For example, investor A, who invests in a security that is not a tax shelter, might pay $100 for a share in a corporation that runs hotels in the expectation that he will receive $10 in dividends each year plus $5 in appreciation of the value of the stock. Investor B might pay $110 for a proportionate share in a partnership that runs hotels in the expectation that, in

An investor who has invested in a tax shelter can be defrauded in either or both of two ways. First, the promoter may have misled him with respect to the level of potential tax benefits. See, *e. g.*, *Lasker* v. *Bear, Stearns & Co.*, 757 F. 2d 15 (CA2 1985); *Sharp* v. *Coopers & Lybrand*, 649 F. 2d 175 (CA3 1981), cert. denied, 455 U. S. 938 (1982). Second, the promoter may have misled him with respect to the value of the underlying asset. See, *e. g.*, *Salcer*, 744 F. 2d, at 940, n. 5 (referring to views of the SEC as *amicus curiae*). This case falls only within the latter category: petitioners do not claim they were misled with regard to the tax benefits they could expect from their investment; rather, they claim respondents misled them with respect to the profitability of the motel.

An investor who receives the promised tax benefits, but not the promised income stream or appreciation, of course has been injured. But this injury—the difference between the value of what he received and the value of what he was promised—is represented, not by the entire purchase price, but rather by that portion of the purchase price which went toward a high quality underlying asset when what was received was a lower quality asset. In other words, the investor received the benefit of his bargain with respect to that part of the purchase price which went toward buying the tax benefits. The proper measure of recovery in such a case is therefore the part of the purchase price attributable to payment for an asset that was never received.[2] See also *Salcer*,

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addition to receiving the same amount of income from the hotels and the same possible appreciation in the value of the partnership share as A receives, he will also receive $25 in deductions he can use to offset income from another source. The additional $10 investor B pays to obtain the tax benefits is a "premium" attributable to receipt of tax benefits rather than receipt of economic benefits from the underlying asset.

[2] Suppose that both investor A and investor B, see n. 1, *supra*, are victims of material misrepresentations and that, in both cases, the hotels actually are worthless. If investor A (the non-tax shelter investor) sued under § 10(b), he would be entitled to damages of $100. If investor B actually

744 F. 2d, at 940, n. 5. The Court recognizes that it may be proper to reduce recovery in cases brought solely under § 10(b) and involving securities as to which tax consequences provided a major inducement to investment, and I therefore join its opinion.

JUSTICE BRENNAN, dissenting.

Section 12(2) of the Securities Act of 1933 provides that an investor may sue a seller of securities for misrepresentation of material facts in the prospectus or offering memorandum "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U. S. C. § 77*l*(2). I agree with the Court that § 12(2) prescribes the remedy of rescission and restitution for investors who still own the securities. Unlike the Court, however, I believe that § 12(2) requires that restitution to the plaintiff be reduced by any tax benefits that a purchaser has bargained for and received from a tax shelter investment.

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had received the anticipated tax benefits (*e. g.*, because, although the roof leaked and the rooms were unusable, the construction costs were actually incurred), he too would have actual damages of $100 (because that part of the purchase price of the security that represented payment for the asset that was claimed to be worth $100 was in fact worthless) and not $110 (because he did receive the tax benefits he was promised, for which a fully informed investor would have paid $10 at the time B bought the investment). Similarly, if it turned out that the ownership shares in the hotel are worth only $40, rather than $100 (*e. g.*, because occupancy is lower than had been projected and revenues are therefore less than anticipated), both investor A and investor B will have actual damages of $60.

This is *not*, however, to say, as the Court of Appeals did, see *Austin* v. *Loftsgaarden*, 768 F. 2d 949, 952 (CA8 1985) *(Austin II)*, that a plaintiff's recovery should be reduced by the amount of the tax benefits received. No rational investor would pay $1 for the ability to shelter $1 of income. Instead, recovery should be reduced by the market value of the economic benefits the plaintiff was promised and actually obtained, which includes the ability to shelter a particular amount of income. The value of that right can be established by expert testimony.

I too begin with the language of the statute. We know that Congress intended to establish rescission and restitution as the remedy for prospectus misrepresentation, not because it said so directly, but because that is the relief Congress describes in § 12(2). Given this intent, I would look for guidance in interpreting the word "income" in the theory and goals of common-law and equitable restitution, rather than in the Internal Revenue Code, as the Court does. L. Loss, Fundamentals of Securities Regulation 1022 (1983) ("Section 12(2) can perhaps best be analyzed and evaluated by comparing it with common law (or equitable) rescission, from which it was adapted").

At common law and equity, rescission entails the undoing of the original transaction and restitution involves the restoration of each party to his precontract position. *E. g.*, 3 H. Black, Rescission of Contracts and Cancellation of Written Instruments § 616, p. 1482 (2d ed., 1929); D. Dobbs, Remedies § 9.4, p. 618 (1973); C. McCormick, Law of Damages § 121, p. 448 (1935). In order to reestablish the *status quo ante*, the plaintiff must return to the defendant the subject of the transaction, plus whatever else he may have bargained for and received under the contract by way of money, property, other consideration, or benefit, and the defendant must return to the plaintiff the consideration furnished by the plaintiff, plus the value of any other direct benefit the defendant received from the bargain, such as interest. *E. g.*, 2 Black, *supra*, § 617, at 1485, 1487; 5 A. Corbin, Contracts § 1114, p. 607 (1964); 1 G. Palmer, Law of Restitution § 3.9, p. 275, § 3.11, p. 294, § 3.12, pp. 303–305 (1978); Thompson, The Measure of Recovery under Rule 10b–5: A Restitution Alternative to Tort Damages, 37 Vand. L. Rev. 349, 366, 369 (1984). In practice, where the defendant has sold something to the plaintiff for money, the steps leading to return to the status quo are streamlined: generally the plaintiff must tender the subject of the sale to the defendant and the defendant must tender to the plaintiff the sale price plus inter-

est, minus whatever direct value the plaintiff has received from the transaction. If the plaintiff were not required to restore the value he has received from the bargain to the defendant, and were allowed to recover the full consideration he gave for the transaction, the plaintiff would be placed in a better position than he occupied before the contract was made—a result contrary to the theory of restitution. *E. g.* Corbin, *supra;* 3 Black, *supra,* § 617, at 1488 ("[A] party will not be permitted to rescind a contract so as to reclaim what he has parted with, and at the same time retain what he has received in the transaction").

Application of these common-law principles to the rescission of a misrepresentation-induced sale of interests in a real estate limited partnership marketed as a tax shelter requires that the investor-plaintiff's award be offset by tax benefits that the plaintiff bargained for and received as a result of the investment. This is so because a major portion of what the investor bargains for and purchases in a tax shelter is the tax benefit. See *Salcer* v. *Envicon Equities Corp.*, 744 F. 2d 935, 940 (CA2 1984) ("One of the prime motivations for investment in limited real estate partnerships is the unique tax advantage made available to high tax bracket individuals"), vacated and remanded, *post,* p. 1015. Banoff, To What Extent Will Benefits from Tax Shelters Be Permitted to Offset Rescission Damages?, 57 J. Taxation 154, 157 (1982) ("[T]he plaintiff invests in a tax shelter largely for tax savings motives"); Note, *Austin v. Loftsgaarden*: Securities Fraud in Real Estate Limited Partnership Investments—Offsetting Plaintiffs' Relief to the Extent of Tax Benefits Received, 16 Creighton L. Rev. 1140, 1143 (1983). Indeed, the facts that an investment is marketed as a tax shelter and that the investor generally pays a higher price for a tax sheltering investment than he would for one simply producing future growth or income, *Salcer, supra,* at 940, indicates that the tax shelter aspect of the investment is a

bargained-for part of the agreement, rather than an incidental benefit. It would be ignoring reality to maintain that the economic benefit that flows to an investor from a tax shelter investment is not as direct a benefit of his bargain as are dividends that flow from a securities investment. Cf. *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 863–864 (1975) (BRENNAN, J., dissenting) (footnote omitted) ("[I]n a practical world there is no difference between [money earned and money saved through tax advantages]. The investor finds no reason to distinguish . . . between tax savings and after-tax income"). To a rational investor, a security that yields $101 of tax benefits differs from a security that yields $100 in dividends in only one way—by $1.

In my view, Congress' use of the word "income" in § 12(2) does not require us to ignore this reality. The term "income" may fairly be construed to embrace the tax benefits that respondents purchased. Income is commonly defined as "a gain or recurrent benefit usually measured in money that derives from capital or labor." Webster's Ninth New Collegiate Dictionary 610 (1983). Under that ordinary meaning, a bargained-for tax benefit is income: it is a gain or benefit measured in money that the investor purchases, that is, that he derives from capital. Petitioners bargained for and received a monetary benefit, in the form of tax savings, from their investments in respondents' tax shelter. The fact that this monetary benefit was realized through tax savings rather than in the form of a check delivered from the partnership to petitioners has no bearing on whether petitioners have received a direct monetary benefit from their investments. There is nothing in the language or history of the Securities Act of 1933 suggesting that Congress, in using the word "income," intended to reject this common meaning of the word. I think that a fair reading of Congress' intent was simply to provide for rescission and restitution, and not to carve out, to the exclusion of all other forms of value that flow directly

from a securities transaction, only income as defined by the tax code, for offset against the plaintiff's award.*

Assuming, as does the Court, that rescission and restitution constitute proper relief for a violation of § 10(b) of the Securities Exchange Act of 1934, I would for the same reasons conclude that tax benefits should be offset against petitioners' award under that provision.

I would affirm the judgment of the Court of Appeals and therefore respectfully dissent.

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*I also disagree with the Court's assertion that because the tax benefits "accrue only if the tax deductions or credits the investment throws off are *combined* with income generated by the investor or taxes owed on such income," they "would in all likelihood not have been deemed a 'direct product' of the security at common law." *Ante*, at 658. The deductions or credits received in a transaction such as the one at issue in this case are valued in a manner that is entirely independent of anything that the investor may or may not do. In other words, in valuing a tax shelter for marketing purposes, the seller assumes that a buyer has need for the tax deductions the investment will generate, just as the seller of a rebuilt automobile engine assumes that the buyer has a car in which to put that engine. We do not—at least I would not—describe the value that an engine has when placed in a car as "indirect" simply because the buyer had to acquire a car in order to exploit that value.

Syllabus

BETHEL SCHOOL DISTRICT NO. 403 ET AL. *v.* FRASER, A MINOR, ET AL.

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

No. 84–1667. Argued March 3, 1986—Decided July 7, 1986

Respondent public high school student (hereafter respondent) delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school-sponsored educational program in self-government, and that was attended by approximately 600 students, many of whom were 14-year-olds. During the entire speech, respondent referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed. Prior to delivering the speech, respondent discussed it with several teachers, two of whom advised him that it was inappropriate and should not be given. The morning after the assembly, the Assistant Principal called respondent into her office and notified him that the school considered his speech to have been a violation of the school's "disruptive-conduct rule," which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. Respondent was given copies of teacher reports of his conduct, and was given a chance to explain his conduct. After he admitted that he deliberately used sexual innuendo in the speech, he was informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. Review of the disciplinary action through petitioner School District's grievance procedures resulted in affirmance of the discipline, but respondent was allowed to return to school after serving only two days of his suspension. Respondent, by his father (also a respondent) as guardian ad litem, then filed suit in Federal District Court, alleging a violation of his First Amendment right to freedom of speech and seeking injunctive relief and damages under 42 U. S. C. § 1983. The court held that the school's sanctions violated the First Amendment, that the school's disruptive-conduct rule was unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment. The court awarded respondent monetary relief and enjoined the

School District from preventing him from speaking at the commencement ceremonies. The Court of Appeals affirmed.

Held:

1. The First Amendment did not prevent the School District from disciplining respondent for giving the offensively lewd and indecent speech at the assembly. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, distinguished. Under the First Amendment, the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, but it does not follow that the same latitude must be permitted to children in a public school. It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board. First Amendment jurisprudence recognizes an interest in protecting minors from exposure to vulgar and offensive spoken language, *FCC* v. *Pacifica Foundation*, 438 U. S. 726, as well as limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children, *Ginsberg* v. *New York*, 390 U. S. 629. Petitioner School District acted entirely within its permissible authority in imposing sanctions upon respondent in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection. Pp. 680–686.

2. There is no merit to respondent's contention that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech would subject him to disciplinary sanctions. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to respondent that his lewd speech could subject him to sanctions. P. 686.

755 F. 2d 1356, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 687. BLACKMUN, J., concurred in the result. MARSHALL, J., *post*, p. 690, and STEVENS, J., *post*, p. 691, filed dissenting opinions.

William A. Coats argued the cause for petitioners. With him on the briefs was *Clifford D. Foster, Jr.*

Jeffrey T. Haley argued the cause for respondents. With him on the brief was *Charles S. Sims.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser re-

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Kuhl, Anthony J. Steinmeyer,* and *Robert V. Zener;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun, John H. Findley,* and *George Nicholson;* and for the Texas Council of School Attorneys by *Jean F. Powers* and *David Crump.*

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Association et al. by *Ronald Coles;* for the Freedom to Read Foundation by *James A. Klenk;* for the National Education Association by *Michael D. Simpson;* and for the Student Press Law Center by *J. Marc Abrams.*

Gwendolyn H. Gregory, August W. Steinhilber, and *Thomas A. Shannon* filed a brief for the National School Boards Association as *amicus curiae.*

ferred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," App. 30, and that his delivery of the speech might have "severe consequences." *Id.*, at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class. *Id.*, at 41–44.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

> "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of

many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U. S. C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, 755 F. 2d 1356 (1985), holding that respondent's speech was indistinguishable from the protest armband in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of

Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the School District's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." 755 F. 2d, at 1363. Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity.

We granted certiorari, 474 U. S. 814 (1985). We reverse.

II

This Court acknowledged in *Tinker* v. *Des Moines Independent Community School Dist.*, *supra*, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, at 506. The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.*, at 508.

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In *Ambach* v. *Norwick*, 441 U. S. 68, 76–77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary

Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." Jefferson's Manual of Parliamentary Practice §§ 359, 360, reprinted in Manual and Rules of House of Representatives, H. R. Doc. No. 97–271, pp. 158–159 (1982); see *id.*, at 111, n. *a* (Jefferson's Manual governs the House in all cases to which it applies). The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any state. See Senate Procedure, S. Doc. No. 97–2, Rule XIX, pp. 568–569, 588–591 (1981). Senators have been censured for abusive language directed at other Senators. See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92–7, pp. 95–98 (1972) (Sens. McLaurin and Tillman); *id.*, at 152–153 (Sen. McCarthy). Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen* v. *California*, 403 U. S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey* v. *T. L. O.*, 469 U. S. 325, 340–342 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas* v. *Board of Education, Granville Central School*

Dist., 607 F. 2d 1043, 1057 (CA2 1979) (opinion concurring in result).

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U. S., at 508; see *Ambach* v. *Norwick*, *supra*. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See App. 77–81. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as

bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg* v. *New York*, 390 U. S. 629 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education* v. *Pico*, 457 U. S. 853, 871–872 (1982) (plurality opinion); *id.*, at 879–881 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918–920 (REHNQUIST, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. In *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), we dealt with the power of the Federal Communications Commission to regulate a radio broadcast described as "indecent but not obscene." There the Court reviewed an administrative condemnation of the radio broadcast of a self-styled "humorist" who described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.*, at 729; see also *id.*, at 751–755 (Appendix to opinion of the Court). The Commission concluded that "certain words depicted sexual and excretory activities in a patently offensive manner, [and] noted

that they 'were broadcast at a time when children were undoubtedly in the audience.'" The Commission issued an order declaring that the radio station was guilty of broadcasting indecent language in violation of 18 U. S. C. § 1464. 438 U. S., at 732. The Court of Appeals set aside the Commission's determination, and we reversed, reinstating the Commission's citation of the station. We concluded that the broadcast was properly considered "obscene, indecent, or profane" within the meaning of the statute. The plurality opinion went on to reject the radio station's assertion of a First Amendment right to broadcast vulgarity:

> "These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U. S., at 572." *Id.*, at 746.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public

school education. Justice Black, dissenting in *Tinker*, made a point that is especially relevant in this case:

> "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U. S., at 526.

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *New Jersey* v. *T. L. O.*, 469 U. S., at 340. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 161 (1974) (REHNQUIST, J., concurring). Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. Cf. *Goss* v. *Lopez*, 419 U. S. 565 (1975). The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.*

*Petitioners also challenge the ruling of the District Court that the removal of Fraser's name from the ballot for graduation speaker violated his due process rights because that sanction was not indicated as a potential punishment in the school's disciplinary rules. We agree with the Court of Appeals that this issue has become moot, since the graduation ceremony has long since passed and Fraser was permitted to speak in accordance

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE BRENNAN, concurring in the judgment.

Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

> "'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> "'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> "'Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> "'So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.'" App. 47.

The Court, referring to these remarks as "obscene," "vulgar," "lewd," and "offensively lewd," concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes. To my mind, the most that can be said about respondent's speech—and all that need be said—is that in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was

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with the District Court's injunction. No part of the damages award was based upon the removal of Fraser's name from the list, since damages were based upon the loss of two days' schooling.

not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits. Thus, while I concur in the Court's judgment, I write separately to express my understanding of the breadth of the Court's holding.

The Court today reaffirms the unimpeachable proposition that students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 680 (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969)). If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate, see *Cohen* v. *California*, 403 U. S. 15 (1971); the Court's opinion does not suggest otherwise.[1] Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. *Ginsberg* v. *New York*, 390 U. S. 629, 635 (1968); *Roth* v. *United States*, 354 U. S. 476, 485 (1957). It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational

[1] In the course of its opinion, the Court makes certain remarks concerning the authority of school officials to regulate student language in public schools. For example, the Court notes that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions." *Ante*, at 683. These statements obviously do not, and indeed given our prior precedents could not, refer to the government's authority generally to regulate the language used in public debate outside of the school environment.

mission.[2] Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express. Cf. *Tinker*, *supra*. Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for high school students, cf. *Board of Education* v. *Pico*, 457 U. S. 853 (1982), or to limit what students should hear, read, or learn about. Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.

The authority school officials have to regulate such speech by high school students is not limitless. See *Thomas* v. *Board of Education, Granville Central School Dist.*, 607 F. 2d 1043, 1057 (CA2 1979) (Newman, J., concurring in result) ("[S]chool officials . . . do [not] have limitless discretion to apply their own notions of indecency. Courts have a First

[2] The Court speculates that the speech was "insulting" to female students, and "seriously damaging" to 14-year-olds, so that school officials could legitimately suppress such expression in order to protect these groups. *Ante*, at 683. There is no evidence in the record that any students, male or female, found the speech "insulting." And while it was not unreasonable for school officials to conclude that respondent's remarks were inappropriate for a school-sponsored assembly, the language respondent used does not even approach the sexually explicit speech regulated in *Ginsberg* v. *New York*, 390 U. S. 629 (1968), or the indecent speech banned in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). Indeed, to my mind, respondent's speech was no more "obscene," "lewd," or "sexually explicit" than the bulk of programs currently appearing on prime time television or in the local cinema. Thus, I disagree with the Court's suggestion that school officials could punish respondent's speech out of a need to protect younger students.

Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar"). Under the circumstances of this case, however, I believe that school officials did not violate the First Amendment in determining that respondent should be disciplined for the disruptive language he used while addressing a high school assembly.[3] Thus, I concur in the judgment reversing the decision of the Court of Appeals.

JUSTICE MARSHALL, dissenting.

I agree with the principles that JUSTICE BRENNAN sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because in my view the School District failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), and concluded that the School District had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment.

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[3] Respondent served two days' suspension and had his name removed from the list of candidates for graduation speaker at the school's commencement exercises, although he was eventually permitted to speak at the graduation. While I find this punishment somewhat severe in light of the nature of respondent's transgression, I cannot conclude that school officials exceeded the bounds of their disciplinary authority.

JUSTICE STEVENS, dissenting.

"Frankly, my dear, I don't give a damn."

When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission.[1] It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation.

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[1] "Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a 'compelling state interest' to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" *Widmar* v. *Vincent*, 454 U. S. 263, 278–279 (1981) (STEVENS, J., concurring in judgment) (footnotes omitted).

"Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 544–545 (1980) (STEVENS, J., concurring in judgment).

The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.

This respondent was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers. This fact is relevant for two reasons. It confirms the conclusion that the discipline imposed on him—a 3-day suspension and ineligibility to speak at the school's graduation exercises—was sufficiently serious to justify invocation of the School District's grievance procedures. See *Goss* v. *Lopez*, 419 U. S. 565, 574–575 (1975). More importantly, it indicates that he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.[2]

The fact that the speech may not have been offensive to his audience—or that he honestly believed that it would be inoffensive—does not mean that he had a constitutional right to deliver it. For the school—not the student—must prescribe the rules of conduct in an educational institution.[3] But it

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[2] As the Court of Appeals noted, there "is no evidence in the record indicating that any students found the speech to be offensive." 755 F. 2d 1356, 1361, n. 4 (CA9 1985).

In its opinion today, the Court describes respondent as a "confused boy," *ante*, at 683, and repeatedly characterizes his audience of high school students as "children," *ante*, at 682, 684. When a more orthodox message is being conveyed to a similar audience, four Members of today's majority would treat high school students like college students rather than like children. See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534 (1986) (dissenting opinions).

[3] See *Arnold* v. *Carpenter*, 459 F. 2d 939, 944 (CA7 1972) (STEVENS, J., dissenting).

does mean that he should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate punitive consequences.

One might conclude that respondent should have known that he would be punished for giving this speech on three quite different theories: (1) It violated the "Disruptive Conduct" rule published in the student handbook; (2) he was specifically warned by his teachers; or (3) the impropriety is so obvious that no specific notice was required. I discuss each theory in turn.

The Disciplinary Rule

At the time the discipline was imposed, as well as in its defense of this lawsuit, the school took the position that respondent violated the following published rule:

> "'In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.
>
> . . . . .
>
> "'*Disruptive Conduct.* Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" 755 F. 2d 1356, 1357, n. 1 (CA9 1985).

Based on the findings of fact made by the District Court, the Court of Appeals concluded that the evidence did not show "that the speech had a materially disruptive effect on the educational process." *Id.*, at 1361. The Court of Appeals explained the basis for this conclusion:

> "[T]he record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly dis-

ruptive of the educational process. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body 'was not atypical to a high school auditorium assembly.' In our view, a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser's First Amendment right to express himself freely.

"We find it significant that although four teachers delivered written statements to an assistant principal commenting on Fraser's speech, none of them suggested that the speech disrupted the assembly or otherwise interfered with school activities. *See*, Finding of Fact No. 8. Nor can a finding of material disruption be based upon the evidence that the speech proved to be a lively topic of conversation among students the following day." *Id.*, at 1360–1361.

Thus, the evidence in the record, as interpreted by the District Court and the Court of Appeals, makes it perfectly clear that respondent's speech was not "conduct" prohibited by the disciplinary rule.[4] Indeed, even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent's speech. What the speech does contain is a sexual metaphor that may unquestionably be offensive to some listeners in some settings. But if an impartial judge puts his

[4] The Court's reliance on the school's authority to prohibit "unanticipated conduct disruptive of the educational process," *ante*, at 686, is misplaced. The findings of the District Court, which were upheld by the Court of Appeals, established that the speech was not "disruptive." Departing from our normal practice concerning factual findings, the Court's decision rests on "utterly unproven, subjective impressions of some hypothetical students." *Bender* v. *Williamsport Area School Dist.*, 475 U. S., at 553 (BURGER, C. J., dissenting).

or her own views about the metaphor to one side, I simply cannot understand how he or she could conclude that it is embraced by the above-quoted rule. At best, the rule is sufficiently ambiguous that without a further explanation or construction it could not advise the reader of the student handbook that the speech would be forbidden.[5]

The Specific Warning by the Teachers

Respondent read his speech to three different teachers before he gave it. Mrs. Irene Hicks told him that she thought the speech "was inappropriate and that he probably should not deliver it." App. 30. Steven DeHart told respondent "that this would indeed cause problems in that it would raise eyebrows." *Id.*, at 61. The third teacher, Shawn Madden, did not testify. None of the three suggested that the speech might violate a school rule. *Id.*, at 49–50.

The fact that respondent reviewed the text of his speech with three different teachers before he gave it does indicate that he must have been aware of the possibility that it would provoke an adverse reaction, but the teachers' responses certainly did not give him any better notice of the likelihood of discipline than did the student handbook itself. In my opinion, therefore, the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it.

[5] The school's disruptive conduct rule is entirely concerned with "the educational process." It does not expressly refer to extracurricular activities in general, or to student political campaigns or student debates. In contrast, "[i]n our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate." See *ante*, at 681. If a written rule is needed to forewarn a United States Senator that the use of offensive speech may give rise to discipline, a high school student should be entitled to an equally unambiguous warning. Unlike the Manual of Parliamentary Practice drafted by Thomas Jefferson, this School District's rules of conduct contain no unequivocal prohibition against the use of "impertinent" speech or "indecent language."

Obvious Impropriety

Justice Sutherland taught us that a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388 (1926). Vulgar language, like vulgar animals, may be acceptable in some contexts and intolerable in others. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (1978). Indeed, even ordinary, inoffensive speech may be wholly unacceptable in some settings. See *Schenck* v. *United States*, 249 U. S. 47, 52 (1919); *Pacifica*, *supra*, at 744–745.

It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?

For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.

I would affirm the judgment of the Court of Appeals.

ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 85–437. Argued April 29, 1986—Decided July 7, 1986

A New York statute authorizes closure of a building found to be a public health nuisance because it was being used as a place for prostitution and lewdness. After a county Deputy Sheriff's undercover investigation of respondents' "adult" bookstore disclosed that illicit sexual activities, including solicitation of prostitution, occurred on the premises, a civil complaint was filed against respondents seeking closure of the premises under the statute. Respondents answered by alleging, *inter alia*, that a closure would impermissibly interfere with their First Amendment right to sell books on the premises and that the closure statute was not intended to apply to establishments other than houses of prostitution. The New York trial court denied respondents' motion for a summary judgment, holding that the statute applied to respondents. The Appellate Division affirmed. The New York Court of Appeals reversed on First Amendment grounds. Applying the test of *United States* v. *O'Brien*, 391 U. S. 367, for determining the validity of a statute regulating conduct that has an expressive element, the court held that the closure statute failed the part of the *O'Brien* test that requires the statute to be no broader than necessary to achieve its purpose, because the closure order was much broader than necessary to achieve the restriction against illicit sexual activities and because an injunction against continuing those activities could achieve the same effect without restricting respondents' bookselling activities.

Held: The First Amendment does not bar enforcement of the closure statute against respondents' bookstore. *United States* v. *O'Brien*, *supra*, has no relevance to a statute directed at imposing sanctions on nonexpressive activity, and the sexual activities carried on in this case manifest absolutely no element of protected expression. The closure statute is directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling on premises used for prostitution does not confer First Amendment coverage to defeat a statute aimed at penalizing and terminating illegal uses of premises. Pp. 702–707.

65 N. Y. 2d 324, 480 N. E. 2d 1089, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR,

J., filed a concurring opinion, in which STEVENS, J., joined, *post*, p. 708. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 708.

John J. DeFranks argued the cause for petitioner. With him on the briefs were *Richard J. Arcara, pro se*, and *Louis A. Haremski.*

Paul John Cambria, Jr., argued the cause and filed a brief for respondents.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution and lewdness because the premises are also used as an adult bookstore.

I

A

Respondents own and operate the "Village Books and News Store" in Kenmore, New York. The establishment characterizes itself as an "adult" bookstore and sells sexually explicit books and magazines with booths available for the viewing of sexually explicit movies. No issue is presented with respect to whether the movies or other materials available at respondents' store are obscene pornographic materials.

During September and October 1982, the Erie County Sheriff's Department conducted an undercover investigation into reported illicit sexual activities occurring on respond-

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**Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner* filed a brief for the city of New York as *amicus curiae* urging reversal.

Steven R. Shapiro, Burt Neuborne, and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Edward Cooper and *James J. Clancy* filed a brief for the city of Santa Ana, California, as *amicus curiae.*

ents' premises. A Deputy Sheriff personally observed instances of masturbation, fondling, and fellatio by patrons on the premises of the store, all within the observation of the proprietor. He also observed instances of solicitation of prostitution, and was himself solicited on at least four occasions by men who offered to perform sexual acts in exchange for money. The Deputy Sheriff reported that the management of the "Village Books and News Store" was fully aware of the sexual activity on the premises. App. to Pet. for Cert. A–54, A–56, A–57, A–58.

B

The results of the undercover investigation formed the basis of a civil complaint against respondents seeking closure of the premises under § 2321 of the New York Public Health Law. Section 2320 of the New York Public Health Law defines places of prostitution, lewdness, and assignation as public health nuisances:

> "1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.
>
> "2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided." N. Y. Pub. Health Law § 2320 (McKinney 1985).

Section 2329 provides for the closure of any building found to be a public health nuisance under § 2320:

> "1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a

> criminal proceeding in any court, an order of abatement shall be entered as part of the judgment in the case, which order . . . shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year . . . ." N. Y. Pub. Health Law § 2329 (McKinney 1985).

Section 2321 of the statute authorizes a suit by the district attorney, among others, to enforce its provisions.

Respondents answered the complaint by denying the allegations of the Deputy Sheriff that sexual activities occurred on the premises with respondents' knowledge, and also by asserting that a closure of the premises would impermissibly interfere with their First Amendment right to sell books on the premises. Respondents moved for partial summary judgment on these First Amendment grounds, and also advanced an argument that the statute was not intended to reach establishments other than houses of prostitution in the traditional sense. The Trial Division of the New York Supreme Court, Special Term, denied the motion for summary judgment, holding that the statute was applicable to respondents; it rejected respondents' First Amendment claims as well, reasoning that the closure order sought did not involve a prior restraint of materials presumptively protected by the First Amendment. It also held that respondents' bookselling activities could not be employed as "a curtain behind which illegal activity can be freely encouraged and conducted."

The Appellate Division, Fourth Department, affirmed. *People ex rel. Arcara* v. *Cloud Books, Inc.*, 101 App. Div. 2d 163, 475 N. Y. S. 2d 173 (1984). The Appellate Division agreed with the trial court that the statute applied to the premises in which respondents' bookstore was operated; closure of the premises would not violate the First Amendment since the admittedly unlawful conduct and activities giving rise to the abatement action were not presumptively protected expressive conduct, and respondents' sales of books on

the premises did not shield it from enforcement of the closure statute. The Appellate Division granted respondents' motion for leave to appeal to the New York Court of Appeals, and certified both the statutory question whether the statute reached establishments other than houses of prostitution and the First Amendment issue.

The New York Court of Appeals reversed. *People ex rel. Arcara* v. *Cloud Books, Inc.*, 65 N. Y. 2d 324, 480 N. E. 2d 1089 (1985). That court agreed that the Public Health Law applied to establishments other than houses of prostitution, but reversed on First Amendment grounds. The court relied on cases from other jurisdictions which analogized an order closing a bookstore or movie theater based upon previous distribution of obscene materials to an unconstitutional prior restraint. *E. g.*, *Gayety Theatres, Inc.* v. *City of Miami*, 719 F. 2d 1550 (CA11 1983); *General Corp.* v. *State ex rel. Sweeton*, 294 Ala. 657, 320 So. 2d 668 (1975), cert. denied, 425 U. S. 904 (1976); *People ex rel. Busch* v. *Projection Room Theater*, 17 Cal. 3d 42, 550 P. 2d 600, cert. denied *sub nom. Van de Kamp* v. *Projection Room Theater*, 429 U. S. 922 (1976).

The New York Court of Appeals relied on the impact of the closure order upon respondents' protected bookselling activities, and concluded that that circumstance required scrutiny under this Court's First Amendment analysis of regulations aimed at nonspeech activity but having an incidental effect on speech. Purporting to apply the four-part test of *United States* v. *O'Brien*, 391 U. S. 367 (1968), the New York Court of Appeals determined that the closure remedy fell within the constitutional power of the State; that the closure remedy furthered a substantial state interest in thwarting prostitution; and that the purpose of the closure remedy was unrelated to the suppression of speech.

Notwithstanding that analysis, the court determined that the closure remedy failed the fourth part of the *O'Brien* test, which requires that the statute incidentally restricting

speech be no broader than necessary to achieve its purpose. The court reasoned that upon the summary judgment record before it, an order closing the premises for a year was much broader than necessary to achieve the restriction against illicit commercial sexual activities and that an injunction against continuing the admittedly illegal activity on the premises could achieve the same effect without restricting respondents' bookselling activities.

We granted certiorari.[1] 474 U. S. 978 (1985). We reverse.

II

This Court has applied First Amendment scrutiny to a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion. *United States* v. *O'Brien*, *supra*. In *O'Brien*, the Court considered the First Amendment ramifications of a statute which imposed criminal sanctions on one who "knowingly destroys, knowingly mutilates, or in any manner changes" a draft registration certificate. 50 U. S. C. App. § 462(b). The *O'Brien* Court noted that on its face the statute did not regulate conduct that was necessarily expressive, since the destruction of a draft card is not ordinarily expressive conduct. The defendant in *O'Brien* had, as respondents here do not, at least the semblance of expressive activity in his claim that the otherwise unlawful burning of a draft card was to "carry a message" of the actor's opposition to the draft. As the Court noted in *O'Brien:*

> "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of con-

[1] The decision of the New York Court of Appeals conflicts with decisions of the Virginia Supreme Court and the Pennsylvania Superior Court which have upheld the closure of bookstores under public health nuisance statutes based upon illicit sexual activities occurring on the premises. *Commonwealth* v. *Croatan Books, Inc.*, 228 Va. 383, 323 S. E. 2d 86 (1984); *Commonwealth ex rel. Lewis* v. *Allouwill*, 330 Pa. Super. 32, 478 A. 2d 1334 (1984).

> duct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377 (footnotes omitted).

The Court determined that the prohibition against mutilation of draft cards met these requirements and could constitutionally be applied against one who publicly burned his draft card as a symbolic protest.

We have applied *O'Brien* to other cases involving governmental regulation of conduct that has an expressive element. In *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984), we considered the application of a ban on camping and sleeping in Lafayette Park and on the Mall in Washington, D. C., to demonstrators who sought to sleep overnight in these parks as a protest of the plight of homeless people. Again in *United States* v. *Albertini*, 472 U. S. 675, (1985), we considered a protester's conviction for reentering a military base after being subject to an order barring him from entering that establishment based on his previous improper conduct on the base. In each of these cases we considered the expressive element of the conduct regulated and upheld the regulations as constitutionally permissible.

We have also applied First Amendment scrutiny to some statutes which, although directed at activity with no expres-

sive component, impose a disproportionate burden upon those engaged in protected First Amendment activities. In *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983), we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a non-expressive activity, since the burden of the tax inevitably fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers excercising the constitutionally protected freedom of the press. Even while striking down the tax in *Minneapolis Star*, we emphasized:

> "Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, *e. g.*, *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155–156 (1951) (same); *Breard* v. *Alexandria*, 341 U. S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946) (same); *Associated Press* v. *United States*, 326 U. S. 1, 6–7, 19–20 (1945) (antitrust laws); *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133 (1937) (National Labor Relations Act); see also *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) (enforcement of subpoenas)." *Id.*, at 581.

III

The New York Court of Appeals held that the *O'Brien* test for permissible governmental regulation was applicable to this case because the closure order sought by petitioner

would also impose an incidental burden upon respondents' bookselling activities. That court ignored a crucial distinction between the circumstances presented in *O'Brien* and the circumstances of this case: unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973), we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

Nor does the distinction drawn by the New York Public Health Law inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden, as did the tax struck down in *Minneapolis Star*. As we noted in *Minneapolis Star*, neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities. If the city imposed closure penalties for demonstrated Fire Code violations or health hazards from inadequate sewage treatment, the First Amendment would not aid the owner of premises who had knowingly allowed such violations to persist.

Nonetheless, respondents argue that the effect of the statutory closure remedy impermissibly burdens its First Amendment protected bookselling activities. The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location.[2] In any event, this argument proves too

[2] For the same reason, we must reject the Court of Appeals' reasoning analogizing the closure order sought in this case to an unconstitutional prior restraint under *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). The closure order sought in this case differs from a prior restraint

much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Cf. *Buckley* v. *Valeo*, 424 U. S. 1 (1976). Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. See *Pell* v. *Procunier*, 417 U. S. 817 (1974); see also *Jones* v. *North Carolina Prisoners Union*, 433 U. S. 119 (1977).

It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*,[3] or where a statute based on a

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in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

[3] The dissent asserts that we have previously struck down "[g]enerally applicable statutes that purport to regulate nonspeech . . . if they unduly penalize speech, political or otherwise." *Post*, at 709. This is obviously a correct statement of holdings which are not relevant here. In each of the cases cited by the dissent, the "nonspeech" which drew sanctions was intimately related to expressive conduct protected under the First Amend-

nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

The New York Court of Appeals thus misread *O'Brien*, which has no relevance to a statute directed at imposing sanctions on nonexpressive activity. The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises. The legislature properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities.[4]

The judgment of the New York Court of Appeals is

Reversed.

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ment. See *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972) (demonstration results in prosecution under antinoise ordinance); *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (trespass in order to distribute religious literature); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (breach of peace prosecution based upon distribution of religious literature). Here, however, the "nonspeech" conduct subject to a general regulation bears absolutely no connection to any expressive activity.

[4] Respondents assert that closure of their premises is sought as a pretext for suppression of First Amendment protected expression. However, there is no suggestion on the record before us that the closure of respondents' bookstore was sought under the public health nuisance statute as a pretext for the suppression of First Amendment protected material. Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution. See *Wayte* v. *United States*, 470 U. S. 598 (1985). Respondents in this case made no such assertion before the trial court.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring.

I agree that the Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental, nonexpressive effect of speech. Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment. If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

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

Respondent Cloud Books, Inc., has a bookstore that sells sexually explicit, but not allegedly obscene, publications. See *People ex rel. Arcara* v. *Cloud Books, Inc.*, 65 N. Y. 2d 324, 326, 480 N. E. 2d 1089, 1091 (1985); see also *ante*, at 698. The Court holds that the store can be shut down for one year as a nuisance if it is found to be a place "in or upon which any lewdness, assignation, or prostitution . . . exists," in violation of New York's Public Health Law §§ 2320 and 2329 (McKinney 1985). Despite the obvious role that commercial bookstores play in facilitating free expression, see, *e. g.*, *Smith* v. *California*, 361 U. S. 147, 150 (1959), the Court today concludes that a closure order would raise no First Amendment concerns, apparently because it would be triggered, not by respondents' sale of books, but by the non-

expressive conduct of patrons. See *ante*, at 698–699, and 706, n. 2. But the First Amendment, made applicable to the States by the Fourteenth Amendment, protects against all laws "abridging the freedom of speech"—not just those specifically directed at expressive activity. Until today, this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so through generally applicable regulations that have "nothing to do with any expressive conduct." See *ante*, at 705–706, n. 2.

To the contrary, the Court has said repeatedly that a statute challenged under the First Amendment "must be tested by its operation and effect." *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 708 (1931). See also *Schad* v. *Mount Ephraim*, 452 U. S. 61, 68 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 552 (1975). "In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation." *Schneider* v. *State*, 308 U. S. 147, 161 (1939).

Generally applicable statutes that purport to regulate nonspeech repeatedly have been struck down if they unduly penalize speech, political or otherwise. See, *e. g.*, *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (trespass); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (breach of peace); *Schneider* v. *State*, *supra* (littering). Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 107–108 (1972) (antinoise ordinance).

The legislation in *Marsh*, *Cantwell*, and *Schneider*, as in this case, did not attempt to censor particular speech, cf. *Near* v. *Minnesota ex rel. Olson*, *supra*, or to burden disproportionately a particular speaker, cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983). The State's concern there, as here, was to preserve the character of the community through the exercise of police power. And state action was triggered not by the speech itself, but by conduct. In *Cantwell*, for example, the Court

pointed out that the speech itself "invaded no right or interest of the public." 310 U. S., at 309. Rather, the rage of the listeners led to state action. In *Schneider*, police arrested the distributors of handbills even though the litter was caused by other people throwing the handbills away. 308 U. S., at 162. In each of these cases, the State's legitimate goal in regulating the effects of speech collided with First Amendment freedoms, and the Court therefore balanced the State's interests against the burden imposed on the exercise of the fundamental right. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976) (secondary effects of adult theaters); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986) (same); *United States* v. *Albertini*, 472 U. S. 675, 687–688 (1985) (earlier conduct threatened military security).*

At some point, of course, the impact of state regulation on First Amendment rights becomes so attenuated that it is easily outweighed by the state interest. But when a State directly and substantially impairs First Amendment activities, such as by shutting down a bookstore, I believe that the State must show, at a minimum, that it has chosen the least restrictive means of pursuing its legitimate objectives. *E. g.*, *Cantwell*, *supra*, at 308. The closure of a bookstore can no more be compared to a traffic arrest of a reporter, see *ante*, at 708 (O'CONNOR, J., concurring), than the closure

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*Our past cases cannot sensibly be distinguished on the ground that they involved regulation of nonexpressive effects of speech, or regulation of nonspeech "intimately related to expressive conduct," *ante*, at 706, n. 3; our concern clearly has been to avoid *any* exercise of governmental power that "unduly suppress[es]" First Amendment interests. *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940). Would the Court feel differently about the present case if respondents had introduced evidence that the illegal sexual activity at their bookstore had been spurred by the passages read by browsing customers? Under the Court's apparent theory, paradoxically, a bookstore which sold books that induced such activity would have more protection than a bookstore whose wares had no effect on the sexual behavior of its clientele.

of a church could be compared to the traffic arrest of its clergyman.

A State has a legitimate interest in forbidding sexual acts committed in public, including a bookstore. An obvious method of eliminating such acts is to arrest the patron committing them. But the statute in issue does not provide for that. Instead, it imposes absolute liability on the bookstore simply because the activity occurs on the premises. And the penalty—a mandatory 1-year closure—imposes an unnecessary burden on speech. Of course "linking the words 'sex' and 'books,'" see *ante*, at 705, is not enough to extend First Amendment protection to illegal sexual activity, but neither should it suffice to *remove* First Amendment protection from books situated near the site of such activity. The State's purpose in stopping public lewdness cannot justify such a substantial infringement of First Amendment rights. First Amendment interests require the use of more "sensitive tools." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958).

Petitioner has not demonstrated that a less restrictive remedy would be inadequate to abate the nuisance. The Court improperly attempts to shift to the bookseller the responsibility for finding an alternative site. But surely the Court would not uphold a city ordinance banning all public debate on the theory that the residents could move somewhere else. "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S., at 556, quoting *Schneider* v. *State*, 308 U. S., at 163. Moreover, respondents allege that changes in local zoning laws prevent them from relocating. See Brief for Respondents 10–11; Tr. of Oral Arg. 26, 31–32. Because the statute is not narrowly tailored to further the asserted governmental interest, it is unconstitutional as applied to respondents.

The Court's decision creates a loophole through which counties like Erie, see also *New York* v. *P. J. Video, Inc.*,

475 U. S. 868 (1986); *New York* v. *Uplinger*, 467 U. S. 246 (1984), can suppress "undesirable," protected speech without confronting the protections of the First Amendment. Until today, the Court has required States to confine any book banning to materials that are determined, through constitutionally approved procedures, to be obscene. See *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Freedman* v. *Maryland*, 380 U. S. 51, 58–59 (1965). Until today, States could enjoin the future dissemination of adult fare as a nuisance only by "adher[ing] to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." See *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 315 (1980). A State now can achieve a sweeping result without any special protection for the First Amendment interests so long as the predicate conduct—which could be as innocent as repeated meetings between a man and a woman—occurs on the premises. That a bookstore might meet the heavy burden of proving selective prosecution, see *ante*, at 707, n. 4; *ante*, at 708 (O'CONNOR, J., concurring); see also *Wayte* v. *United States*, 470 U. S. 598, 607–610 (1985); *Kuzinich* v. *County of Santa Clara*, 689 F. 2d 1345, 1349 (CA9 1982); *State* v. *Flynt*, 63 Ohio St. 2d 132, 133, 407 N. E. 2d 15, 17–18, cert. granted, 449 U. S. 1033 (1980), cert. dism'd, 451 U. S. 619 (1981), hardly guarantees the prompt, constitutionally required review necessary to minimize deterrence of protected speech, see *New York* v. *P. J. Video, Inc.*, 475 U. S., at 873. And even when a State's only intention is to eliminate sexual acts in public, a 1-year closure has a severe and unnecessary impact on the First Amendment rights of booksellers.

If the freedom of speech protected by the First Amendment is to retain its "transcend[ent] value," *Speiser* v. *Randall*, 357 U. S., at 525, First Amendment interests must be given special protection. *Marsh* v. *Alabama*, 326 U. S., at 509. "'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being sti-

fled by more subtle governmental interference.'" *Healy* v. *James*, 408 U. S. 169, 183 (1972), quoting *Bates* v. *Little Rock*, 361 U. S. 516, 523 (1960). Since I agree with the New York Court of Appeals that the mandatory closure requirement is unconstitutional as applied to respondents, I dissent from the reversal of that court's judgment.

BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.

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

No. 85–1377. Argued April 23, 1986—Decided July 7, 1986*

In order to eliminate the federal budget deficit, Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985 (Act), popularly known as the "Gramm-Rudman-Hollings Act," which sets a maximum deficit amount for federal spending for each of the fiscal years 1986 through 1991 (progressively reducing the deficit amount to zero in 1991). If in any fiscal year the budget deficit exceeds the prescribed maximum by more than a specified sum, the Act requires basically across-the-board cuts in federal spending to reach the targeted deficit level. These reductions are accomplished under the "reporting provisions" spelled out in § 251 of the Act, which requires the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) to submit their deficit estimates and program-by-program budget reduction calculations to the Comptroller General who, after reviewing the Directors' joint report, then reports his conclusions to the President. The President in turn must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General, and the sequestration order becomes effective unless, within a specified time, Congress legislates reductions to obviate the need for the sequestration order. The Act also contains in § 274(f) a "fallback" deficit reduction process (eliminating the Comptroller General's participation) to take effect if § 251's reporting provisions are invalidated. In consolidated actions in the Federal District Court, individual Congressmen and the National Treasury Employees Union (Union) (who, along with one of the Union's members, are appellees here) challenged the Act's constitutionality. The court held, *inter alia*, that the Comptroller General's role in exercising executive functions under the Act's deficit reduction process violated the constitutionally imposed doctrine of separation of powers because the Comptroller General is removable only by a congressional

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*Together with No. 85–1378, *United States Senate* v. *Synar, Member of Congress, et al.*, and No. 85–1379, *O'Neill, Speaker of the United States House of Representatives, et al.* v. *Synar, Member of Congress, et al.*, also on appeal from the same court.

joint resolution or by impeachment, and Congress may not retain the power of removal over an officer performing executive powers.

Held:

1. The fact that members of the Union, one of whom is an appellee here, will sustain injury because the Act suspends certain scheduled cost-of-living benefit increases to the members, is sufficient to create standing under a provision of the Act and Article III to challenge the Act's constitutionality. Therefore, the standing issue as to the Union itself or Members of Congress need not be considered. P. 721.

2. The powers vested in the Comptroller General under § 251 violate the Constitution's command that Congress play no direct role in the execution of the laws. Pp. 721–734.

(a) Under the constitutional principle of separation of powers, Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control of the execution of the laws. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess. Cf. *INS* v. *Chadha*, 462 U. S. 919. Pp. 721–727.

(b) There is no merit to the contention that the Comptroller General performs his duties independently and is not subservient to Congress. Although nominated by the President and confirmed by the Senate, the Comptroller General is removable only at the initiative of Congress. Under controlling statutes, he may be removed not only by impeachment but also by joint resolution of Congress "at any time" for specified causes, including "inefficiency," "neglect of duty," and "malfeasance." The quoted terms, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. Moreover, the political realities do not reveal that the Comptroller General is free from Congress' influence. He heads the General Accounting Office, which under pertinent statutes is "an instrumentality of the United States Government independent of the executive departments," and Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. Thus, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. Pp. 727–732.

(c) Under § 251 of the Act, the Comptroller General has been improperly assigned executive powers. Although he is to have "due regard" for the estimates and reductions contained in the joint report of

the Directors of the CBO and the OMB, the Act clearly contemplates that in preparing his report the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates and will make decisions of the kind that are made by officers charged with executing a statute. The Act's provisions give him, not the President, the ultimate authority in determining what budget cuts are to be made. By placing the responsibility for execution of the Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the Act's execution and has unconstitutionally intruded into the executive function. Pp. 732–734.

3. It is not necessary to consider whether the appropriate remedy is to nullify the 1921 statutory provisions that authorize Congress to remove the Comptroller General, rather than to invalidate § 251 of the Act. In § 274(f), Congress has explicitly provided "fallback" provisions that take effect if any of the reporting procedures described in § 251 are invalidated. Assuming that the question of the appropriate remedy must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect as written. Pp. 734–736.

626 F. Supp. 1374, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 736. WHITE, J., *post*, p. 759, and BLACKMUN, J., *post*, p. 776, filed dissenting opinions.

Lloyd N. Cutler argued the cause for appellant in No. 85–1377. With him on the briefs were *John H. Pickering*, *William T. Lake*, *Richard K. Lahne*, and *Neal T. Kilminster*. *Steven R. Ross* argued the cause for appellants in No. 85–1379. With him on the briefs were *Charles Tiefer* and *Michael L. Murray*. *Michael Davidson* argued the cause for appellant in No. 85–1378. With him on the briefs were *Ken U. Benjamin, Jr.*, and *Morgan J. Frankel*.

Solicitor General Fried argued the cause for the United States. With him on the brief were *Assistant Attorney General Willard*, *Deputy Solicitor General Kuhl*, *Deputy Assistant Attorney General Spears*, *Edwin S. Kneedler*, *Robert E. Kopp*, *Neil H. Koslowe*, and *Douglas Letter*. *Alan B. Morrison* argued the cause for appellees Synar et al. With him on the brief was *Katherine A. Meyer*. *Lois G. Williams* ar-

gued the cause for appellees National Treasury Employees Union et al. With her on the brief were *Gregory O'Duden* and *Elaine D. Kaplan.*†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

I

A

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038, 2 U. S. C. § 901 *et seq.* (1982 ed., Supp. III), popularly known as the "Gramm-Rudman-Hollings Act." The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a "maximum deficit amount" for federal spending for each of fiscal years 1986 through 1991. The size of that maximum deficit amount progressively reduces to zero in fiscal year 1991. If in any fiscal year the federal budget deficit exceeds the maxi-

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†Briefs of *amici curiae* urging reversal were filed for the National Tax Limitation Committee et al. by *Ronald A. Zumbrun, Sam Kazman,* and *Lucinda Low Swartz;* and for Howard H. Baker, Jr., *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Robert M. Weinberg, Peter O. Shinevar, Laurence Gold, George Kaufmann, Edward J. Hickey, Jr., Thomas A. Woodley, Mark Roth, Darryl J. Anderson,* and *Anton G. Hajjar;* for the Coalition for Health Funding et al. by *Stephan E. Lawton* and *Jack N. Goodman;* for the National Federation of Federal Employees by *Patrick J. Riley;* and for William H. Gray III et al. by *Richard A. Wegman, Paul S. Hoff,* and *Thomas H. Stanton.*

Briefs of *amici curiae* were filed for the American Jewish Congress by *Neil H. Cogan;* and for Edward Blankstein by *Eric H. Karp.*

mum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs. The Act exempts certain priority programs from these cuts. § 255.

These "automatic" reductions are accomplished through a rather complicated procedure, spelled out in § 251, the so-called "reporting provisions" of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that fiscal year by more than a specified amount, the Directors of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors' reports, then reports his conclusions to the President. § 251(b). The President in turn must issue a "sequestration" order mandating the spending reductions specified by the Comptroller General. § 252. There follows a period during which Congress may by legislation reduce spending to obviate, in whole or in part, the need for the sequestration order. If such reductions are not enacted, the sequestration order becomes effective and the spending reductions included in that order are made.

Anticipating constitutional challenge to these procedures, the Act also contains a "fallback" deficit reduction process to take effect "[i]n the event that any of the reporting procedures described in section 251 are invalidated." § 274(f). Under these provisions, the report prepared by the Directors of OMB and the CBO is submitted directly to a specially

created Temporary Joint Committee on Deficit Reduction, which must report in five days to both Houses a joint resolution setting forth the content of the Directors' report. Congress then must vote on the resolution under special rules, which render amendments out of order. If the resolution is passed and signed by the President, it then serves as the basis for a Presidential sequestration order.

B

Within hours of the President's signing of the Act,[1] Congressman Synar, who had voted against the Act, filed a complaint seeking declaratory relief that the Act was unconstitutional. Eleven other Members later joined Congressman Synar's suit. A virtually identical lawsuit was also filed by the National Treasury Employees Union. The Union alleged that its members had been injured as a result of the Act's automatic spending reduction provisions, which have suspended certain cost-of-living benefit increases to the Union's members.[2]

A three-judge District Court, appointed pursuant to 2 U. S. C. § 922(a)(5) (1982 ed., Supp. III), invalidated the reporting provisions. *Synar* v. *United States*, 626 F. Supp. 1374 (DC 1986) (Scalia, Johnson, and Gasch, JJ.). The District Court concluded that the Union had standing to challenge the Act since the members of the Union had suffered actual injury by suspension of certain benefit increases. The District Court also concluded that Congressman Synar and his fellow Members had standing under the so-called "congressional standing" doctrine. See *Barnes* v. *Kline*, 245 U. S. App. D. C. 1, 21, 759 F. 2d 21, 41 (1985), cert. granted *sub nom. Burke* v. *Barnes*, 475 U. S. 1044 (1986).

[1] In his signing statement, the President expressed his view that the Act was constitutionally defective because of the Comptroller General's ability to exercise supervisory authority over the President. Statement on Signing H. J. Res. 372 Into Law, 21 Weekly Comp. of Pres. Doc. 1491 (1985).

[2] An individual member of the Union was later added as a plaintiff. See 475 U. S. 1094 (1986).

The District Court next rejected appellees' challenge that the Act violated the delegation doctrine. The court expressed no doubt that the Act delegated broad authority, but delegation of similarly broad authority has been upheld in past cases. The District Court observed that in *Yakus* v. *United States*, 321 U. S. 414, 420 (1944), this Court upheld a statute that delegated to an unelected "Price Administrator" the power "to promulgate regulations fixing prices of commodities." Moreover, in the District Court's view, the Act adequately confined the exercise of administrative discretion. The District Court concluded that "the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative decisionmaking." 626 F. Supp., at 1389.

Although the District Court concluded that the Act survived a delegation doctrine challenge, it held that the role of the Comptroller General in the deficit reduction process violated the constitutionally imposed separation of powers. The court first explained that the Comptroller General exercises executive functions under the Act. However, the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not by the President but only by a joint resolution of Congress or by impeachment. The District Court reasoned that this arrangement could not be sustained under this Court's decisions in *Myers* v. *United States*, 272 U. S. 52 (1926), and *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935). Under the separation of powers established by the Framers of the Constitution, the court concluded, Congress may not retain the power of removal over an officer performing executive functions. The congressional removal power created a "here-and-now subservience" of the Comptroller General to Congress. 626 F. Supp., at 1392. The District Court therefore held that

> "since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are are central cannot be implemented." *Id.*, at 1403.

Appeals were taken directly to this Court pursuant to § 274(b) of the Act. We noted probable jurisdiction and expedited consideration of the appeals. 475 U. S. 1009 (1986). We affirm.

II

A threshold issue is whether the Members of Congress, members of the National Treasury Employees Union, or the Union itself have standing to challenge the constitutionality of the Act in question. It is clear that members of the Union, one of whom is an appellee here, will sustain injury by not receiving a scheduled increase in benefits. See § 252(a)(6)(C)(i); 626 F. Supp., at 1381. This is sufficient to confer standing under § 274(a)(2) and Article III. We therefore need not consider the standing issue as to the Union or Members of Congress. See *Secretary of Interior* v. *California*, 464 U. S. 312, 319, n. 3 (1984). Cf. *Automobile Workers* v. *Brock*, 477 U. S. 274 (1986); *Barnes* v. *Kline*, *supra*. Accordingly, we turn to the merits of the case.

III

We noted recently that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu,

quoted by James Madison in The Federalist No. 47, that "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' . . . ." The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with "[t]he judicial Power . . . extend-[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States." Art. III, § 2.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, § 6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, § 4. And even in the impeachment of a President the presiding officer of the ultimate tribunal is not a member of the Legislative Branch, but the Chief Justice of the United States. Art. I, § 3.

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of

the Senate . . . ." Art. II, § 2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Art. II, § 4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

This was made clear in debate in the First Congress in 1789. When Congress considered an amendment to a bill establishing the Department of Foreign Affairs, the debate centered around whether the Congress "should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate." *Myers*, 272 U. S., at 114. James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment, saying in debate:

> "Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body. It has been objected, that the Senate have too much of the Executive power even, by having a control over the President in the appointment to office. Now, shall we extend this connexion between the Legislative and Executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?" 1 Annals of Cong. 380 (1789).

Madison's position ultimately prevailed, and a congressional role in the removal process was rejected. This "Decision of 1789" provides "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the

First Congress "had taken part in framing that instrument." *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983).[3]

This Court first directly addressed this issue in *Myers* v. *United States*, 272 U. S. 52 (1925). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President removed one such Postmaster without Senate approval, and a lawsuit ensued. Chief Justice Taft, writing for the Court, declared the statute unconstitutional on the ground that for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.*, at 161.

A decade later, in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), relied upon heavily by appellants, a Federal Trade Commissioner who had been removed by the President sought backpay. *Humphrey's Executor* involved an issue not presented either in the *Myers* case or in this case—*i. e.*, the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. 295

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[3] The First Congress included 20 Members who had been delegates to the Philadelphia Convention:

IN THE SENATE

Richard Bassett (Delaware)	Rufus King (New York)
Pierce Butler (South Carolina)	John Langdon (New Hampshire)
Oliver Ellsworth (Connecticut)	Robert Morris (Pennsylvania)
William Few (Georgia)	William Paterson (New Jersey)
William Samuel Johnson (Connecticut)	George Read (Delaware)
	Caleb Strong (Massachusetts)

IN THE HOUSE

Abraham Baldwin (Georgia)	Nicholas Gilman (New Hampshire)
Daniel Carroll (Maryland)	James Madison (Virginia)
George Clymer (Pennsylvania)	Roger Sherman (Connecticut)
Thomas FitzSimons (Pennsylvania)	Hugh Williamson (North Carolina)
Elbridge Gerry (Massachusetts)	

U. S., at 630.[4] The relevant statute permitted removal "by the President," but only "for inefficiency, neglect of duty, or malfeasance in office." Justice Sutherland, speaking for the Court, upheld the statute, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." *Id.*, at 628–629. The Court distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional. Justice Sutherland's opinion for the Court also underscored the crucial role of separated powers in our system:

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality." 295 U. S., at 629–630.

The Court reached a similar result in *Wiener* v. *United States*, 357 U. S. 349 (1958), concluding that, under *Humphrey's Executor*, the President did not have unrestrained

[4] Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of "independent" agencies because no issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes, see, *e. g.*, 15 U. S. C. § 41 (members of the Federal Trade Commission may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office"), or else do not specify a removal procedure, see, *e. g.*, 2 U. S. C. § 437c (Federal Election Commission). This case involves nothing like these statutes, but rather a statute that provides for direct congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General, see Part IV, *infra*.

removal authority over a member of the War Claims Commission.

In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." 626 F. Supp., at 1401. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Our decision in *INS* v. *Chadha*, 462 U. S. 919 (1983), supports this conclusion. In *Chadha*, we struck down a one-House "legislative veto" provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make:

> "Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*, at 954–955.

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over

the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.

The dangers of congressional usurpation of Executive Branch functions have long been recognized. "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley* v. *Valeo*, 424 U. S. 1, 129 (1976). Indeed, we also have observed only recently that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha, supra,* at 951. With these principles in mind, we turn to consideration of whether the Comptroller General is controlled by Congress.

IV

Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress. We agree with the District Court that this contention does not bear close scrutiny.

The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability.[5] Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, see 31 U. S. C.

[5] We reject appellants' argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used. As the District Court concluded, "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." *Synar* v. *United States*, 626 F. Supp. 1374, 1392 (DC 1986). The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse.

§ 703(a)(2),[6] and confirmed by the Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment but also by joint resolution of Congress "at any time" resting on any one of the following bases:

"(i) permanent disability;
"(ii) inefficiency;
"(iii) neglect of duty;
"(iv) malfeasance; or
"(v) a felony or conduct involving moral turpitude."

31 U. S. C. § 703(e)(1)B.[7]

This provision was included, as one Congressman explained in urging passage of the Act, because Congress "felt that [the Comptroller General] should be brought under the sole control of Congress, so that Congress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment." 61 Cong. Rec. 1081 (1921).

The removal provision was an important part of the legislative scheme, as a number of Congressmen recognized. Representative Hawley commented: "[H]e is our officer, in a measure, getting information for us . . . . If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from his office." 58 Cong. Rec. 7136 (1919). Representative Sisson observed that the removal provisions would give "[t]he Congress of the United States . . . absolute control of the man's destiny in office."

[6] Congress adopted this provision in 1980 because of "the special interest of both Houses in the choice of an individual whose primary function is to provide assistance to Congress." S. Rep. No. 96-570, p. 10.

[7] Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition. Like the District Court, 626 F. Supp., at 1393, n. 21, we therefore read the removal provision as authorizing removal by Congress alone.

61 Cong. Rec. 987 (1921). The ultimate design was to "give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal." 58 Cong. Rec. 7211 (1919) (Rep. Temple).

JUSTICE WHITE contends: "The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary." *Post*, at 770. That observation by the dissenter rests on at least two arguable premises: (a) that the enumeration of certain specified causes of removal excludes the possibility of removal for other causes, cf. *Shurtleff* v. *United States*, 189 U. S. 311, 315–316 (1903); and (b) that any removal would be subject to judicial review, a position that appellants were unwilling to endorse.[8]

Glossing over these difficulties, the dissent's assessment of the statute fails to recognize the breadth of the grounds for removal. The statute permits removal for "inefficiency," "neglect of duty," or "malfeasance." These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. The Constitutional Convention chose to permit impeachment of executive officers only for "Treason, Bribery, or other high Crimes and Misdemeanors." It rejected language that would have permitted impeachment for "maladministration," with Madison

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[8] The dissent relies on *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), as its only Court authority for this point, but the President did not assert that he had removed the Federal Trade Commissioner in compliance with one of the enumerated statutory causes for removal. See *id.*, at 612 (argument of Solicitor General Reed); see also *Synar* v. *United States*, 626 F. Supp., at 1398.

arguing that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." 2 M. Farrand, Records of the Federal Convention of 1787, p. 550 (1911).

We need not decide whether "inefficiency" or "malfeasance" are terms as broad as "maladministration" in order to reject the dissent's position that removing the Comptroller General requires "a feat of bipartisanship more difficult than that required to impeach and convict." *Post*, at 771 (WHITE, J., dissenting). Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding "inefficiency," "neglect of duty," or "malfeasance."

JUSTICE WHITE, however, assures us that "[r]ealistic consideration" of the "practical result of the removal provision," *post*, at 774, 773, reveals that the Comptroller General is unlikely to be removed by Congress. The separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

This much said, we must also add that the dissent is simply in error to suggest that the political realities reveal that the Comptroller General is free from influence by Congress. The Comptroller General heads the General Accounting Office (GAO), "an instrumentality of the United States Government independent of the executive departments," 31 U. S. C. § 702(a), which was created by Congress in 1921 as part of the Budget and Accounting Act of 1921, 42 Stat. 23. Congress created the office because it believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mans-

field, The Comptroller General: A Study in the Law and Practice of Financial Administration 65 (1939).

It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch. The Reorganization Acts of 1945 and 1949, for example, both stated that the Comptroller General and the GAO are "a part of the legislative branch of the Government." 59 Stat. 616; 63 Stat. 205. Similarly, in the Accounting and Auditing Act of 1950, Congress required the Comptroller General to conduct audits "as an agent of the Congress." 64 Stat. 835.

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch. In one of the early Annual Reports of Comptroller General, the official seal of his office was described as reflecting

> "the independence of judgment to be exercised by the General Accounting Office, subject to the control of the legislative branch. . . . The combination represents an agency of the Congress independent of other authority auditing and checking the expenditures of the Government as required by law and subjecting any questions arising in that connection to quasi-judicial determination." GAO Ann. Rep. 5–6 (1924).

Later, Comptroller General Warren, who had been a Member of Congress for 15 years before being appointed Comptroller General, testified: "During most of my public life, . . . I have been a member of the legislative branch. Even now, although heading a great agency, it is an agency of the Congress, and *I am an agent of the Congress*." To Provide for Reorganizing of Agencies of the Government: Hearings on H. R. 3325 before the House Committee on Expenditures, 79th Cong., 1st Sess., 69 (1945) (emphasis added). And, in one conflict during Comptroller General McCarl's tenure, he asserted his independence of the Executive Branch, stating:

> "Congress . . . is . . . the only authority to which there lies an appeal from the decision of this office. . . .

> ". . . I may not accept the opinion of any official, inclusive of the Attorney General, as controlling my duty under the law." 2 Comp. Gen. 784, 786–787 (1923) (disregarding conclusion of the Attorney General, 33 Op. Atty. Gen. 476 (1923), with respect to interpretation of compensation statute).

Against this background, we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

V

The primary responsibility of the Comptroller General under the instant Act is the preparation of a "report." This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

In preparing the report, the Comptroller General is to have "due regard" for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President's fiscal and budgetary adviser. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General's report "shall explain fully any differences between the contents of such report and the report of the Directors." § 251(b)(2).

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute "execution of the law" in a meaningful sense. On the contrary, we view these functions as plainly entailing execution

of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation (with exceptions not relevant to the constitutional issues presented), the directive of the Comptroller General as to the budget reductions:

> "The [Presidential] order *must provide* for reductions in the manner specified in section 251(a)(3), *must incorporate* the provisions of the [Comptroller General's] report submitted under section 251(b), and *must be consistent with such report in all respects*. The President *may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages* set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account . . . ." § 252(a)(3) (emphasis added).

See also § 251(d)(3)(A).

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution

of its enactment only indirectly—by passing new legislation. *Chadha*, 462 U. S., at 958. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

VI

We now turn to the final issue of remedy. Appellants urge that rather than striking down § 251 and invalidating the significant power Congress vested in the Comptroller General to meet a national fiscal emergency, we should take the lesser course of nullifying the statutory provisions of the 1921 Act that authorizes Congress to remove the Comptroller General. At oral argument, counsel for the Comptroller General suggested that this might make the Comptroller General removable by the President. All appellants urge that Congress would prefer invalidation of the removal provisions rather than invalidation of § 251 of the Balanced Budget and Emergency Deficit Control Act.

Severance at this late date of the removal provisions enacted 65 years ago would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch. Recasting the Comptroller General as an officer of the Executive Branch would accordingly alter the balance that Congress had in mind in drafting the Budget and Accounting Act of 1921 and the Balanced Budget and Emergency Deficit Control Act, to say nothing of the wide array of other tasks and duties Congress has assigned the Comptroller General in other statutes.[9] Thus appellants'

[9] Since 1921, the Comptroller General has been assigned a variety of functions. See, *e. g.*, 2 U. S. C. § 687 (1982 ed., Supp. III) (duty to bring suit to require release of impounded budget authority); 42 U. S. C. § 6384(a) (duty to impose civil penalties under the Energy Policy and Conservation Act of 1975); 15 U. S. C. § 1862 (member of Chrysler Corporation

argument would require this Court to undertake a weighing of the importance Congress attached to the removal provisions in the Budget and Accounting Act of 1921 as well as in other subsequent enactments against the importance it placed on the Balanced Budget and Emergency Deficit Control Act of 1985.

Fortunately this is a thicket we need not enter. The language of the Balanced Budget and Emergency Deficit Control Act itself settles the issue. In § 274(f), Congress has explicitly provided "fallback" provisions in the Act that take effect "[i]n the event . . . *any* of the reporting procedures described in section 251 are invalidated." § 274(f)(1) (emphasis added). The fallback provisions are "'fully operative as a law,'" *Buckley* v. *Valeo*, 424 U. S., at 108 (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932)). Assuming that appellants are correct in urging that this matter must be resolved on the basis of congressional intent, the intent appears to have been for § 274(f) to be given effect in this situation. Indeed, striking the removal provisions would lead to a statute that Congress would probably have refused to adopt. As the District Court concluded:

> "[T]he grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself . . . ." 626 F. Supp., at 1394.

Loan Guarantee Board); 45 U. S. C. § 711(d)(1)(C) (member of Board of Directors of United States Railway Association); 31 U. S. C. §§ 3551–3556 (1982 ed., Supp. III) (authority to consider bid protests under Competition in Contracting Act of 1984).

Accordingly, rather than perform the type of creative and imaginative statutory surgery urged by appellants, our holding simply permits the fallback provisions to come into play.[10]

VII

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Chadha*, *supra*, at 944.

We conclude that the District Court correctly held that the powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws. Accordingly, the judgment and order of the District Court are affirmed.

Our judgment is stayed for a period not to exceed 60 days to permit Congress to implement the fallback provisions.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment.

When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons. I

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[10] Because we conclude that the Comptroller General, as an officer removable by Congress, may not exercise the powers conferred upon him by the Act, we have no occasion for considering appellees' other challenges to the Act, including their argument that the assignment of powers to the Comptroller General in § 251 violates the delegation doctrine, see, *e. g.*, *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Yakus* v. *United States*, 321 U. S. 414 (1944).

agree with the Court that the "Gramm-Rudman-Hollings" Act contains a constitutional infirmity so severe that the flawed provision may not stand. I disagree with the Court, however, on the reasons why the Constitution prohibits the Comptroller General from exercising the powers assigned to him by § 251(b) and § 251(c)(2) of the Act. It is not the dormant, carefully circumscribed congressional removal power that represents the primary constitutional evil. Nor do I agree with the conclusion of both the majority and the dissent that the analysis depends on a labeling of the functions assigned to the Comptroller General as "executive powers." *Ante*, at 732–734; *post*, at 764–765. Rather, I am convinced that the Comptroller General must be characterized as an agent of Congress because of his longstanding statutory responsibilities; that the powers assigned to him under the Gramm-Rudman-Hollings Act require him to make policy that will bind the Nation; and that, when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office. *INS* v. *Chadha*, 462 U. S. 919 (1983). That principle, I believe, is applicable to the Comptroller General.

I

The fact that Congress retained for itself the power to remove the Comptroller General is important evidence supporting the conclusion that he is a member of the Legislative Branch of the Government. Unlike the Court, however, I am not persuaded that the congressional removal power is either a necessary, or a sufficient, basis for concluding that his statutory assignment is invalid.

As JUSTICE WHITE explains, *post*, at 770–771, Congress does not have the power to remove the Comptroller General at will, or because of disagreement with any policy determination that he may be required to make in the administration of this, or any other, Act. The statute provides a term of 15 years for the Comptroller General; it further provides that he must retire upon becoming 70 years of age, and that he may be removed at any time by impeachment or by "joint resolution of Congress, after notice and an opportunity for a hearing, only for—(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U. S. C. § 703(e)(1)(B). Far from assuming that this provision creates a "'here-and-now subservience'" respecting all of the Comptroller General's actions, *ante*, at 727, n. 5 (quoting District Court), we should presume that Congress will adhere to the law—that it would only exercise its removal powers if the Comptroller General were found to be permanently disabled, inefficient, neglectful, or culpable of malfeasance, a felony, or conduct involving moral turpitude.[1]

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[1] Just as it is "always appropriate to assume that our elected representatives, like other citizens, know the law," *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979), so too is it appropriate to assume that our elected representatives, like other citizens, will respect the law. As the proceedings in the United States Senate resulting from the impeachment of Justice Chase demonstrate, moreover, if that body were willing to give only lipservice to the governing standard, political considerations rather than "good behavior" would determine the tenure of federal judges. See M. Elsmere, The Impeachment Trial of Justice Samuel Chase 205 (1962); 3 A. Beveridge, The Life of John Marshall 157–223 (1919). See also W. Wilson, Congressional Government: A Study in American Politics 186–187 (Meridian Books ed., 1956) (quoted in Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 369, 380 (1976)):

"'If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished. . . . *Power and strict accountability of its use* are the essential constituents of good government.'" (Emphasis in original.)

The notion that the removal power at issue here automatically creates some kind of "here-and-now subservience" of the Comptroller General to Congress is belied by history. There is no evidence that Congress has ever removed, or threatened to remove, the Comptroller General for reasons of policy. Moreover, the President has long possessed a comparable power to remove members of the Federal Trade Commission, yet it is universally accepted that they are independent of, rather than subservient to, the President in performing their official duties. Thus, the statute that the Court construed in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), provided:

> "Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 38 Stat. 718.

In upholding the congressional limitations on the President's power of removal, the Court stressed the independence of the Commission from the President.[2] There was no suggestion that the retained Presidential removal powers—similar to those at issue here—created a subservience to the President.[3]

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[2] See *Humphrey's Executor*, 295 U. S., at 625–626 (describing congressional intention to create "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government") (emphasis in original).

[3] The manner in which President Franklin Roosevelt exercised his removal power further underscores the propriety of presuming that Congress, and the President, will not use statutorily prescribed removal causes as pretexts for other removal reasons. President Roosevelt never claimed that his removal of Humphrey was for one of the statutorily prescribed reasons—inefficiency, neglect of duty, or malfeasance in office. The President's removal letter merely stated:

"'Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'" See *id.*, at 619.

Previously, the President had written to Commissioner Humphrey stating:

To be sure, there may be a significant separation-of-powers difference between the President's *exercise* of carefully circumscribed removal authority and Congress' *exercise* of identically circumscribed removal authority. But the *Humphrey's Executor* analysis at least demonstrates that it is entirely proper for Congress to specify the qualifications for an office that it has created, and that the prescription of what might be termed "dereliction-of-duty" removal standards does not itself impair the independence of the official subject to such standards.[4]

The fact that Congress retained for itself the power to remove the Comptroller General thus is not necessarily an adequate reason for concluding that his role in the Gramm-Rudman-Hollings budget reduction process is unconstitutional. It is, however, a fact that lends support to my ulti-

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"'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'" *Ibid.*

[4] Indeed, even in *Myers* v. *United States*, 272 U. S. 52 (1926), in its challenge to the provision requiring Senate approval of the removal of a postmaster, the Federal Government assumed that Congress had power to limit the terms of removal to reasons that relate to the office. Solicitor General Beck recognized "that the power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, and which leaves to him the exercise of the power subject to such general laws as may fairly measure the standard of public service." Substitute Brief for United States on Reargument in No. 2, O. T. 1926, p. 9. At oral argument, the Solicitor General explained his position:

"Mr. BECK. . . . Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be member of the bar, he shall be removed. I am not prepared to say that such a law can not be reconciled with the Constitution. What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is not the declaration of qualifications, but is the creation of an appointing power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President." 272 U. S., at 96–97.

mate conclusion that, in exercising his functions under this Act, he serves as an agent of the Congress.

II

In assessing the role of the Comptroller General, it is appropriate to consider his already existing statutory responsibilities. Those responsibilities leave little doubt that one of the identifying characteristics of the Comptroller General is his statutorily required relationship to the Legislative Branch.

In the statutory section that identifies the Comptroller General's responsibilities for investigating the use of public money, four of the five enumerated duties specifically describe an obligation owed to Congress. The first is the only one that does not expressly refer to Congress: The Comptroller General shall "investigate all matters related to the receipt, disbursement, and use of public money." 31 U. S. C. § 712(1). The other four clearly require the Comptroller General to work with Congress' specific needs as his legal duty. Thus, the Comptroller General must "estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law *and report each estimate to Congress with recommendations* the Comptroller General considers desirable." § 712(2) (emphasis added). He must "analyze expenditures of each executive agency the Comptroller General believes *will help Congress decide* whether public money has been used and expended economically and efficiently." § 712(3) (emphasis added). He must "make an investigation and report *ordered by either House of Congress or a committee of Congress* having jurisdiction over revenue, appropriations, or expenditures." § 712(4) (emphasis added). Finally, he must "give *a committee of Congress* having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests." § 712(5) (emphasis added).

The statutory provision detailing the Comptroller General's role in evaluating programs and activities of the United States Government similarly leaves no doubt regarding the beneficiary of the Comptroller General's labors. The Comptroller General may undertake such an evaluation for one of three specified reasons: (1) on his own initiative; (2) "when either House of Congress orders an evaluation"; or (3) "when a committee of Congress with jurisdiction over the program or activity requests the evaluation." 31 U. S. C. § 717(b). In assessing a program or activity, moreover, the Comptroller General's responsibility is to "develop and recommend *to Congress* ways to evaluate a program or activity the Government carries out under existing law." § 717(c) (emphasis added).

The Comptroller General's responsibilities are repeatedly framed in terms of his specific obligations to Congress. Thus, one provision specifies in some detail the obligations of the Comptroller General with respect to an individual committee's request for a program evaluation:

> "On request of a committee of Congress, the Comptroller General shall help the committee to—
>
> "(A) develop a statement of legislative goals and ways to assess and report program performance related to the goals, including recommended ways to assess performance, information to be reported, responsibility for reporting, frequency of reports, and feasibility of pilot testing; and
>
> "(B) assess program evaluations prepared by and for an agency." § 717(d)(1).

Similarly, another provision requires that, on "request of a member of Congress, the Comptroller General shall give the member a copy of the material the Comptroller General compiles in carrying out this subsection that has been released by the committee for which the material was compiled." § 717(d)(2).

Numerous other provisions strongly support the conclusion that one of the Comptroller General's primary responsibilities is to work specifically on behalf of Congress. The Comptroller General must make annual reports on specified subjects to Congress, to the Senate Committee on Finance, to the Senate Committee on Governmental Affairs, to the House Committee on Ways and Means, to the House Committee on Government Operations, and to the Joint Committee on Taxation. 31 U. S. C. §§ 719(a),(d). On request of a committee, the Comptroller General "shall explain to and discuss with the committee or committee staff a report the Comptroller General makes that would help the committee—(1) evaluate a program or activity of an agency within the jurisdiction of the committee; or (2) in its consideration of proposed legislation." § 719(i). Indeed, the relationship between the Comptroller General and Congress is so close that the "Comptroller General may assign or detail an officer or employee of the General Accounting Office to full-time continuous duty with a committee of Congress for not more than one year." 31 U. S. C. § 734(a).

The Comptroller General's current statutory responsibilities on behalf of Congress are fully consistent with the historic conception of the Comptroller General's office. The statute that created the Comptroller General's office—the Budget and Accounting Act of 1921—provided that four of the five statutory responsibilities given to the Comptroller General be exercised on behalf of Congress, three of them exclusively so.[5] On at least three occasions since 1921, more-

[5] In pertinent part, the 1921 Act provided:

"SEC. 312(a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and *to Congress at the beginning of each regular session*, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, dis-

over, in considering the structure of Government, Congress has defined the Comptroller General as being a part of the Legislative Branch. In the Reorganization Act of 1945, Congress specified that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 59 Stat. 616.[6] In the Reorganization Act of 1949, Congress again confirmed that the Comptroller General and the General Accounting Office "are a part of the legislative branch of the Government." 63 Stat. 205.[7] Finally, in the Budget and Accounting Procedures Act of 1950, Congress referred to the "auditing for the Government, con-

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bursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

"(b) He shall make such investigations and reports as shall be ordered by *either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures.* The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"(c) The Comptroller General shall specifically report *to Congress* every expenditure or contract made by any department or establishment in any year in violation of law.

"(d) He shall submit *to Congress* reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

"(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time." 42 Stat. 25–26 (emphases added).

[6] See also H. R. Rep. No. 971, 79th Cong., 1st Sess., 12 (1945) ("[T]he Comptroller General of the United States" and "the General Accounting Office . . . are declared by the bill to be a part of the legislative branch of the Government").

[7] See also H. R. Rep. No. 23, 81st Cong., 1st Sess., 11 (1949) ("[T]he Comptroller General of the United States" and "the General Accounting Office . . . (as in the Reorganization Act of 1945) are declared by the bill to be a part of the legislative branch of the Government").

ducted by the Comptroller General of the United States as an agent of the Congress." 64 Stat. 835. Like the already existing statutory responsibilities, then, the history of the Comptroller General statute confirms that the Comptroller General should be viewed as an agent of the Congress.

This is not to say, of course, that the Comptroller General has no obligations to the Executive Branch, or that he is an agent of the Congress in quite so clear a manner as the Doorkeeper of the House. For the current statutory responsibilities also envision a role for the Comptroller General with respect to the Executive Branch. The Comptroller General must "give the President information on expenditures and accounting the President requests." 31 U. S. C. § 719(f). Although the Comptroller General is required to provide Congress with an annual report, he is also required to provide the President with the report if the President so requests. § 719(a). The Comptroller General is statutorily required to audit the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms (and provide congressional committees with information respecting the audits). § 713. In at least one respect, moreover, the Comptroller General is treated like an executive agency: "To the extent applicable, all laws generally related to administering an agency apply to the Comptroller General." § 704(a). Historically, as well, the Comptroller General has had some relationship to the Executive Branch. As noted, n. 5, *supra*, in the 1921 Act, one of the Comptroller General's specific responsibilities was to provide information to the Bureau of the Budget. In fact, when the Comptroller General's office was created, its functions, personnel, records, and even furniture derived from a previous executive office.[8]

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[8] See 42 Stat. 23 ("The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 21, 1921. . . . [A]ll books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office").

Thus, the Comptroller General retains certain obligations with respect to the Executive Branch.[9] Obligations to two branches are not, however, impermissible and the presence of such dual obligations does not prevent the characterization of the official with the dual obligations as part of one branch.[10] It is at least clear that, in most, if not all, of his statutory responsibilities, the Comptroller General is properly characterized as an agent of the Congress.[11]

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[9] The Comptroller General, of course, is also appointed by the President. 31 U. S. C. § 703(a)(1). So too, however, are the Librarian of Congress, 2 U. S. C. § 136, the Architect of the Capitol, 40 U. S. C. § 162, and the Public Printer, 44 U. S. C. § 301.

[10] See *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 36–37, and n. 1 (1985) (reviewing the Marshals' statutory obligations to the Judiciary and the Executive Branch, but noting that the "Marshals are within the Executive Branch of the Federal Government"). Cf. Report by the Comptroller General, U. S. Marshals' Dilemma: Serving Two Branches of Government 14 (1982) ("It is extremely difficult for one person to effectively serve two masters"). Surely no one would suggest that the fact that THE CHIEF JUSTICE performs executive functions for the Smithsonian Institution, 20 U. S. C. § 42, affects his characterization as a member of the Judicial Branch of the Government. Nor does the performance of similar functions by three Members of the Senate and three Members of the House, *ibid.*, affect their characterization as members of the Legislative Branch of the Government.

[11] Despite the suggestions of the dissents, *post*, at 773, n. 12 (WHITE, J., dissenting); *post*, at 778–779, n. 1 (BLACKMUN, J., dissenting), it is quite obvious that the Comptroller General, and the General Accounting Office, have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission. Rather than an independent agency, the Comptroller General and the GAO are functionally equivalent to congressional agents such as the Congressional Budget Office, the Office of Technology Assessment, and the Library of Congress' Congressional Research Service. As the statutory responsibilities make clear, like those congressional agents, the Comptroller General and the GAO function virtually as a permanent staff for Congress. Indeed, in creating the Congressional Budget Office, Congress explicitly required that the GAO provide extensive services for the CBO—a fact with some significance for this case. The CBO statute enumerates the three "congressional agencies" that must provide assistance to the CBO—"the General Account-

III

Everyone agrees that the powers assigned to the Comptroller General by § 251(b) and § 251(c)(2) of the Gramm-Rudman-Hollings Act are extremely important. They require him to exercise sophisticated economic judgment concerning anticipated trends in the Nation's economy, pro-

ing Office, the Library of Congress, and the Office of Technology Assessment." 2 U. S. C. § 601(e). These "congressional agencies" are authorized to provide the CBO with "services, facilities, and personnel with or without reimbursement," *ibid.*, as well as "information, data, estimates, and statistics." *Ibid.* See also Congressional Quarterly's Guide to Congress 555 (3d ed. 1982) ("In addition to their staffs, committees, facilities and privileges, members of Congress are backed by a number of other supporting organizations and activities that keep Capitol Hill running. Among the largest of these in size of staff are the General Accounting Office (GAO), with about 5,200 employees; the Library of Congress' Congressional Research Service (CRS), with 856; the Congressional Budget Office (CBO), with 218; and the Office of Technology Assessment (OTA), with 130. . . . To an extent, each of the four legislative agencies has its own specialized functions. . . . Although each of the four agencies has been given its own task, their jobs overlap to some extent. This has led in some cases to duplication and waste and even to competition among the different groups. . . . The General Accounting Office is an arm of the legislative branch that was created to oversee the expenditures of the executive branch").

Thus, to contend that the Comptroller General's numerous statutory responsibilities to serve Congress directly are somehow like an independent agency's obligations to report to Congress and to implement legislatively mandated standards simply misconceives the actual duties of the Comptroller General and the GAO. It also ignores the clear import of the legislative history of these entities. See, *e. g.*, *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d 875, 892–893 (CA3 1986) (Becker, J., concurring in part) ("Because the office of the Comptroller General is created by statute, the Comptroller General's status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent. . . . There is copious evidence in the legislative history that the GAO (and therefore the Comptroller General) was intended to be in the legislative branch. . . . Because there is no legislative intent to the contrary, I believe that it is incumbent upon us to hold that the Comptroller General is within the legislative branch of government, despite the inconveniences that may attend such a holding").

jected levels of unemployment, interest rates, and the special problems that may be confronted by the many components of a vast federal bureaucracy. His duties are anything but ministerial—he is not merely a clerk wearing a "green eyeshade" as he undertakes these tasks. Rather, he is vested with the kind of responsibilities that Congress has elected to discharge itself under the fallback provision that will become effective if and when § 251(b) and § 251(c)(2) are held invalid. Unless we make the naive assumption that the economic destiny of the Nation could be safely entrusted to a mindless bank of computers, the powers that this Act vests in the Comptroller General must be recognized as having transcendent importance.[12]

The Court concludes that the Gramm-Rudman-Hollings Act impermissibly assigns the Comptroller General "executive powers." *Ante*, at 732. JUSTICE WHITE's dissent agrees that "the powers exercised by the Comptroller under the Act may be characterized as 'executive' in that they involve the interpretation and carrying out of the Act's mandate." *Post*, at 765. This conclusion is not only far from obvious but also rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power.

"The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U. S. 189, 209 (1928) (Holmes, J., dissenting). "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one an-

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[12] The element of judgment that the Comptroller General must exercise is evident by the congressional recognition that there may be "differences between the contents of [his] report and the report of the Directors" of the Congressional Budget Office and the Office of Management and Budget. § 251(b)(2).

other would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U. S. 1, 121 (1976). As Justice Brandeis explained in his dissent in *Myers* v. *United States*, 272 U. S. 52, 291 (1926): "The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial."

One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned. For this reason, "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *INS* v. *Chadha*, 462 U. S., at 951.[13]

The *Chadha* case itself illustrates this basic point. The governmental decision that was being made was whether a resident alien who had overstayed his student visa should be

[13] "Perhaps as a matter of political science we could say that Congress should only concern itself with broad principles of policy and leave their application in particular cases to the executive branch. But no such rule can be found in the Constitution itself or in legislative practice. It is fruitless, therefore, to try to draw any sharp and logical line between legislative and executive functions. Characteristically, the draftsmen of 1787 did not even attempt doctrinaire definitions, but placed their reliance in the mechanics of the Constitution. One of their principal devices was to vest the legislative powers in the two Houses of Congress and to make the President a part of the legislative process by requiring that all bills passed by the two Houses be submitted to him for his approval or disapproval, his disapproval or veto to be overridden only by a two-thirds vote of each House. It is in such checks upon powers, rather than in the classifications of powers, that our governmental system finds equilibrium." Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 571 (1953) (footnote omitted).

deported. From the point of view of the Administrative Law Judge who conducted a hearing on the issue—or as JUSTICE POWELL saw the issue in his concurrence[14]—the decision took on a judicial coloring. From the point of view of the Attorney General of the United States to whom Congress had delegated the authority to suspend deportation of certain aliens, the decision appeared to have an executive character.[15] But, as the Court held, when the House of Representatives finally decided that Chadha must be deported, its action "was essentially legislative in purpose and effect." *Id.*, at 952.

The powers delegated to the Comptroller General by § 251 of the Act before us today have a similar chameleon-like quality. The District Court persuasively explained why they may be appropriately characterized as executive powers.[16] But, when that delegation is held invalid, the "fallback provision" provides that the report that would otherwise be issued by the Comptroller General shall be issued by Congress it-

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[14] For JUSTICE POWELL the critical question in the *Chadha* case was "whether Congress impermissibly assumed a judicial function." 462 U. S., at 963.

[15] "It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act." *Id.*, at 953, n. 16.

[16] "Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretation of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Synar* v. *United States*, 626 F. Supp. 1374, 1400 (DC 1986).

self.[17] In the event that the resolution is enacted, the congressional report will have the same legal consequences as if it had been issued by the Comptroller General. In that event, moreover, surely no one would suggest that Congress had acted in any capacity other than "legislative." Since the District Court expressly recognized the validity of what it described as the "'fallback' deficit reduction process," *Synar* v. *United States*, 626 F. Supp. 1374, 1377 (DC 1986), it obviously did not doubt the constitutionality of the performance by Congress of the functions delegated to the Comptroller General.

Under the District Court's analysis, and the analysis adopted by the majority today, it would therefore appear that the function at issue is "executive" if performed by the Comptroller General but "legislative" if performed by the Congress. In my view, however, the function may appropri-

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[17] Section 274(f) of the Act provides, in part:

"ALTERNATIVE PROCEDURES FOR THE JOINT REPORTS OF THE DIRECTORS.—

"(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) . . . shall be transmitted to the joint committee established under this subsection.

"(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of the House of Representatives and the Senate. . . . The purposes of the Joint Committee are to receive the reports of the Directors as described in paragraph (1), and to report (with respect to each such report of the Directors) a joint resolution as described in paragraph (3).

"(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

. . . . . .

"(5) *Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2)* (whichever is applicable)." 99 Stat. 1100 (emphasis added).

ately be labeled "legislative" even if performed by the Comptroller General or by an executive agency.

Despite the statement in Article I of the Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States," it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers. As JUSTICE WHITE explained in his *Chadha* dissent, after reviewing our cases upholding broad delegations of legislative power:

> "[T]hese cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation. For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U. S. C. § 551(4), provides that a 'rule' is an agency statement 'designed to implement, interpret, or prescribe law or policy.' When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.' See, *e. g.*, *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43–44 (1981); *Batterton* v. *Francis*, 432 U. S. 416 (1977). These regulations bind courts and officers of the Federal Government, may preempt state law, see, *e. g.*, *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982), and grant rights to and impose obligations on the public. In sum, they have the force of law." 462 U. S., at 985–986 (footnote omitted).

Thus, I do not agree that the Comptroller General's responsibilities under the Gramm-Rudman-Hollings Act must be

termed "executive powers," or even that our inquiry is much advanced by using that term. For, whatever the label given the functions to be performed by the Comptroller General under § 251—or by the Congress under § 274—the District Court had no difficulty in concluding that Congress could delegate the performance of those functions to another branch of the Government.[18] If the delegation to a stranger is permissible, why may not Congress delegate the same responsibilities to one of its own agents? That is the central question before us today.

IV

Congress regularly delegates responsibility to a number of agents who provide important support for its legislative activities. Many perform functions that could be characterized as "executive" in most contexts—the Capitol Police can arrest and press charges against lawbreakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the buildings and grounds, and its Librarian has custody of a vast number of books and records. Moreover, the Members themselves necessarily engage in many activities that are merely ancillary to their primary lawmak-

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[18] "All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself. Through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." 626 F. Supp., at 1391.

The District Court's holding that the exercise of discretion was not the kind of political judgment that "must be made by Congress itself" is, of course, consistent with the view that it is a judgment that "*may* be made by Congress itself" pursuant to § 274.

ing responsibilities—they manage their separate offices, they communicate with their constituents, they conduct hearings, they inform themselves about the problems confronting the Nation, and they make rules for the governance of their own business. The responsibilities assigned to the Comptroller General in the case before us are, of course, quite different from these delegations and ancillary activities.

The Gramm-Rudman-Hollings Act assigns to the Comptroller General the duty to make policy decisions that have the force of law. The Comptroller General's report is, in the current statute, the engine that gives life to the ambitious budget reduction process. It is the Comptroller General's report that "provide[s] for the determination of reductions" and that "contain[s] estimates, determinations, and specifications for all of the items contained in the report" submitted by the Office of Management and Budget and the Congressional Budget Office. § 251(b). It is the Comptroller General's report that the President must follow and that will have conclusive effect. § 252. It is, in short, the Comptroller General's report that will have a profound, dramatic, and immediate impact on the Government and on the Nation at large.

Article I of the Constitution specifies the procedures that Congress must follow when it makes policy that binds the Nation: its legislation must be approved by both of its Houses and presented to the President. In holding that an attempt to legislate by means of a "one-House veto" violated the procedural mandate in Article I, we explained:

> "We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exer-

> cised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS* v. *Chadha*, 462 U. S., at 951.

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution." *Id.*, at 959.[19] That danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency.[20]

The distinction between the kinds of action that Congress may delegate to its own components and agents and those that require either compliance with Article I procedures or delegation to another branch pursuant to defined standards is

[19] Even scholars who would have sustained the one-House veto appear to agree with this ultimate conclusion. See Nathanson, Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the "Independent" Agencies, 75 Nw. U. L. Rev. 1064, 1090 (1981) ("It is not a case where the Congress has delegated authority to one of its components to take affirmative steps to impose regulations upon private interests—an action which would, I assume, be unconstitutional"). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 286 (1976) (WHITE, J., dissenting) (expressing the opinion that a one-House veto of agency regulations would be unobjectionable, but adding that it "would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses").

[20] As I have emphasized, in this case, the Comptroller General is assigned functions that require him to make policy determinations that bind the Nation. I note only that this analysis need not call into question the Comptroller General's performance of numerous existing functions that may not rise to this level. See *ante*, at 734–735, n. 9.

reflected in the practices that have developed over the years regarding congressional resolutions. The *joint* resolution, which is used for "special purposes and . . . incidental matters," 7 Deschler's Precedents of the House of Representatives 334 (1977), makes binding policy and "requires an affirmative vote by both Houses and submission to the President for approval" *id.*, at 333—the full Article I requirements. A *concurrent* resolution, in contrast, makes no binding policy; it is "a means of expressing fact, principles, opinions, and purposes of the two Houses," Jefferson's Manual and Rules of the House of Representatives 176 (1983), and thus does not need to be presented to the President. It is settled, however, that if a resolution is intended to make policy that will bind the Nation and thus is "legislative in its character and effect," S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897)—then the full Article I requirements must be observed. For "the nature or substance of the resolution, and not its form, controls the question of its disposition." *Ibid.*

In my opinion, Congress itself could not exercise the Gramm-Rudman-Hollings functions through a concurrent resolution. The fact that the fallback provision in § 274 requires a joint resolution rather than a concurrent resolution indicates that Congress endorsed this view.[21] I think it equally clear that Congress may not simply delegate those functions to an agent such as the Congressional Budget Office. Since I am persuaded that the Comptroller General is also fairly deemed to be an agent of Congress, he too cannot exercise such functions.[22]

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[21] The fact that Congress specified a joint resolution as the fallback provision has another significance as well. For it reveals the congressional intent that, if the Comptroller General could not exercise the prescribed functions, Congress wished to perform them itself, rather than delegating them, for instance, to an independent agency or to an Executive Branch official. This choice shows that Congress intended that the important functions of the Act be no further from itself than the Comptroller General.

[22] In considering analogous problems, our state courts have consistently recognized the importance of strict adherence to constitutionally mandated

As a result, to decide this case there is no need to consider the Decision of 1789, the President's removal power, or the abstract nature of "executive powers." Once it is clear that the Comptroller General, whose statutory duties define him as an agent of Congress, has been assigned the task of making policy determinations that will bind the Nation, the question is simply one of congressional process. There can be no doubt that the Comptroller General's statutory duties under Gramm-Rudman-Hollings do not follow the constitutionally prescribed procedures for congressional lawmaking.[23]

In short, even though it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power, when it elects to exercise such power itself, it may not authorize a lesser representative of the Legislative

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procedures in the legislative process. See, *e. g.*, *State* v. *A. L. I. V. E. Voluntary*, 606 P. 2d 769, 773, 777 (Alaska 1980) ("Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity. . . . The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate"); *People* v. *Tremaine*, 252 N. Y. 27, 44 168 N. E. 817, 822 (1929) ("If the power to approve the segregation of lump sum appropriations may be delegated to any one, even to one or two members of the Legislature, it necessarily follows that the power to segregate such appropriations may also be conferred upon such delegates. . . . To visualize an extreme case, one lump sum appropriation might be made to be segregated by the committee chairmen. Such a delegation of legislative power would be abhor[r]ent to all our notions of legislation on the matter of appropriations").

[23] I have previously noted my concern about the need for a "due process of lawmaking" even when Congress has acted with bicameralism and presentment. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 549, and n. 24 (1980) (STEVENS, J., dissenting); *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 98, and n. 11 (1977) (STEVENS, J., dissenting). When a legislature's agent is given powers to act without even the formalities of the legislative process, these concerns are especially prominent.

Branch to act on its behalf.[24] It is for this reason that I believe § 251(b) and § 251(c)(2) of the Act are unconstitutional.[25]

Thus, the critical inquiry in this case concerns not the manner in which executive officials or agencies may act, but the manner in which Congress and its agents may act. As we emphasized in *Chadha*, when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I. Neither the unquestioned urgency of the national budget crisis nor the Comptroller General's proud record of professionalism and dedication provides a justification for allowing a congressional agent to set policy that binds

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[24] See also Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983, 1067, n. 430 (1975) ("A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency"); Ginnane, 66 Harv. L. Rev., at 595 ("It is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore 'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise").

[25] JUSTICE BLACKMUN suggests that Congress may delegate legislative power to one of its own agents as long as it does not retain "tight control" over that agent. *Post*, at 779, n. 1. His suggestion is not faithful to the rationale of *Chadha* because no component of Congress, not even one of its Houses, is subject to the "tight control" of the entire Congress. For instance, the Congressional Research Service, whose primary function is to respond to congressional research requests, 2 U. S. C. § 166, apparently would not fall within JUSTICE BLACKMUN's "tight control" test because Congress has guaranteed the Service "complete research independence and the maximum practicable administrative independence consistent with these objectives." § 166(b)(2). I take it, however, that few would doubt the unconstitutionality of assigning the functions at issue in this case to the Congressional Research Service. Moreover, *Chadha* surely forecloses the suggestion that because delegation of legislative power to an independent agency is acceptable, such power may also be delegated to a component or an agent of Congress. Finally, with respect to JUSTICE BLACKMUN's emphasis on Presidential appointment of the Comptroller General, *post*, at 778–779, n. 1, as I have previously pointed out, other obvious congressional agents, such as the Librarian of Congress, the Architect of the Capitol, and the Public Printer are also appointed by the President. See n. 9, *supra*.

the Nation. Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclusive effect, it must do so through a process akin to that specified in the fallback provision—through enactment by both Houses and presentment to the President.

I concur in the judgment.

JUSTICE WHITE, dissenting.

The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal. The basis of the Court's action is a solitary provision of another statute that was passed over 60 years ago and has lain dormant since that time. I cannot concur in the Court's action. Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive, *both* of which expressed their assent to the statute barely half a year ago. I will, however, address the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution. Twice in the past four years I have expressed my view that the Court's recent efforts to police the separation of powers have rested on untenable constitutional propositions leading to regrettable results. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 92–118 (1982) (WHITE, J., dissenting); *INS* v. *Chadha*, 462 U. S. 919, 967–1003 (1983) (WHITE, J., dissenting). Today's result is even more misguided. As I will explain, the Court's decision rests on a feature of the legislative scheme that is of minimal practical significance and that presents no substantial threat to the basic scheme of separation of powers. In attaching dispositive significance to what should be regarded as a triviality, the Court neglects what has

in the past been recognized as a fundamental principle governing consideration of disputes over separation of powers:

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J. concurring).

I

The Court's argument is straightforward: the Act vests the Comptroller General with "executive" powers, that is, powers to "[i]nterpre[t] a law enacted by Congress [in order] to implement the legislative mandate," *ante*, at 733; such powers may not be vested by Congress in itself or its agents, see *Buckley* v. *Valeo*, 424 U. S. 1, 120–141 (1976), for the system of Government established by the Constitution for the most part limits Congress to a legislative rather than an executive or judicial role, see *INS* v. *Chadha*, *supra;* the Comptroller General is an agent of Congress by virtue of a provision in the Budget and Accounting Act of 1921, 43 Stat. 23, 31 U. S. C. § 703(e)(1), granting Congress the power to remove the Comptroller for cause through joint resolution; therefore the Comptroller General may not constitutionally exercise the executive powers granted him in the Gramm-Rudman-Hollings Act, and the Act's automatic budget-reduction mechanism, which is premised on the Comptroller's exercise of those powers, must be struck down.

Before examining the merits of the Court's argument, I wish to emphasize what it is that the Court quite pointedly and correctly does *not* hold: namely, that "executive" powers of the sort granted the Comptroller by the Act may only be exercised by officers removable at will by the President.

The Court's apparent unwillingness to accept this argument,[1] which has been tendered in this Court by the Solicitor General,[2] is fully consistent with the Court's longstanding recognition that it is within the power of Congress under the "Necessary and Proper" Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control. See, *e. g.*, *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935); *Wiener* v. *United States*, 357 U. S. 349 (1958).[3] In an earlier day, in which simpler notions of the role of government in society prevailed, it was perhaps plausible to insist that all "executive" officers be subject to an unqualified Presidential removal power, see *Myers* v. *United States*, 272 U. S. 52 (1926); but with the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the Federal Government, the

[1] See *ante*, at 724–726, and n. 4.

[2] The Solicitor General appeared on behalf of the "United States," or, more properly, the Executive Departments, which intervened to attack the constitutionality of the statute that the Chief Executive had earlier endorsed and signed into law.

[3] Although the Court in *Humphrey's Executor* characterized the powers of the Federal Trade Commissioner whose tenure was at issue as "quasi-legislative" and "quasi-judicial," it is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" in the same sense as is the Comptroller's authority under Gramm-Rudman-Hollings—that is, it involves the implementation (or the interpretation and application) of an Act of Congress. Thus, although the Court in *Humphrey's Executor* found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in *Myers* v. *United States*, 272 U. S. 52 (1926), these terms are hardly of any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487–488 (1952) (dissenting).

Court has been virtually compelled to recognize that Congress may reasonably deem it "necessary and proper" to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President.

The Court's recognition of the legitimacy of legislation vesting "executive" authority in officers independent of the President does not imply derogation of the President's own constitutional authority—indeed, duty—to "take Care that the Laws be faithfully executed," Art. II, § 3, for any such duty is necessarily limited to a great extent by the content of the laws enacted by the Congress. As Justice Holmes put it: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers* v. *United States*, *supra*, at 177 (dissenting).[4] Justice Holmes perhaps overstated his case, for there are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President. Whether a particular function falls within this class or within the far larger class that may be relegated to independent officers "will depend upon the character of the office." *Humphrey's Executor*, *supra*, at 631. In determining whether a limitation on the President's power to remove an officer performing executive functions constitutes a violation of the constitutional scheme of separation of powers, a court must "focu[s] on the extent to which [such a limitation] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). "Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Ibid.* This inquiry

[4] Cf. *ante*, at 733 ("[U]ndoubtedly the content of the Act determines the nature of the executive duty").

is, to be sure, not one that will beget easy answers; it provides nothing approaching a bright-line rule or set of rules. Such an inquiry, however, is necessitated by the recognition that "formalistic and unbending rules" in the area of separation of powers may "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Commodity Futures Trading Comm'n* v. *Schor*, *post*, at 851.

It is evident (and nothing in the Court's opinion is to the contrary) that the powers exercised by the Comptroller General under the Gramm-Rudman-Hollings Act are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers. Determining the level of spending by the Federal Government is not by nature a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating funds is a peculiarly legislative function, and one expressly committed to Congress by Art. I, § 9, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In enacting Gramm-Rudman-Hollings, Congress has chosen to exercise this legislative power to establish the level of federal spending by providing a detailed set of criteria for reducing expenditures below the level of appropriations in the event that certain conditions are met. Delegating the execution of this legislation—that is, the power to apply the Act's criteria and make the required calculations—to an officer independent of the President's will does not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office. Rather, the result of such a delegation, from the standpoint of the President, is no different from the result of more traditional forms of appropriation: under either system, the level of funds available to the Executive Branch to carry out its duties is not within the President's discretionary control. To be sure,

if the budget-cutting mechanism required the responsible officer to exercise a great deal of policymaking discretion, one might argue that having created such broad discretion Congress had some obligation based upon Art. II to vest it in the Chief Executive or his agents. In Gramm-Rudman-Hollings, however, Congress has done no such thing; instead, it has created a precise and articulated set of criteria designed to minimize the degree of policy choice exercised by the officer executing the statute and to ensure that the relative spending priorities established by Congress in the appropriations it passes into law remain unaltered.[5] Given that the exercise of policy choice by the officer executing the statute would be inimical to Congress' goal in enacting "automatic" budget-cutting measures, it is eminently reasonable and proper for Congress to vest the budget-cutting authority in an officer who is to the greatest degree possible nonpartisan and independent of the President and his political agenda and who therefore may be relied upon not to allow his calculations to be colored by political considerations. Such a delegation deprives the President of no authority that is rightfully his.

II

If, as the Court seems to agree, the assignment of "executive" powers under Gramm-Rudman-Hollings to an officer not removable at will by the President would not in itself represent a violation of the constitutional scheme of separated

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[5] That the statute provides, to the greatest extent possible, precise guidelines for the officer assigned to carry out the required budget cuts not only indicates that vesting budget-cutting authority in an officer independent of the President does not in any sense deprive the President of a significant amount of discretionary authority that should rightfully be vested in him or an officer accountable to him, but also answers the claim that the Act represents an excessive and hence unlawful delegation of legislative authority. Because the majority does not address the delegation argument, I shall not discuss it at any length, other than to refer the reader to the District Court's persuasive demonstration that the statute is not void under the nondelegation doctrine.

powers, the question remains whether, as the Court concludes, the fact that the officer to whom Congress has delegated the authority to implement the Act is removable by a joint resolution of Congress should require invalidation of the Act. The Court's decision, as I have stated above, is based on a syllogism: the Act vests the Comptroller with "executive power"; such power may not be exercised by Congress or its agents; the Comptroller is an agent of Congress because he is removable by Congress; therefore the Act is invalid. I have no quarrel with the proposition that the powers exercised by the Comptroller under the Act may be characterized as "executive" in that they involve the interpretation and carrying out of the Act's mandate. I can also accept the general proposition that although Congress has considerable authority in designating the officers who are to execute legislation, see *supra*, at 760–764, the constitutional scheme of separated powers does prevent Congress from reserving an executive role for itself or for its "agents." *Buckley* v. *Valeo*, 424 U. S., at 120–141; *id.*, at 267–282 (WHITE, J., concurring in part and dissenting in part). I cannot accept, however, that the exercise of authority by an officer removable for cause by a joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself, nor would I hold that the congressional role in the removal process renders the Comptroller an "agent" of the Congress, incapable of receiving "executive" power.

In *Buckley* v. *Valeo*, *supra*, the Court held that Congress could not reserve to itself the power to appoint members of the Federal Election Commission, a body exercising "executive" power. *Buckley*, however, was grounded on a textually based separation-of-powers argument whose central premise was that the Constitution requires that all "Officers of the United States" (defined as "all persons who can be said to hold an office under the government," 424 U. S., at 126) whose appointment is not otherwise specifically provided for elsewhere in its text be appointed through the means speci-

fied by the Appointments Clause, Art. II, § 2, cl. 2—that is, either by the President with the advice and consent of the Senate or, if Congress so specifies, by the President alone, by the courts, or by the head of a department. The *Buckley* Court treated the Appointments Clause as reflecting the principle that "the Legislative Branch may not exercise executive authority," 424 U. S., at 119 (citing *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928)), but the Court's holding was merely that Congress may not direct that its laws be implemented through persons who are its agents in the sense that it chose them; the Court did not pass on the legitimacy of other means by which Congress might exercise authority over those who execute its laws. Because the Comptroller is not an appointee of Congress but an officer of the United States appointed by the President with the advice and consent of the Senate, *Buckley* neither requires that he be characterized as an agent of the Congress nor in any other way calls into question his capacity to exercise "executive" authority. See 424 U. S., at 128, n. 165.

As the majority points out, however, the Court's decision in *INS* v. *Chadha*, 462 U. S. 919 (1983), recognizes additional limits on the ability of Congress to participate in or influence the execution of the laws. As interpreted in *Chadha*, the Constitution prevents Congress from interfering with the actions of officers of the United States through means short of legislation satisfying the demands of bicameral passage and presentment to the President for approval or disapproval. *Id.*, at 954–955. Today's majority concludes that the same concerns that underlay *Chadha* indicate the invalidity of a statutory provision allowing the removal by joint resolution for specified cause of any officer performing executive functions. Such removal power, the Court contends, constitutes a "congressional veto" analogous to that struck down in *Chadha*, for it permits Congress to "remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory." *Ante*, at 726. The Court concludes

that it is "[t]his kind of congressional control over the execution of the laws" that *Chadha* condemns. *Ante*, at 726–727.

The deficiencies in the Court's reasoning are apparent. First, the Court baldly mischaracterizes the removal provision when it suggests that it allows Congress to remove the Comptoller for "executing the laws in any fashion found to be unsatisfactory"; in fact, Congress may remove the Comptroller only for one or more of five specified reasons, which "although not so narrow as to deny Congress any leeway, circumscribe Congress' power to some extent by providing a basis for judicial review of congressional removal." *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d 875, 895 (CA3 1986) (Becker, J., concurring in part). Second, and more to the point, the Court overlooks or deliberately ignores the decisive difference between the congressional removal provision and the legislative veto struck down in *Chadha:* under the Budget and Accounting Act, Congress may remove the Comptroller only through a joint resolution, which by definition must be passed by both Houses and signed by the President. See *United States* v. *California*, 332 U. S. 19, 28 (1947).[6] In other words, a removal of the Comptroller under the statute *satisfies the requirements of bicameralism and presentment laid down in* Chadha. The majority's citation of *Chadha* for the proposition that Congress may only control the acts of officers of the United States "by passing new legislation," *ante*, at 734, in

[6] The legislative history indicates that the inclusion of the President in the removal process was a deliberate choice on the part of the Congress that enacted the Budget and Accounting Act. The previous year, legislation establishing the position of Comptroller General and providing for removal by *concurrent* resolution—that is, by a resolution not presented to the President—had been vetoed by President Wilson on the ground that granting the sole power of removal to the Congress would be unconstitutional. See 59 Cong. Rec. 8609–8610 (1920). That Congress responded by providing for removal through joint resolution clearly evinces congressional intent that removal take place only through the legislative process, with Presidential participation.

no sense casts doubt on the legitimacy of the removal provision, for that provision allows Congress to effect removal only through action that constitutes legislation as defined in *Chadha*.

To the extent that it has any bearing on the problem now before us, *Chadha* would seem to suggest the legitimacy of the statutory provision making the Comptroller removable through joint resolution, for the Court's opinion in *Chadha* reflects the view that the bicameralism and presentment requirements of Art. I represent the principal assurances that Congress will remain within its legislative role in the constitutionally prescribed scheme of separated powers. Action taken in accordance with the "single, finely wrought, and exhaustively considered, procedure" established by Art. I, *Chadha, supra*, at 951, should be presumptively viewed as a legitimate exercise of legislative power. That such action may represent a more or less successful attempt by Congress to "control" the actions of an officer of the United States surely does not in itself indicate that it is unconstitutional, for no one would dispute that Congress has the power to "control" administration through legislation imposing duties or substantive restraints on executive officers, through legislation increasing or decreasing the funds made available to such officers, or through legislation actually abolishing a particular office. Indeed, *Chadha* expressly recognizes that while congressional meddling with administration of the laws outside of the legislative process is impermissible, congressional control over executive officers exercised through the legislative process is valid. 462 U. S., at 955, n. 19. Thus, if the existence of a statute permitting removal of the Comptroller through joint resolution (that is, through the legislative process) renders his exercise of executive powers unconstitutional, it is for reasons having virtually nothing to do with *Chadha*.[7]

[7] Because a joint resolution passed by both Houses of Congress and signed by the President (or repassed over the President's veto) is legisla-

That a joint resolution removing the Comptroller General would satisfy the requirements for legitimate legislative action laid down in *Chadha* does not fully answer the separation-of-powers argument, for it is apparent that even the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation of powers. *Nixon* v. *Administrator of General*

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tion having the same force as any other Act of Congress, it is somewhat mysterious why the Court focuses on the Budget and Accounting Act's authorization of removal of the Comptroller through such a resolution as an indicator that the Comptroller may not be vested with executive powers. After all, even without such prior statutory authorization, Congress could pass, and the President sign, a joint resolution purporting to remove the Comptroller, and the validity of such legislation would seem in no way dependent on previous legislation contemplating it. Surely the fact that Congress might at any time pass and the President sign legislation purporting to remove some officer of the United States does not make the exercise of executive power by all such officers unconstitutional. Since the effect of the Budget and Accounting Act is merely to recognize the possibility of legislation that Congress might at any time attempt to enact with respect to any executive officer, it should not make the exercise of "executive" power by the Comptroller any more problematic than the exercise of such power by any other officer. A joint resolution purporting to remove the Comptroller, or any other executive officer, might be constitutionally infirm, but Congress' advance assertion of the power to enact such legislation seems irrelevant to the question whether exercise of authority by an officer who might in the future be subject to such a possibly valid and possibly invalid resolution is permissible, since the provision contemplating a resolution of removal obviously cannot in any way add to Congress' power to enact such a resolution.

Of course, the foregoing analysis does not imply that the removal provision of the Budget and Accounting Act is meaningless; for although that provision cannot *add to* any power Congress might have to pass legislation (that is, a joint resolution) removing the Comptroller, it can *limit* its power to do so to the circumstances specified. The reason for this is that any joint resolution purporting to remove the Comptroller in the absence of a hearing or one of the specified grounds for removal would not be deemed an implied repeal of the limits on removal in the 1921 Act (for such implied repeals are disfavored), and thus the joint resolution would only be given effect to the extent consistent with the pre-existing law (that is, to the extent that there was actually cause for removal).

Services, 433 U. S. 425 (1977). The question to be answered is whether the threat of removal of the Comptroller General for cause through joint resolution as authorized by the Budget and Accounting Act renders the Comptroller sufficiently subservient to Congress that investing him with "executive" power can be realistically equated with the unlawful retention of such power by Congress itself; more generally, the question is whether there is a genuine threat of "encroachment or aggrandizement of one branch at the expense of the other," *Buckley* v. *Valeo*, 424 U. S., at 122. Common sense indicates that the existence of the removal provision poses no such threat to the principle of separation of powers.

The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary. See *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d, at 895 (Becker, J., concurring in part).[8] These procedural and substantive limitations on the removal power militate strongly against the characterization of the Comptroller as a mere agent of Congress by virtue of the removal authority. Indeed, similarly qualified grants of removal power are generally deemed to protect the officers to whom they apply and to establish their independence from the domination of the possessor of the removal power. See *Humphrey's Executor* v. *United States*, 295 U. S., at 625–626, 629–630. Removal authority limited in such a manner is more properly viewed as motivating adherence to a substantive standard established by law than as inducing subservience to the particular

[8] Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), in which the Court entertained a challenge to Presidential removal under a statute that similarly limited removals to specified cause.

institution that enforces that standard. That the agent enforcing the standard is Congress may be of some significance to the Comptroller, but Congress' substantively limited removal power will undoubtedly be less of a spur to subservience than Congress' unquestionable and unqualified power to enact legislation reducing the Comptroller's salary, cutting the funds available to his department, reducing his personnel, limiting or expanding his duties, or even abolishing his position altogether.

More importantly, the substantial role played by the President in the process of removal through joint resolution reduces to utter insignificance the possibility that the threat of removal will induce subservience to the Congress. As I have pointed out above, a joint resolution must be presented to the President and is ineffective if it is vetoed by him, unless the veto is overridden by the constitutionally prescribed two-thirds majority of both Houses of Congress. The requirement of Presidential approval obviates the possibility that the Comptroller will perceive himself as so completely at the mercy of Congress that he will function as its tool.[9] If the Comptroller's conduct in office is not so unsatisfactory to the President as to convince the latter that removal is required under the statutory standard, Congress will have no independent power to coerce the Comptroller unless it can muster a two-thirds majority in both Houses—a feat of bipartisanship more difficult than that required to impeach and convict. The incremental *in terrorem* effect of the possibility of congressional removal in the face of a Presidential

[9] The Court cites statements made by supporters of the Budget and Accounting Act indicating their belief that the Act's removal provisions would render the Comptroller subservient to Congress by giving Congress "'absolute control of the man's destiny in office.'" *Ante*, at 728. The Court's scholarship, however, is faulty: at the time all of these statements were made—including Representative Sisson's statement of May 3, 1921—the proposed legislation provided for removal by concurrent resolution, with no Presidential role. See 61 Cong. Rec. 983, 989–992, 1079–1085 (1921).

veto is therefore exceedingly unlikely to have any discernible impact on the extent of congressional influence over the Comptroller.[10]

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[10] Concededly, the substantive grounds for removal under the statute are broader than the grounds for impeachment specified by the Constitution, see *ante*, at 729–730, although given that it is unclear whether the limits on the impeachment power may be policed by any body other than Congress itself, the practical significance of the difference is hard to gauge. It seems to me most likely that the difficulty of obtaining a two-thirds vote for removal in both Houses would more than offset any increased likelihood of removal that might result from the greater liberality of the substantive grounds for removal under the statute. And even if removal by Congress alone through joint resolution passed over Presidential veto is marginally more likely than impeachment, whatever additional influence over the Comptroller Congress may thereby possess seems likely to be minimal in relation to that which Congress already possesses by virtue of its general legislative powers and its power to impeach. Of course, if it were demonstrable that the Constitution specifically limited Congress' role in removal to the impeachment process, the insignificance of the marginal increase in congressional influence resulting from the provision authorizing removal through joint resolution would be no answer to a claim of unconstitutionality. But no such limit appears in the Constitution: the Constitution merely provides that all officers of the United States may be impeached for high crimes and misdemeanors, and nowhere suggests that impeachment is the sole means of removing such officers.

As for the Court's observation that "no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance,'" *ante*, at 730, it can only be described as a non sequitur. The issue is not whether the removal provision makes the Comptroller *more* independent than he would be if he were removable only through impeachment, but whether the provision so weakens the Comptroller that he may not exercise executive authority. Moreover, the Court's reference to standards applicable to removal of Art. III judges is a red herring, for Art. III judges—unlike other officers of the United States—are specifically protected against removal for other than constitutionally specified cause. Thus, the infirmity of a statute purporting to allow removal of judges for some other reason would be that it violated the specific command of Art. III. In the absence of a similar textual limit on the removal of nonjudicial officers, the test for a violation of separation of powers should be whether an asserted congressional power to remove would constitute a real and sub-

The practical result of the removal provision is not to render the Comptroller unduly dependent upon or subservient to Congress, but to render him one of the most independent officers in the entire federal establishment. Those who have studied the office agree that the procedural and substantive limits on the power of Congress and the President to remove the Comptroller make dislodging him against his will practically impossible. As one scholar put it nearly 50 years ago: "Under the statute the Comptroller General, once confirmed, is safe so long as he avoids a public exhibition of personal immorality, dishonesty, or failing mentality." H. Mansfield, The Comptroller General 75–76 (1939).[11] The passage of time has done little to cast doubt on this view: of the six Comptrollers who have served since 1921, none has been threatened with, much less subjected to, removal. Recent students of the office concur that "[b]arring resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it, and not a day more." F. Mosher, The GAO 242 (1979).[12] The threat of "here-and-now subservience," *ante*, at 720, is obviously remote indeed.[13]

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stantial aggrandizement of congressional authority at the expense of executive power, not whether a similar removal provision would appear problematic if applied to federal judges.

[11] The author of this statement was no apologist for the Comptroller; rather, his study of the office is premised on the desirability of Presidential control over many of the Comptroller's functions. Nonetheless, he apparently found no reason to accuse the Comptroller of subservience to Congress, and he conceded that "[t]he political independence of the office has in fact been one of its outstanding characteristics." H. Mansfield, The Comptroller General 75 (1939).

[12] Professor Mosher's reference to the fact that the Comptroller is limited to a single term highlights an additional source of independence: unlike an officer with a fixed term who may be reappointed to office, the Comptroller need not concern himself with currying favor with the Senate in order to secure its consent to his reappointment.

[13] The majority responds to the facts indicating the practical independence of the Comptroller from congressional control by cataloging a series of

Realistic consideration of the nature of the Comptroller General's relation to Congress thus reveals that the threat to separation of powers conjured up by the majority is wholly chimerical. The power over removal retained by the Congress is not a power that is exercised outside the legislative process as established by the Constitution, nor does it appear likely that it is a power that adds significantly to the influence Congress may exert over executive officers through other, undoubtedly constitutional exercises of legislative power and through the constitutionally guaranteed impeachment power. Indeed, the removal power is so constrained by its own substantive limits and by the requirement of Presidential ap-

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statements and materials categorizing the Comptroller as a part of the "Legislative Branch." *Ante*, at 730–732. Such meaningless labels are quite obviously irrelevant to the question whether in actuality the Comptroller is so subject to congressional domination that he may not participate in the execution of the laws.

JUSTICE STEVENS, for his part, finds that the Comptroller is an "agent" of Congress, and thus incapable of wielding the authority granted him by the Act, because his responsibilities under a variety of statutes include making reports to the Congress. JUSTICE STEVENS' position is puzzling, to say the least. It seems to rest on the view that an officer required to perform certain duties for the benefit of Congress somehow becomes a part of Congress for all purposes. But it is by no means true that an officer who must perform specified duties for some other body is under that body's control or acts as its agent when carrying out other, unrelated duties. As JUSTICE BLACKMUN points out, see *post*, at 778–779, n. 1, duties toward Congress are imposed on a variety of agencies, including the Federal Trade Commission; and certainly it cannot credibly be maintained that by virtue of those duties the agencies become branches of Congress, incapable of wielding governmental power except through the legislative process. Indeed, the President himself is under numerous obligations, both statutory and constitutional, to provide information to Congress, see, *e. g.*, Art. II, § 3, cl. 1; surely the President is not thereby transformed into an arm or agency of the Congress. If, therefore, as JUSTICE STEVENS concedes, see *ante*, at 737–741, the provision authorizing removal of the Comptroller by joint resolution does not suffice to establish that he may not exercise the authority granted him under Gramm-Rudman-Hollings, I see no substantial basis for concluding that his various duties toward Congress render him incapable of receiving such power.

proval "that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves." *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d, at 895 (Becker, J., concurring in part).[14]

[14] Even if I were to concede that the exercise of executive authority by the Comptroller is inconsistent with the removal provision, I would agree with JUSTICE BLACKMUN that striking down the provisions of the Gramm-Rudman-Hollings Act vesting the Comptroller with such duties is a grossly inappropriate remedy for the supposed constitutional infirmity, and that if one of the features of the statutory scheme must go, it should be the removal provision. As JUSTICE BLACKMUN points out, the mere fact that the parties before the Court have standing only to seek invalidation of the Gramm-Rudman-Hollings spending limits cannot dictate that the Court resolve any constitutional incompatibility by striking down Gramm-Rudman-Hollings. Nor does the existence of the fallback provisions in Gramm-Rudman-Hollings indicate the appropriateness of the Court's choice, for those provisions, by their terms, go into effect only if the Court finds that the primary budget-cutting mechanism established by the Act must be invalidated; they by no means answer the antecedent question whether the Court should take that step.

Given the majority's constitutional premises, it is clear to me that the decision whether to strike down Gramm-Rudman-Hollings must depend on whether such a choice would be more or less disruptive of congressional objectives than declaring the removal provision invalid (with the result that the Comptroller would still be protected against removal at will by the President, but could also not be removed through joint resolution). When the choice is put in these terms, it is evident that it is the never-used removal provision that is far less central to the overall statutory scheme. That this is so is underscored by the fact that under the majority's theory, the removal provision was *never* constitutional, as the Comptroller's primary duties under the 1921 Act were clearly executive under the Court's definition: the Comptroller's most important tasks under that legislation were to dictate accounting techniques for all executive agencies, to audit all federal expenditures, and to approve or disapprove disbursement of funds. See F. Mosher, The GAO (1979). Surely the Congress in 1921 would have sacrificed its own role in removal rather than allow such duties to go unfulfilled by a Comptroller independent of the President. See 59 Cong. Rec. 8611 (1920).

The majority's contrary conclusion rests on the rigid dogma that, outside of the impeachment process, any "direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers." *Ante*, at 723. Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. The wisdom of vesting "executive" powers in an officer removable by joint resolution may indeed be debatable—as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress—but such matters are for the most part to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests. The Act vesting budget-cutting authority in the Comptroller General represents Congress' judgment that the delegation of such authority to counteract ever-mounting deficits is "necessary and proper" to the exercise of the powers granted the Federal Government by the Constitution; and the President's approval of the statute signifies his unwillingness to reject the choice made by Congress. Cf. *Nixon* v. *Administrator of General Services*, 433 U. S., at 441. Under such circumstances, the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law. Because I see no such threat, I cannot join the Court in striking down the Act.

I dissent.

JUSTICE BLACKMUN, dissenting.

The Court may be correct when it says that Congress cannot constitutionally exercise removal authority over an official vested with the budget-reduction powers that § 251 of the Balanced Budget and Emergency Deficit Control Act of 1985

gives to the Comptroller General. This, however, is not because "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress," *ante*, at 730; I agree with JUSTICE WHITE that any such claim is unrealistic. Furthermore, I think it is clear under *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), that "executive" powers of the kind delegated to the Comptroller General under the Deficit Control Act need not be exercised by an officer who serves at the President's pleasure; Congress certainly could prescribe the standards and procedures for removing the Comptroller General. But it seems to me that an attempt by Congress to participate *directly* in the removal of an executive officer—other than through the constitutionally prescribed procedure of impeachment—might well violate the principle of separation of powers by assuming for Congress part of the President's constitutional responsibility to carry out the laws.

In my view, however, that important and difficult question need not be decided in this litigation, because no matter how it is resolved the plaintiffs, now appellees, are not entitled to the relief they have requested. Appellees have not sought invalidation of the 1921 provision that authorizes Congress to remove the Comptroller General by joint resolution; indeed, it is far from clear they would have standing to request such a judgment. The only relief sought in this case is nullification of the automatic budget-reduction provisions of the Deficit Control Act, and that relief should not be awarded even if the Court is correct that those provisions are constitutionally incompatible with Congress' authority to remove the Comptroller General by joint resolution. Any incompatibility, I feel, should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provisions of the Deficit Control Act. However wise or foolish it may be, that statute unquestionably ranks among the most important federal enactments of the past several

decades. I cannot see the sense of invalidating legislation of this magnitude in order to preserve a cumbersome, 65-year-old removal power that has never been exercised and appears to have been all but forgotten until this litigation.[1]

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[1] For the reasons identified by the District Court, I agree that the Deficit Control Act does not violate the nondelegation doctrine. See *Synar* v. *United States*, 626 F. Supp. 1374, 1382–1391 (DC 1986).

JUSTICE STEVENS concludes that the delegation effected under § 251 contravenes the holding of *INS* v. *Chadha*, 462 U. S. 919 (1983), that Congress may make law only "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.*, at 958. I do not agree. We made clear in *Chadha* that the bicameralism and presentation requirements prevented Congress from *itself* exercising legislative power through some kind of procedural shortcut, such as the one-House veto challenged in that case. But we also made clear that our holding in no way questioned "Congress' authority to delegate portions of its power to administrative agencies." *Id.*, at 953–954, n. 16. We explained: "Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Ibid.*

Although JUSTICE STEVENS seems to agree that the duties delegated to the Comptroller General under § 251 could be assigned constitutionally to an independent administrative agency, he argues that Congress may not give these duties "to one of its own agents." *Ante*, at 752–753. He explains that the Comptroller General fits this description because "most" of his statutory responsibilities require him to provide services to Congress, and because Congress has repeatedly referred to the Comptroller General as part of the Legislative Branch. See *ante*, at 741–746. "If Congress were free to delegate its policymaking authority" to such an officer, JUSTICE STEVENS contends that "it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.'" *Ante*, at 755, quoting *Chadha*, 462 U. S., at 959. In his view, "[t]hat danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency." *Ante*, at 755.

I do not think that danger is present here, either. The Comptroller General is not Congress, nor is he a part of Congress; "irrespective of Con-

I

The District Court believed it had no choice in this matter. Once it concluded that the Comptroller General's functions under the Deficit Control Act were constitutionally incompatible with the 1921 removal provision, the District Court considered itself bound as a matter of orderly judicial procedure to set aside the statute challenged by the plaintiffs. See *Synar* v. *United States*, 626 F. Supp. 1374, 1393 (DC 1986). The majority today does not take this view, and I believe it is untenable.

Under the District Court's approach, everything depends on who first files suit. Because Representative Synar and

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gress' designation," he is an officer of the United States, appointed by the President. *Buckley* v. *Valeo*, 424 U. S. 1, 128, n. 165 (1976). In this respect the Comptroller General differs critically from, for example, the Director of the Congressional Budget Office, who is appointed by Congress, see 2 U. S. C. § 601(a)(2), and hence may not "exercis[e] significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, *supra*, at 126; see U. S. Const., Art. II, § 2, cl. 2. The exercise of rulemaking authority by an independent agency such as the Federal Trade Commission does not offend *Chadha*, even though the Commission could be described as an "agent" of Congress because it "carr[ies] into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628 (1935). I do not see why the danger of "congressional action that evades constitutional restraints" becomes any more pronounced when a statute delegates power to a Presidentially appointed agent whose primary duties require him to provide services to Congress. The impermissibility of such a delegation surely is not rendered "obvious" by the fact that some officers who perform services for Congress have titles such as "librarian," "architect," or "printer." See *ante*, at 758, n. 25 (STEVENS, J., concurring in judgment). Furthermore, in sustaining the constitutionality of the Federal Trade Commission's independent status, this Court noted specifically that the Commission "acts as a legislative agency" in "making investigations and reports thereon for the information of Congress . . . in aid of the legislative power." 295 U. S., at 628. JUSTICE STEVENS' approach might make some sense if Congress had delegated legislative responsibility to an officer over whom Congress could hope to exercise tight control, but even JUSTICE STEVENS does not claim that the Comptroller General is such an officer.

the plaintiffs who later joined him in this case objected to budget cuts made pursuant to the Deficit Control Act, the District Court struck down that statute, while retaining the 1921 removal provision. But if the Comptroller General had filed suit 15 minutes before the Congressman did, seeking a declaratory judgment that the 1921 removal power could not constitutionally be exercised in light of the duties delegated to the Comptroller General in 1985, the removal provision presumably would have been invalidated, and the Deficit Control Act would have survived intact. Momentous issues of public law should not be decided in so arbitrary a fashion. In my view, the only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives.

The District Court apparently thought differently in large part because it believed this Court had never undertaken such analysis in the past; instead, according to the District Court, this Court has "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." 626 F. Supp., at 1393. But none of the four cases the District Court cited for this proposition discussed the problem of choice of remedy, and in none of them could a strong argument have been made that invalidating the other of the inconsistent statutory provisions would have interfered less substantially with legislative goals or have been less disruptive of governmental operations.[2]

[2] In *Myers* v. *United States*, 272 U. S. 52 (1926), the Court refused to enforce a statute requiring congressional approval for removal of postmasters. The Court's analysis suggested that there was no practical way the duties of the office could have been reformulated to render congressional participation in the removal process permissible. In *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), the Court removed from office several Philippine officials exercising executive powers but appointed by officers of the Philippine Legislature. As in *Myers*, the Court concluded that the offices by their very nature were executive, so the appointments

More importantly, the District Court ignored what appears to be the only separation-of-powers case in which this Court *did* expressly consider the question as to which of two incompatible statutes to invalidate: *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962). The petitioners in that case had received unfavorable rulings from judges assigned to temporary duty in the District Court or Court of Appeals from the Court of Claims or the Court of Customs and Patent Appeals; they argued that those rulings should be set aside because the judges from the specialized courts did not enjoy the tenure and compensation guaranteed by Article III of the Constitution. Before the assignments, Congress had pronounced the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts, implying that judges on those courts were entitled to Article III benefits. Older statutes, however, gave both courts authority to issue advisory opinions, an authority incompatible with Article III status. *Glidden* held that the Court of Claims and the Court of Customs and Patent Appeals were indeed Article III tribunals. With respect to the advisory-opinion jurisdiction, Justice Harlan's opinion for the plurality noted: "The overwhelming majority of the Court of Claims' business is composed of cases and controversies." 370 U. S., at 583. Since

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could not have been rendered legal simply by trimming the delegated duties. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court set aside Federal Election Campaign Act provisions granting certain powers to officials appointed by Congress, but it structured its remedy so as to interfere as little as possible with the orderly conduct of business by the Federal Election Commission. Past acts of the improperly constituted Commission were deemed valid, and the Court's mandate was stayed for 30 days to allow time for the Commission to be reconstituted through Presidential appointment. See *id.*, at 142–143. Finally, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), the Court set aside an exercise of judicial power by a bankruptcy judge, because his tenure was not protected in the manner required by Article III of the Constitution. To give Article III protections to bankruptcy judges, the federal bankruptcy statute would have had to be rewritten completely.

"it would be . . . perverse to make the status of these courts turn upon so minuscule a portion of their purported functions," Justice Harlan reasoned that, "if necessary, the particular offensive jurisdiction, and not the courts, would fall." *Ibid.* Justice Clark's opinion concurring in the result for himself and the Chief Justice similarly concluded that the "minuscule" advisory-opinion jurisdiction of the courts in question would have to bow to the Article III status clearly proclaimed by Congress, and not vice versa. *Id.*, at 587–589.

The Court thus recognized in *Glidden* that it makes no sense to resolve the constitutional incompatibility between two statutory provisions simply by striking down whichever provision happens to be challenged first. A similar recognition has underlain the Court's approach in equal protection cases concerning statutes that create unconstitutionally circumscribed groups of beneficiaries. The Court has noted repeatedly that such a defect may be remedied in either of two ways: the statute may be nullified, or its benefits may be extended to the excluded class. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 738 (1984); *Califano* v. *Westcott*, 443 U. S. 76, 89 (1979). Although extension is generally the preferred alternative, we have instructed lower courts choosing between the two remedies to "'measure the intensity of [legislative] commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Heckler* v. *Mathews*, *supra*, at 739, n. 5, quoting *Welsh* v. *United States*, 398 U. S. 333, 365 (1970) (Harlan, J., concurring in result). Calculations of this kind are obviously more complicated when a court is faced with two different statutes, enacted decades apart, but *Glidden* indicates that even then the task is judicially manageable. No matter how difficult it is to determine which remedy would less obstruct congressional objectives, surely we should make that determination as best we can instead of leaving the selection to the litigants.

II

Assuming that the Comptroller General's functions under § 251 of the Deficit Control Act cannot be exercised by an official removable by joint resolution of Congress, we must determine whether legislative goals would be frustrated more by striking down § 251 or by invalidating the 1921 removal provision. That question is not answered by the "fallback" provisions of the 1985 Act, which take effect "[i]n the event that any of the reporting procedures described in section 251 [of the Act] are invalidated." § 274(f)(1), 99 Stat. 1100. The question is whether the reporting procedures should be invalidated in the first place. The fallback provisions simply make clear that Congress would prefer a watered-down version of the Deficit Control Act to none at all; they provide no evidence that Congress would rather settle for the watered-down version than surrender its statutory authority to remove the Comptroller General. The legislative history of the Deficit Control Act contains no mention of the 1921 statute, and both Houses of Congress have argued in this Court that, if necessary, the removal provision should be invalidated rather than § 251. See Brief for Appellant United States Senate 31–43; Brief for Appellants Speaker and Bipartisan Leadership Group of United States House of Representatives 49; accord, Brief for Appellant Comptroller General 33–47. To the extent that the absence of express fallback provisions in the 1921 statute signifies anything, it appears to signify only that, if the removal provision were invalidated, Congress preferred simply that the remainder of the statute should remain in effect without alteration.[3]

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[3] Although the legislative history on this point is sparse, it seems reasonably clear that Congress intended the removal provision to be severable from the remainder of the 1921 statute. An earlier bill, providing for removal of the Comptroller General only by impeachment or concurrent resolution of Congress, was vetoed by President Wilson on the grounds that Congress could not constitutionally limit the President's removal power or exercise such power on its own. See 59 Cong. Rec. 8609–8610

In the absence of express statutory direction, I think it is plain that, as both Houses urge, invalidating the Comptroller General's functions under the Deficit Control Act would frustrate congressional objectives far more seriously than would refusing to allow Congress to exercise its removal authority under the 1921 law. The majority suggests that the removal authority plays an important role in furthering Congress' desire to keep the Comptroller General under its control. But as JUSTICE WHITE demonstrates, see *ante*, at 770–773, the removal provision serves feebly for such purposes, especially in comparison to other, more effective means of supervision at Congress' disposal. Unless Congress institutes impeachment proceedings—a course all agree the Constitution would permit—the 1921 law authorizes Congress to remove the Comptroller General only for specified cause, only after a hearing, and only by passing the procedural equivalent of a new public law. Congress has never attempted to use this cumbersome procedure, and the Comptroller General has shown few signs of subservience.[4] If Congress in 1921

(1920). In the course of an unsuccessful attempt to override the veto, Representative Pell inquired: "If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue." Representative Blanton answered, "Certainly." *Id.*, at 8611.

[4] "All of the comptrollers general have treasured and defended the independence of their office, not alone from the president but also from the Congress itself. . . . Like the other institutions in the government, GAO depends upon Congress for its powers, its resources, and its general oversight. But it also possesses continuing legal powers, of both long and recent standing, that Congress has granted it and that it can exercise in a quite independent fashion. And the comptroller general, realistically speaking, is immune from removal during his fifteen-year term for anything short of a capital crime, a crippling illness, or insanity." F. Mosher, A Tale of Two Agencies 158 (1984). See also, *e. g.*, *Ameron, Inc.* v. *United States Army Corps of Engineers*, 787 F. 2d 875, 885–887 (CA3 1986); F. Mosher, The GAO 2, 240–244 (1979); H. Mansfield, The Comptroller General 75–76 (1939).

wished to make the Comptroller General its lackey, it did a remarkably poor job.

Indeed, there is little evidence that Congress as a whole was very concerned in 1921—much less in 1985 or during the intervening decades—with its own ability to control the Comptroller General. The Committee Reports on the 1921 Act and its predecessor bills strongly suggest that what was critical to the legislators was not the Comptroller General's subservience to Congress, but rather his independence from the President. See, *e. g.*, H. R. Rep. No. 14, 67th Cong., 1st Sess., 7–8 (1921); H. R. Conf. Rep. No. 1044, 66th Cong., 2d Sess., 13 (1920); S. Rep. No. 524, 66th Cong., 2d Sess., 6–7 (1920); H. R. Rep. No. 362, 66th Cong., 1st Sess., 8–9 (1919). The debates over the Deficit Control Act contain no suggestion that the Comptroller General was chosen for the tasks outlined in § 251 because Congress thought it could count on him to do its will; instead, the Comptroller General appears to have been selected precisely because of his independence from both the Legislature and the Executive. By assigning the reporting functions to the Comptroller General, rather than to the Congressional Budget Office or to the Office of Management and Budget, Congress sought to create "a wall . . . that takes these decisions out of the hands of the President *and the Congress.*" 131 Cong. Rec. 30865 (1985) (remarks of Rep. Gephardt) (emphasis added); see also, *e. g.*, *id.*, at 36089 (1985) (remarks of Rep. Weiss); *id.*, at 36367 (1985) (remarks of Rep. Bedell).

Of course, the Deficit Control Act was hardly the first statute to assign new functions to the Comptroller General; a good number of other duties have been delegated to the Comptroller General over the years. But there is no reason to believe that, in effecting these earlier delegations, Congress relied any more heavily on the availability of the re-

moval provision than it did in passing the Deficit Control Act. In the past, as in 1985, it is far more likely that Congress was concerned mainly with the Comptroller General's demonstrated political independence, and perhaps to a lesser extent with his long tradition of service to the Legislative Branch; neither of these characteristics depends to any significant extent on the ability of Congress to remove the Comptroller General without instituting impeachment proceedings. Striking down the congressional-removal provision might marginally frustrate the legislative expectations underlying some grants of authority to the Comptroller General, but surely to a lesser extent than would invalidation of § 251 of Gramm-Rudman-Hollings—along with all other "executive" powers delegated to the Comptroller General over the years.[5]

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[5] Many of the Comptroller General's other duties, including those listed by the majority, see *ante*, at 734, n. 9, appear to meet the majority's test for plainly "executive" functions—*i. e.*, they require the Comptroller General to "[i]nterpre[t] a law enacted by Congress to implement the legislative mandate," and to "exercise judgment concerning facts that affect the application of the [law]." *Ante*, at 733. Indeed, the majority's approach would appear to classify as "executive" some of the most traditional duties of the Comptroller General, such as approving expenditure warrants, rendering conclusive decisions on the legality of proposed agency disbursements, and settling financial claims by and against the Government. See 31 U. S. C. §§ 3323, 3526–3529, 3702; F. Mosher, A Tale of Two Agencies 159–160 (1984). All three of these functions were given to the Comptroller General when the position was created in 1921. See 42 Stat. 20, 24–25.

I do not understand the majority's assertion that invalidating the 1921 removal provision might make the Comptroller General "subservient to the Executive Branch." *Ante*, at 734. The majority does not suggest that an official who exercises the functions that the Deficit Control Act vests in the Comptroller General must be removable by the President at will. Perhaps the President possesses inherent constitutional authority to remove "executive" officials for such politically neutral grounds as inefficiency or neglect of duty, but if so—and I am not convinced of it—I do not see how that power would be enhanced by nullification of a statutory provision giving similar authority to Congress. In any event, I agree with JUSTICE WHITE and JUSTICE STEVENS that the power to remove an officer for rea-

I do not claim that the 1921 removal provision is a piece of statutory deadwood utterly without contemporary significance. But it comes close. Rarely if ever invoked even for symbolic purposes, the removal provision certainly pales in importance beside the legislative scheme the Court strikes down today—an extraordinarily far-reaching response to a deficit problem of unprecedented proportions. Because I believe that the constitutional defect found by the Court cannot justify the remedy it has imposed, I respectfully dissent.

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sons of this kind cannot realistically be expected to make an officer "subservient" in any meaningful sense to the removing authority. Cf. *Humphrey's Executor* v. *United States*, 295 U. S., at 629.

UNIVERSITY OF TENNESSEE ET AL. *v.* ELLIOTT

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

No. 85–588. Argued April 21, 1986—Decided July 7, 1986

When petitioner University of Tennessee informed respondent, a black employee, that he would be discharged for inadequate work performance and misconduct on the job, he requested an administrative hearing. Prior to the commencement of the administrative proceedings, respondent filed suit in Federal District Court against the University and others (also petitioners), alleging that his proposed discharge was racially motivated and seeking relief under Title VII of the Civil Rights Act of 1964 and the Reconstruction civil rights statutes. The court allowed the administrative proceedings to go forward, resulting in a ruling by an Administrative Law Judge (ALJ) (affirmed by a University Vice President on appeal) that respondent's proposed discharge was not racially motivated. Instead of seeking state-court review of the administrative proceedings, respondent returned to the District Court, which granted summary judgment for petitioners on the ground that the ALJ's ruling was entitled to preclusive effect. The Court of Appeals reversed, holding that respondent's Title VII claim was governed by *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, which held that final state-court judgments are entitled to full faith and credit in Title VII actions, but indicated that unreviewed determinations by state agencies do not preclude trial *de novo* in federal court on Title VII claims. As regards respondent's claims under the other civil rights statutes, the court held that 28 U. S. C. § 1738, which accords a state-court judgment the same full faith and credit in federal courts as it would have in the State's courts, does not require that federal courts be bound by the unreviewed findings of state administrative agencies. The court also declined to fashion a federal common law of preclusion.

Held:

1. Title 28 U. S. C. § 1738 is not applicable to the unreviewed state administrative factfinding at issue here. However, federal common-law rules of preclusion have been frequently fashioned in the absence of a governing statute. Because § 1738 antedates the development of administrative agencies it does not represent a congressional determination that state administrative agency decisions should not be given preclusive effect. Pp. 794–795.

2. The Court of Appeals correctly held that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims, and thus a federal common-law rule of preclusion would not be appropriate. The analysis in *Kremer*, *supra*, and *Chandler* v. *Roudebush*, 425 U. S. 840, of the language and legislative history of Title VII supports this conclusion. Pp. 795–796.

3. However, when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts in actions under the Reconstruction civil rights statutes must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts (a matter for resolution on remand here). In enacting those statutes, Congress did not intend to create an exception to general rules of preclusion, or to foreclose the adaptation of those rules to such subsequent developments as the use of administrative adjudication. Giving preclusive effect in federal courts to the factfindings of state administrative bodies acting in a judicial capacity serves both the value of enforcing repose, which underlies general principles of collateral estoppel, and the value of federalism. Pp. 796–799.

766 F. 2d 982, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I, II, and III of which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 799. MARSHALL, J., took no part in the consideration or decision of the case.

Beauchamp E. Brogan argued the cause for petitioners. With him on the briefs were *Alan M. Parker*, *Catherine S. Mizell*, *G. Ray Bratton*, *N. Richard Glassman*, *John Barry Burgess*, *Tommy Coley*, *pro se*, and *W. J. Michael Cody*, Attorney General of Tennessee.

Ronald L. Ellis argued the cause for respondent. With him on the brief were *Julius LeVonne Chambers*, *Eric Schnapper*, *Judith Reed*, and *Richard H. Dinkins*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Kansas et al. by *Robert T. Stephan*, Attorney General of Kansas, and *David D. Plinsky*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows, *Charles A. Graddick* of Alabama, *Robert K. Corbin* of Arizona, *Joseph I. Lieberman* of Connecticut, *Jim*

JUSTICE WHITE delivered the opinion of the Court.

A state Administrative Law Judge determined that petitioner University of Tennessee (hereafter petitioner or University) was not motivated by racial prejudice in seeking to discharge respondent. The question presented is whether this finding is entitled to preclusive effect in federal court, where respondent has raised discrimination claims under various civil rights laws, including Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and 42 U. S. C. § 1983.

I

In 1981, petitioner informed respondent, a black employee of the University's Agricultural Extension Service, that he would be discharged for inadequate work performance and misconduct on the job. Respondent requested a hearing under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4–5–101 *et seq.* (1985), to contest his proposed termination. Prior to the start of the hearing, respondent also filed suit in the United States District Court for the Western District of Tennessee, alleging that his proposed discharge was racially motivated and seeking relief under Title VII and other civil rights statutes, including 42

Smith of Florida, *Richard Opper* of Guam, *Corinne Watanabe* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinios, *Linley E. Pearson* of Indiana, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *Edward L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *W. Cary Edwards* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Michael Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *David L. Wilkinson* of Utah, *Michael Dunston* of The Virgin Islands, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; and for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell.*

Solicitor General Fried, Deputy Solicitor General Kuhl, Johnny J. Butler, Gwendolyn Young Reams, Vella M. Fink, and *Mark S. Flynn* filed a brief for the Equal Employment Opportunity Commission as *amicus curiae* urging affirmance.

U. S. C. § 1983.[1] The relief sought included damages, an injunction prohibiting respondent's discharge, and classwide relief from alleged patterns of discrimination by petitioner.

The District Court initially entered a temporary restraining order prohibiting the University from taking any job action against respondent, but later lifted this order and permitted the state administrative proceeding to go forward. App. to Pet. for Cert. A27. There followed a hearing at which an administrative assistant to the University's Vice President for Agriculture presided as an Administrative Law Judge (ALJ). The focus of the hearing was on 10 particular charges that the University gave as grounds for respondent's discharge. Respondent denied these charges, which he contended were motivated by racial prejudice, and also argued that the University's subjecting him to the charges violated his rights under the Constitution, Title VII, and other federal statutes. The ALJ held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims, but did allow respondent to present, as an affirmative defense, evidence that the charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge. *Id.*, at A44–45.

After hearing extensive evidence,[2] the ALJ found that the University had proved some but not all of the charges against respondent, and that the charges were not racially motivated. *Id.*, at A177–179. Concluding that the proposed discharge of respondent was too severe a penalty, the ALJ ordered him transferred to a new assignment with supervisors other than those with whom he had experienced conflicts. *Id.*, at A179–181. Respondent appealed to the University's

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[1] Respondent's complaint also included claims under 42 U. S. C. §§ 1981, 1985, 1986, and 1988, as well as the First, Thirteenth, and Fourteenth Amendments. App. 17.

[2] The hearing continued intermittently for more than five months, involved more than 100 witnesses and 150 exhibits, and generated over 5,000 pages of transcript. App. to Pet. for Cert. A27.

Vice President for Agriculture, who affirmed the ALJ's ruling. *Id.*, at A33–35. The Vice President stated that his review of the record persuaded him that the proposed discharge of respondent had not been racially motivated. *Id.*, at A34.

Respondent did not seek review of these administrative proceedings in the Tennessee courts; instead, he returned to federal court to pursue his civil rights claims. There, petitioner moved for summary judgment on the ground that respondent's suit was an improper collateral attack on the ALJ's ruling, which petitioner contended was entitled to preclusive effect. The District Court agreed, holding that the civil rights statutes on which respondent relied "were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period." *Id.*, at A32.

Respondent appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the District Court's judgment. 766 F. 2d 982 (1985). As regards respondent's Title VII claim, the Court of Appeals looked for guidance to our decision in *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982).[3] While *Kremer* teaches that final state-court judgments are entitled to full faith and credit in Title VII actions, it indicates that unreviewed determinations by state agencies stand on a different footing. The

[3] In *Kremer*, an employee filed a Title VII discrimination charge with the Equal Employment Opportunity Commission, which pursuant to 42 U. S. C. § 2000e–5 referred the case to the New York State Division of Human Rights, the agency charged with administering the State's employment discrimination laws. The state agency rejected the employee's discrimination claim, a judgment that was affirmed both at the agency appellate level and by a reviewing state court. The employee then brought a Title VII action, in which the employer raised a res judicata defense. This Court held that under 28 U. S. C. § 1738 the state court's judgment affirming the state agency's finding of no discrimination was entitled to preclusive effect in the employee's Title VII action.

Sixth Circuit found the following passage from *Kremer* directly on point:

> "EEOC review [pursuant to 42 U. S. C. § 2000e–5(b)] of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. *Batiste* v. *Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975). Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts. *Garner* v. *Giarrusso*, 571 F. 2d 1330 (CA5 1978), *Batiste* v. *Furnco Constr. Corp.*, *supra*; *Cooper* v. *Philip Morris, Inc.*, 464 F. 2d 9 (CA6 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (CA2 1971), cert. denied, 406 U. S. 918 (1972)." *Id.*, at 470, n. 7.

The court accordingly held that res judicata did not foreclose a trial *de novo* on respondent's Title VII claim.

The Sixth Circuit found the question of applying preclusion principles to respondent's claims under § 1983 and other civil rights statutes a more difficult question. It held that 28 U. S. C. § 1738,[4] which concerns the preclusive effect of "ju-

[4] Title 28 U. S. C. § 1738 provides in pertinent part:

"The records and judicial proceedings of any court of any . . . State, Territory or Possession [of the United States], or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such . . . records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the

dicial proceedings of any [state] court," does not require that federal courts be bound by the unreviewed findings of state administrative agencies. The court also declined to fashion a federal common law of preclusion, declaring that "[a]t least implicit in the legislative history of section 1983 is the recognition that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court." 766 F. 2d, at 992. The court recognized that a similar argument for denying res judicata effect to state-court judgments in subsequent § 1983 actions was rejected in *Allen* v. *McCurry*, 449 U. S. 90 (1980), and *Migra* v. *Warren City School District Board of Education*, 465 U. S. 75 (1984), but distinguished those cases as based on the explicit command of § 1738.

We granted certiorari to consider petitioner's contention that the Sixth Circuit erred in holding that state administrative factfinding is never entitled to preclusive effect in actions under Title VII or the Reconstruction civil rights statutes. 474 U. S. 1004 (1985).

II

Title 28 U. S. C. § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case. However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute. See, *e. g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938); *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 289–291 (1906). Although § 1738 is a governing statute with

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United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

regard to the judgments and records of state courts, because § 1738 antedates the development of administrative agencies it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect. Accordingly, we will consider whether a rule of preclusion is appropriate, first with respect to respondent's Title VII claim, and next with respect to his claims under the Constitution and the Reconstruction civil rights statutes.

III

Under 42 U. S. C. § 2000e–5(b), the Equal Employment Opportunity Commission (EEOC), in investigating discrimination charges, must give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." As we noted in *Kremer*, 456 U. S., at 470, n. 7, it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court.

Moreover, our decision in *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), strongly supports respondent's contention that Congress intended one in his position to have a trial *de novo* on his Title VII claim. In *Chandler*, we held that a federal employee whose discrimination claim was rejected by her employing agency after an administrative hearing was entitled to a trial *de novo* in federal court on her Title VII claim. After reviewing in considerable detail the language of Title VII and the history of the 1972 amendments to the statute, we concluded:

> "The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees and employees of state governments and political sub-

divisions under the amended Civil Rights Act of 1964." *Id.*, at 848.

Like the plaintiff in *Chandler*, the respondent in this case pursued his Title VII action following an administrative proceeding at which the employing agency rejected a discrimination claim. It would be contrary to the rationale of *Chandler* to apply res judicata to deny respondent a trial *de novo* on his Title VII claim.

Invoking the presumption against implied repeal, petitioner distinguishes *Chandler* as involving a *federal* agency determination not entitled to full faith and credit under § 1738. Reply Brief for Petitioners 16. This argument is based on the erroneous premise that § 1738 applies to state administrative proceedings. See Part II, *supra*. The question actually before us is whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII. On the basis of our analysis in *Kremer* and *Chandler* of the language and legislative history of Title VII, we conclude that the Sixth Circuit correctly held that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.[5]

IV

This Court has held that § 1738 requires that state-court judgments be given both issue and claim preclusive effect in subsequent actions under 42 U. S. C. § 1983. *Allen* v. *McCurry*, *supra* (issue preclusion); *Migra* v. *Warren City School District Board of Education*, *supra* (claim preclusion). Those decisions are not controlling in this case, where § 1738 does not apply; nonetheless, they support the view that Con-

[5] The fact that respondent requested the administrative hearing rather than being compelled to participate in it does not weigh in favor of preclusion. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48 (1974) (footnote omitted).

gress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion. As we stated in *Allen:*

> "[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U. S. C. § 1738. . . .
>
> "Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." 449 U. S., at 97–98.

The Court's discussion in *Allen* suggests that it would have reached the same result even in the absence of § 1738. We also see no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century.

We have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity. In a unanimous decision in *United States* v. *Utah Construction & Mining Co.*, 384 U. S. 394 (1966), we held that the factfinding of the Advisory Board of Contract Appeals was binding in a subsequent action in the Court of Claims involving a contract dispute between the same parties. We explained:

> "Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and re-

> solves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.*, at 421–422 (1966) (footnotes omitted).

Thus, *Utah Construction*, which we subsequently approved in *Kremer* v. *Chemical Construction Co.*, 456 U. S., at 484–485, n. 26, teaches that giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel: enforcing repose.[6] This value, which encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources, *Allen* v. *McCurry*, 449 U. S., at 94, is equally implicated whether factfinding is done by a federal or state agency.

Having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism. Significantly, all of the opinions in *Thomas* v. *Washington Gas Light Co.*, 448 U. S. 261 (1980), express the view that the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State. *Id.*, at 281 (opinion of

[6] As one respected authority on administrative law has observed:

"The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions—a very great extent—the law worked out for courts does and should apply to agencies." 4 K. Davis, Administrative Law Treatise § 21.9, p. 78 (2d ed. 1983).

The Restatement (Second) of Judgments § 83, p. 269 (1982), reaches a similar conclusion:

"Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court."

STEVENS, J.); 287–289 (WHITE, J., concurring in judgment); 291–292 (REHNQUIST, J., dissenting). The Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion. "Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force," *id.*, at 289 (WHITE, J., concurring in judgment), and this purpose is served by giving preclusive effect to state administrative factfinding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results.[7] Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *Utah Construction & Mining Co., supra*, at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.[8]

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

It is so ordered.

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

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

An administrative assistant to the Vice President for Agriculture of the University of Tennessee conducted a hearing

[7] Congress of course may decide, as it did in enacting Title VII, that other values outweigh the policy of according finality to state administrative factfinding. See Part III, *supra*.

[8] Respondent argues against preclusion on the grounds that the administrative hearing in this case did not satisfy the standard set out in *Utah Construction & Mining Co.*, Brief for Respondent 39–76, and that the ALJ's factfinding would not be given preclusive effect in the Tennessee courts, *id.*, at 99–105. These contentions were not passed upon below, and we leave them for resolution on remand.

and determined that respondent's proposed discharge was not racially motivated. The Court today correctly holds that 28 U. S. C. § 1738 does not require that this determination by an administrative assistant be given full faith and credit in subsequent federal litigation. The Court also correctly refuses to fashion a federal common-law rule of preclusion that would bar respondent from litigating his claim against the University under Title VII of the Civil Rights Act of 1964. I agree with these conclusions and therefore join Parts I, II, and III of the Court's opinion.

In Part IV of its opinion, however, the Court concludes that the findings of the administrative assistant may bar respondent's claims under 42 U. S. C. § 1983 and other of the Reconstruction-era Civil Rights Acts. Although its reading of the legislative history of the 1964 Civil Rights Act persuades the Court that it should not interpose a judicially created bar to the cause of action authorized by that statute, it creates such a bar to claims authorized by the earlier Civil Rights Acts without even mentioning the concerns that prompted their enactment. As a consequence, the Court's analysis is incomplete and ultimately unconvincing.

Preclusion of claims brought under the post-Civil War Acts does not advance the objectives typically associated with finality or federalism. In the employment setting which concerns us here, precluding civil rights claims based on the Reconstruction-era statutes fails to conserve the resources of either the litigants or the courts, because the complainant's companion Title VII claim will still go to federal court under today's decision.[1] Nor does preclusion show respect for

[1] "The difficulties that will be encountered with this schizophrenic approach [ruling that state administrative findings may establish preclusion as to the claims under these Civil Rights Acts, at the same time as the same issues are relitigated as to the Title VII claim] are obvious. A way out of these difficulties remains to be found. As to any issues that must be retried, with perhaps inconsistent results, it may prove better simply to retry the issues as to all statutory claims. Application of preclusion as to part of the case saves no effort, does not prevent the risk of inconsistent

state administrative determinations, because litigants apprised of this decision will presumably forgo state administrative determinations for the same reason they currently forgo state judicial review of those determinations—to protect their entitlement to a federal forum. Cf. *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 532–533 (1982) (POWELL, J., joined by BURGER, C. J., dissenting) (intimating that litigation of unreviewed state administrative determinations in federal court is necessary to encourage exhaustion of state administrative remedies); *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 136 (1981) (BRENNAN, J., joined by MARSHALL, STEVENS, and O'CONNOR, JJ., concurring in judgment) (same); *Moore* v. *East Cleveland*, 431 U. S. 494, 524, n. 2 (1977) (BURGER, C. J., dissenting) (same).

In support of its view that preclusion is required, the Court relies on an analogy to its construction of the Wunderlich Act in *United States* v. *Utah Construction & Mining Co.*, 384 U. S. 394 (1966). In my opinion, that analogy is seriously flawed. In *Utah Construction*, the Court held that in a dispute arising under a Government contract, factual findings by the Board of Contract Appeals were binding on the Court of Claims. In support of its dictum that the holding was "harmonious with general principles of collateral estoppel," *id.*, at 421, the Court relied on the fact that Congress had

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findings, and may distort the process of finding the issues. The opportunity for repose is substantially weakened by the remaining exposure to liability. Insistence on preclusion in these circumstances has little value, and more risk than it may be worth." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4471, p. 169 (Supp. 1985).

Moreover, in this case, and presumably in many other cases as well, even the § 1983 claim may be litigated in federal court, at least to the extent of determining whether the complainant was afforded a full and fair opportunity to litigate before the state administrative tribunal. See *ante*, at 799, n. 8.

plainly intended the administrative findings in such proceedings to be conclusive.[2]

The relevant federal statute in this case is the 1871 Civil Rights Act, not the Wunderlich Act. Needless to say, there is nothing in the legislative history of the post-Civil War legislation remotely suggesting that Congress intended to give binding effect to unreviewed rulings by state administrators in litigation arising under that statute. Quite the contrary, as we explained in *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961):

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts

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[2] The Court quoted with approval the following excerpt from the dissenting opinion of Judge Davis in the Court of Claims:

"'This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi*'s evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (4th Cir., 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion. *[Utah Construction & Mining Co.* v. *United States,]* 168 Ct. Cl. [522,] 541–542, 339 F. 2d [606,] 618 [1964].'" See 384 U. S., at 421, n. 18.

> 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."

See *Mitchum* v. *Foster*, 407 U. S. 225, 238–239, 242 (1972). Cf. *Briscoe* v. *LaHue*, 460 U. S. 325, 338 (1983). Due respect for the intent of the Congress that enacted the Civil Rights Act of 1871, as revealed in the voluminous legislative history of that Act, should preclude the Court from creating a judge-made rule that bars access to the express legislative remedy enacted by Congress.

Accordingly, I respectfully dissent from Part IV of the Court's opinion.

MERRELL DOW PHARMACEUTICALS INC. *v.* THOMPSON ET AL., AS NEXT FRIENDS AND GUARDIANS OF THOMPSON ET AL.

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

No. 85–619. Argued April 28, 1986—Decided July 7, 1986

Respondent residents of Canada and respondent residents of Scotland filed separate complaints in an Ohio state court against petitioner Ohio corporation, the manufacturer and distributor of the drug Bendectin, alleging that children were born with deformities as a result of their mothers' ingestion of the drug during pregnancy. Damages were sought on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence, and also on the ground that the alleged "misbranding" of the drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA) represented a "rebuttable presumption" of negligence and the "proximate cause" of the injuries. Petitioner filed a petition for removal of the actions to Federal District Court, alleging that they were founded, in part, on a claim "arising under the laws of the United States." After removal, the cases were consolidated, and the Federal District Court denied respondents' motion to remand to the state court and granted petitioner's motion to dismiss on *forum non conveniens* grounds. The Court of Appeals reversed. Noting that the FDCA does not create or imply a private right of action, the court held that the causes of action did not arise under federal law and therefore were improperly removed to federal court.

Held: A violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States" within the meaning of 28 U. S. C. § 1331. Thus, here, determining the question of removal jurisdiction by reference to the "well-pleaded complaint," and assuming that there is no federal cause of action for FDCA violations, the cases were improperly removed to the Federal District Court. The assumed congressional determination to preclude federal private remedies for violations of the FDCA is tantamount to a congressional conclusion that a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction. The asserted federal interest in federal review and the novelty of the question whether the FDCA applies to sales in Canada

and Scotland are not sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question. Pp. 807–817.

766 F. 2d 1005, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 818.

Frank C. Woodside III argued the cause for petitioner. With him on the briefs was *Christine L. McBroom.*

Stanley M. Chesley argued the cause and filed a brief for respondents.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U. S. C. § 1331.

I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (1982 ed. and Supp. III), because its labeling did not provide adequate

warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin "constitutes a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately caused the injuries suffered" by the two infants. App. 22, 32.

Petitioner filed a timely petition for removal from the state court to the Federal District Court alleging that the action was "founded, in part, on an alleged claim arising under the laws of the United States."[1] After removal, the two cases were consolidated. Respondents filed a motion to remand to the state forum on the ground that the federal court lacked subject-matter jurisdiction. Relying on our decision in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921), the District Court held that Count IV of the complaint alleged a cause of action arising under federal law and denied the motion to remand. It then granted petitioner's motion to dismiss on *forum non conveniens* grounds.

The Court of Appeals for the Sixth Circuit reversed. 766 F. 2d 1005 (1985). After quoting one sentence from the concluding paragraph in our recent opinion in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U. S. 1 (1983),[2] and noting "that the FDCA does not create or imply

[1] App. 36–37. The petition also alleged that the action "is between citizens of a State and citizens or subjects of a foreign state." *Id.*, at 36. Because petitioner is a corporation with its principal place of business in Ohio, however, the removal was not proper unless the action was founded on a claim arising under federal law. Title 28 U. S. C. § 1441(b) provides:

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

[2] "'Under our interpretations, Congress has given the lower courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily

a private right of action for individuals injured as a result of violations of the Act," it explained:

> "Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court." 766 F. 2d, at 1006.

We granted certiorari, 474 U. S. 1004 (1985), and we now affirm.

II

Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes.[3] That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction.[4] Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action, *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 823 (1824), we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power.

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depends on resolution of a substantial question of federal law.'" 766 F. 2d, at 1006 (quoting *Franchise Tax Board*, 463 U. S., at 28).

[3] See Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

[4] Act of Mar. 3, 1875, § 1, 18 Stat. 470. As currently codified, the statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U. S. C. § 1331.

Verlinden B. V. v. *Central Bank of Nigeria*, 461 U. S. 480, 494–495 (1983); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 379 (1959).

Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." *Franchise Tax Board*, 463 U. S., at 9–10. A defense that raises a federal question is inadequate to confer federal jurisdiction. *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908). Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U. S. C. § 1441(b), moreover, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint."

As was true in *Franchise Tax Board*, *supra*, the propriety of the removal in this case thus turns on whether the case falls within the original "federal question" jurisdiction of the federal courts. There is no "single, precise definition" of that concept; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id.*, at 8.

This much, however, is clear. The "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a "'suit arises under the law that creates the cause of action.'" *Id.*, at 8–9, quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916). Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.

We have, however, also noted that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law."

Franchise Tax Board, 463 U. S., at 9.[5] Our actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 *et seq.* (1982 ed. and Supp. III), but we nevertheless concluded that federal jurisdiction was lacking.

This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted.[6] This case thus poses what Justice Frankfurter called the "litigation-provoking problem," *Textile Workers* v. *Lincoln Mills*, 353

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[5] The case most frequently cited for that proposition is *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). In that case the Court upheld federal jurisdiction of a shareholder's bill to enjoin the corporation from purchasing bonds issued by the federal land banks under the authority of the Federal Farm Loan Act on the ground that the federal statute that authorized the issuance of the bonds was unconstitutional. The Court stated:

"The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision." *Id.*, at 199.

The effect of this view, expressed over Justice Holmes' vigorous dissent, on his *American Well Works* formulation has been often noted. See, *e. g.*, *Franchise Tax Board*, 463 U. S., at 9 ("[I]t is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction"); *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 827 (CA2 1964) (Friendly, J.) ("It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended").

[6] Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. See *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 480 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon"). See also *United States* v. *Mottaz*, 476 U. S. 834, 850 (1986).

U. S. 448, 470 (1957) (dissenting opinion)—the presence of a federal issue in a state-created cause of action.

In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero* v. *International Terminal Operating Co.*, 358 U. S., at 379. In *Franchise Tax Board*, we forcefully reiterated this need for prudence and restraint in the jurisdictional inquiry: "We have always interpreted what *Skelly Oil* [*Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 673 (1950)] called 'the current of jurisdictional legislation since the Act of March 3, 1875' . . . with an eye to practicality and necessity." 463 U. S., at 20.

In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA. Thus, as the case comes to us, it is appropriate to assume that, under the settled framework for evaluating whether a federal cause of action lies, some combination of the following factors is present: (1) the plaintiffs are not part of the class for whose special benefit the statute was passed; (2) the indicia of legis-

lative intent reveal no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondents' cause of action is a subject traditionally relegated to state law.[7] In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

This is the first case in which we have reviewed this type of jurisdictional claim in light of these factors. That this is so is not surprising. The development of our framework for determining whether a private cause of action exists has proceeded only in the last 11 years, and its inception represented a significant change in our approach to congressional silence on the provision of federal remedies.[8]

The recent character of that development does not, however, diminish its importance. Indeed, the very reasons for the development of the modern implied remedy doctrine—the "increased complexity of federal legislation and the increased volume of federal litigation," as well as "the desirability of a more careful scrutiny of legislative intent," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377 (1982) (footnote omitted)—are precisely the kind of considerations that should inform the concern for "practicality and necessity" that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is as-

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[7] See *California* v. *Sierra Club*, 451 U. S. 287, 293 (1981); *Cannon* v. *University of Chicago*, 441 U. S. 677, 689–709 (1979); *Cort* v. *Ash*, 422 U. S. 66, 78 (1975).

[8] See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377 (1982) ("In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action"). Cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 25 (1981) (STEVENS, J., concurring in judgment in part and dissenting in part) ("In 1975, in *Cort* v. *Ash*, 422 U. S. 66, the Court cut back on the simple common-law presumption by fashioning a four-factor formula that led to the denial of relief in that case").

serted because of the presence of a federal issue in a state cause of action.

The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute.[9] We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.[10]

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[9] See, *e. g.*, *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 535–536 (1984) ("In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question"); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S., at 13 ("The key to the inquiry is the intent of the Legislature"); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981) ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress"); *California* v. *Sierra Club*, 451 U. S., at 293 ("[T]he ultimate issue is whether Congress intended to create a private right of action"); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 91 (1981) ("The ultimate question in cases such as this is whether Congress intended to create the private remedy"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15 (1979) ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction"); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979) ("The question of the existence of a statutory cause of action is, of course, one of statutory construction").

[10] When we conclude that Congress has decided not to provide a particular federal remedy, we are not free to "supplement" that decision in a way that makes it "meaningless." Cf. *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978) (When Congress "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless"). See also *California* v. *Sierra Club*, 451

III

Petitioner advances three arguments to support its position that, even in the face of this congressional preclusion of a federal cause of action for a violation of the federal statute, federal-question jurisdiction may lie for the violation of the federal statute as an element of a state cause of action.

First, petitioner contends that the case represents a straightforward application of the statement in *Franchise Tax Board* that federal-question jurisdiction is appropriate when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." 463 U. S., at 13. *Franchise Tax Board*, however, did not purport to disturb the long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.[11] Indeed, in determining that federal-question jurisdiction was not appropriate in the case before us, we stressed Justice Cardozo's emphasis on principled, pragmatic distinctions: "'What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web

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U. S., at 297 ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

[11] See, *e. g.*, *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 470 (1957) (Frankfurter, J., dissenting) (defining inquiry as "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote"); *Gully* v. *First National Bank*, 299 U. S. 109, 115 (1936) ("Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit"); *id.*, at 118 ("If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by").

and lays the other ones aside.'" *Id.*, at 20–21 (quoting *Gully* v. *First National Bank*, 299 U. S. 109, 117–118 (1936)).

Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. This conclusion is fully consistent with the very sentence relied on so heavily by petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.[12]

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[12] Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake. See, *e. g.*, Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543, 568 (1985); C. Wright, Federal Courts 96 (4th ed. 1983); Cohen, The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 890, 916 (1967). Cf. *Kravitz* v. *Homeowners Warranty Corp.*, 542 F. Supp. 317, 320 (ED Pa. 1982) (Pollak, J.) ("I cannot identify any compelling reasons of federal judicial policy for embracing a case of this kind as a federal question case. The essential Pennsylvania elements of plaintiffs' suit for rescission would be more appropriately dealt with by a Court of Common Pleas than by this court; and, with respect to the lesser-included issue of federal law, Pennsylvania's courts are fully competent to interpret the Magnuson-Moss Warranty Act and the relevant F. T. C. regulations, subject to review by the United States Supreme Court").

Focusing on the nature of the federal interest, moreover, suggests that the widely perceived "irreconcilable" conflict between the finding of federal jurisdiction in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921), and the finding of no jurisdiction in *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S. 205 (1934), see, *e. g.*, M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 67 (1980), is far from clear. For the difference in results can be seen as manifestations of the differences in

Second, petitioner contends that there is a powerful federal interest in seeing that the federal statute is given uniform interpretations, and that federal review is the best way of insuring such uniformity. In addition to the significance of the congressional decision to preclude a federal remedy, we do

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the nature of the federal issues at stake. In *Smith*, as the Court emphasized, the issue was the constitutionality of an important federal statute. See 255 U. S., at 201 ("It is . . . apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue"). In *Moore*, in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action. See 291 U. S., at 216–217 ("'The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State'") (quoting *Minneapolis, St. P. & S. S. M. R. Co.* v. *Popplar*, 237 U. S. 369, 372 (1915)).

The importance of the nature of the federal issue in federal-question jurisdiction is highlighted by the fact that, despite the usual reliability of the Holmes test as an inclusionary principle, this Court has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction because of the overwhelming predominance of state-law issues. See *Shulthis* v. *McDougal*, 225 U. S. 561, 569–570 (1912) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws"); *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507 (1900) ("We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws").

not agree with petitioner's characterization of the federal interest and its implications for federal-question jurisdiction. To the extent that petitioner is arguing that state use and interpretation of the FDCA pose a threat to the order and stability of the FDCA regime, petitioner should be arguing, not that federal courts should be able to review and enforce state FDCA-based causes of action as an aspect of federal-question jurisdiction, but that the FDCA pre-empts state-court jurisdiction over the issue in dispute.[13] Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action.[14]

Finally, petitioner argues that, whatever the general rule, there are special circumstances that justify federal-question jurisdiction in this case. Petitioner emphasizes that it is unclear whether the FDCA applies to sales in Canada and Scotland; there is, therefore, a special reason for having a federal

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[13] Cf. *Longshoremen* v. *Davis*, 476 U. S. 380, 391 (1986) ("[O]ur decisions describing the nature of *Garmon* pre-emption and defining its boundaries have rested on a determination that in enacting the [National Labor Relations Act] Congress intended for the [National Labor Relations] Board generally to exercise exclusive jurisdiction in this area").

[14] See *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S., at 214–215 ("Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. . . . But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship"). Cf. *Franchise Tax Board*, 463 U. S., at 12, n. 12 ("[T]he absence of original jurisdiction does not mean that there is no federal forum in which a pre-emption defense may be heard. If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court").

court answer the novel federal question relating to the extra-territorial meaning of the Act. We reject this argument. We do not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue. Although it is true that federal jurisdiction cannot be based on a frivolous or insubstantial federal question, "the interrelation of federal and state authority and the proper management of the federal judicial system," *Franchise Tax Board*, 463 U. S., at 8, would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort. The novelty of an FDCA issue is not sufficient to give it status as a federal cause of action; nor should it be sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question.[15]

IV

We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[15] Petitioner also contends that the Court of Appeals opinion rests on a view that federal-question jurisdiction was inappropriate because, whatever the role of the federal issue in the FDCA-related count, the plaintiff could recover on other, strictly state-law claims. See 766 F. 2d, at 1006 (noting that "the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA"). To the extent that the opinion can be read to express such a view, we agree that it was erroneous. If the FDCA-related count presented a sufficient federal question, its relationship to the other, state-law claims would be determined by the ordinary principles of pendent jurisdiction described in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). For the reasons that we have stated, however, there is no federal-question jursidiction even with that possible error corrected.

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

Article III, § 2, of the Constitution provides that the federal judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." We have long recognized the great breadth of this grant of jurisdiction, holding that there is federal jurisdiction whenever a federal question is an "ingredient" of the action, *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 823 (1824), and suggesting that there may even be jurisdiction simply because a case involves "potential federal questions," *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 471 (1957) (Frankfurter, J., dissenting); see also *Osborn*, *supra*, at 824; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); *Pacific Railroad Removal Cases*, 115 U. S. 1 (1885); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 492–493 (1983).

Title 28 U. S. C. § 1331 provides, in language that parrots the language of Article III, that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." Although this language suggests that Congress intended in § 1331 to confer upon federal courts the full breadth of permissible "federal question" jurisdiction (an inference that is supported by the contemporary evidence, see *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U. S. 1, 8, n. 8 (1983); Forrester, The Nature of a "Federal Question," 16 Tulane L. Rev. 362, 374–376 (1942); Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543, 568 (1985)), § 1331 has been construed more narrowly than its constitutional counterpart. See *Verlinden B. V.*, *supra*, at 494–495; *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 379 (1959). Nonetheless, given the language of the statute and its close relation to the constitutional grant of federal-question jurisdiction, limitations on federal-question jurisdiction under § 1331 must be justified by careful consideration of the reasons

underlying the grant of jurisdiction and the need for federal review. *Ibid.* I believe that the limitation on federal jurisdiction recognized by the Court today is inconsistent with the purposes of § 1331. Therefore, I respectfully dissent.

I

While the majority of cases covered by § 1331 may well be described by Justice Holmes' adage that "[a] suit arises under the law that creates the cause of action," *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916), it is firmly settled that there may be federal-question jurisdiction even though both the right asserted and the remedy sought by the plaintiff are state created. See C. Wright, Federal Courts § 17, pp. 95–96 (4th ed. 1983) (hereinafter Wright); M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 64–71 (1980) (hereinafter Redish). The rule as to such cases was stated in what Judge Friendly described as "[t]he path-breaking opinion" in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 827 (CA2 1964). In *Smith*, a shareholder of the defendant corporation brought suit in the federal court to enjoin the defendant from investing corporate funds in bonds issued under the authority of the Federal Farm Loan Act. The plaintiff alleged that Missouri law imposed a fiduciary duty on the corporation to invest only in bonds that were authorized by a valid law and argued that, because the Farm Loan Act was unconstitutional, the defendant could not purchase bonds issued under its authority. Although the cause of action was wholly state created, the Court held that there was original federal jurisdiction over the case:

> "The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdic-

tion under [the statute granting federal question jurisdiction]." 255 U. S., at 199.

The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times—most recently just three Terms ago by a unanimous Court in *Franchise Tax Board* v. *Construction Laborers Vacation Trust, supra*, at 9. See *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350, 357 (1921); *Bell* v. *Hood*, 327 U. S. 678, 685 (1946); *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 450, and n. 18 (1955) (plurality opinion); *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682, 696 (1963); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 70 (1978). See also *Ashwander* v. *TVA*, 297 U. S. 288, 356 (1936) (separate opinion of McReynolds, J.); *Textile Workers* v. *Lincoln Mills, supra*, at 470 (Frankfurter, J., dissenting); *Wheeldin* v. *Wheeler*, 373 U. S. 647, 659 (1963) (BRENNAN, J., dissenting). Cf. *Gully* v. *First National Bank*, 299 U. S. 109, 112 (1936) ("To bring a case within [§ 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"). Moreover, in addition to Judge Friendly's authoritative opinion in *T. B. Harms Co.* v. *Eliscu, supra*, at 827, *Smith* has been widely cited and followed in the lower federal courts. See, *e. g.*, *Hanes Corp.* v. *Millard*, 174 U. S. App. D. C. 253, 263, n. 8, 531 F. 2d 585, 595, n. 8 (1976); *Mungin* v. *Florida East Coast R. Co.*, 416 F. 2d 1169, 1176–1177 (CA5 1969); *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F. 2d 486, 492 (CA2 1968); *Warrington Sewer Co.* v. *Tracy*, 463 F. 2d 771, 772 (CA3 1972) *(per curiam); New York by Abrams* v. *Citibank, N. A.*, 537 F. Supp. 1192, 1196 (SDNY 1982); *Kravitz* v. *Homeowners Warranty Corp.*, 542 F. Supp. 317, 319 (ED Pa. 1982). See also *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F. 2d 323 (CA2 1982); *Christopher* v. *Cavallo*, 662 F. 2d 1082 (CA4 1981); *Mountain Fuel Supply Co.* v. *Johnson Oil Co.*, 586 F. 2d 1375 (CA10 1978),

cert. denied, 441 U. S. 952 (1979); *Garrett* v. *Time-D. C., Inc.*, 502 F. 2d 627 (CA9 1974), cert. denied, 421 U. S. 913 (1975); *Sweeney* v. *Abramovitz*, 449 F. Supp. 213 (Conn. 1978). Furthermore, the principle of the *Smith* case has been recognized and endorsed by most commentators as well. Redish 67, 69; American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 178 (1969) (hereinafter ALI); Wright § 17, at 96; P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 889 (2d ed., 1973); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 166 (1953); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 225 (1948).[1]

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[1] Some commentators have argued that the result in *Smith* conflicts with our decision in *Moore* v. *Chesapeake & Ohio R. Co.*, 291 U. S. 205 (1934). See, *e. g.*, Greene, Hybrid State Law in the Federal Courts, 83 Harv. L. Rev. 289, 323 (1969). In *Moore*, the plaintiff brought an action under Kentucky's Employer Liability Act, which provided that a plaintiff could not be held responsible for contributory negligence or assumption of risk where his injury resulted from the violation of any state or federal statute enacted for the safety of employees. The plaintiff in *Moore* alleged that his injury was due to the defendant's failure to comply with the Federal Safety Appliance Act; therefore, an important issue in the adjudication of the state cause of action was whether the terms of the federal law had been violated. The Court could have dismissed the complaint on the ground that the federal issue would arise only in response to a defense of contributory negligence or assumption of risk, and that therefore there was no jurisdiction under the well-pleaded complaint rule. Instead, the Court held that "a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should [not] be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship." 291 U. S., at 214–215.

The Court suggests that *Smith* and *Moore* may be reconciled if one views the question whether there is jurisdiction under § 1331 as turning upon "an evaluation of the *nature* of the federal interest at stake." *Ante*, at 814, n. 12 (emphasis in original). Thus, the Court explains, while in *Smith* the issue was the constitutionality of "an important federal statute," in *Moore*

There is, to my mind, no question that there is federal jurisdiction over the respondents' fourth cause of action under the rule set forth in *Smith* and reaffirmed in *Franchise Tax*

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the federal interest was less significant in that "the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action." *Ante*, at 815, n. 12.

In one sense, the Court is correct in asserting that we can reconcile *Smith* and *Moore* on the ground that the "nature" of the federal interest was more significant in *Smith* than in *Moore*. Indeed, as the Court appears to believe, *ante*, at 814–815, n. 12, we could reconcile many of the seemingly inconsistent results that have been reached under § 1331 with such a test. But this is so only because a test based upon an ad hoc evaluation of the importance of the federal issue is infinitely malleable: at what point does a federal interest become strong enough to create jurisdiction? What principles guide the determination whether a statute is "important" or not? Why, for instance, was the statute in *Smith* so "important" that direct review of a state-court decision (under our mandatory appellate jurisdiction) would have been inadequate? Would the result in *Moore* have been different if the federal issue had been a more important element of the tort claim? The point is that if one makes the test sufficiently vague and general, virtually any set of results can be "reconciled." However, the inevitable—and undesirable—result of a test such as that suggested in the Court's footnote 12 is that federal jurisdiction turns in every case on an appraisal of the federal issue, its importance and its relation to state-law issues. Yet it is precisely because the Court believes that federal jurisdiction would be "ill served" by such a case-by-case appraisal that it rejects petitioner's claim that the difficulty and importance of the statutory issue presented by its claim suffices to confer jurisdiction under § 1331. *Ante*, at 817. The Court cannot have it both ways.

My own view is in accord with those commentators who view the results in *Smith* and *Moore* as irreconcilable. See, *e. g.*, Redish 67; D. Currie, Federal Jurisdiction in a Nutshell 109 (2d ed. 1981). That fact does not trouble me greatly, however, for I view *Moore* as having been a "sport" at the time it was decided and having long been in a state of innocuous desuetude. Unlike the jurisdictional holding in *Smith*, the jurisdictional holding in *Moore* has never been relied upon or even cited by this Court. *Moore* has similarly borne little fruit in the lower courts, leading Professor Redish to conclude after comparing the vitality of *Smith* and *Moore* that "the principle enunciated in *Smith* is the one widely followed by modern lower federal courts." Redish 67. Finally, as noted in text, the commentators have also preferred *Smith*. *Supra*, at 821. *Moore* simply has not sur-

Board. Respondents pleaded that petitioner's labeling of the drug Bendectin constituted "misbranding" in violation of §§ 201 and 502(f)(2) and (j) of the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (1982 ed. and Supp. III), and that this violation "directly and proximately caused" their injuries. App. 21–22 (Thompson complaint), 31–32 (MacTavish complaint). Respondents asserted in the complaint that this violation established petitioner's negligence *per se* and entitled them to recover damages without more. *Ibid.* No other basis for finding petitioner negligent was asserted in connection with this claim. As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States." *Smith*, 255 U. S., at 199; see also *Franchise Tax Board*, 463 U. S., at 28 (there is federal jurisdiction under § 1331 where the plaintiff's right to relief "necessarily depends" upon resolution of a federal question).[2] Furthermore, although petitioner disputes its liability under the FDCA, it concedes that respondents' claim that petitioner violated the FDCA is "colorable, and rests upon a reasonable foundation." *Smith*, *supra*, at 199.[3]

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vived the test of time; it is presently moribund, and, to the extent that it is inconsistent with the well-established rule of the *Smith* case, it ought to be overruled.

[2] As the Court correctly notes, the Court of Appeals erred in holding that respondents' right to relief did not depend upon the resolution of a federal question because respondents might prevail on one of their other, wholly state-law claims. The fourth cause of action presents an independent and independently sufficient claim for relief. Whether it "arises under" federal law within the meaning of § 1331 must therefore be determined without reference to any other claims, as if only that claim was asserted. If, after such consideration, it is determined that there is jurisdiction, the plaintiff may join additional state-law claims meeting the test for pendent jurisdiction set forth in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). See *ante*, at 817, n. 15.

[3] *Franchise Tax Board* states that the plaintiff's right to relief must necessarily depend upon resolution of a "substantial" federal question. 463 U. S., at 28. In context, however, it is clear that this was simply another

Of course, since petitioner must make this concession to prevail in this Court, it need not be accepted at face value. However, independent examination of respondents' claim substantiates the conclusion that it is neither frivolous nor meritless. As stated in the complaint, a drug is "misbranded" under the FDCA if "the labeling or advertising fails to reveal facts material . . . with respect to consequences which may result from the use of the article to which the labeling or advertising relates . . . ." 21 U. S. C. § 321(n). Obviously, the possibility that a mother's ingestion of Bendectin during pregnancy could produce malformed children is material. Petitioner's principal defense is that the Act does not govern the branding of drugs that are sold in foreign countries. It is certainly not immediately obvious whether this argument is correct. Thus, the statutory question is one which "discloses a need for determining the meaning or application of [the FDCA]," *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d, at 827, and the claim raised by the fourth cause of action is one "arising under" federal law within the meaning of § 1331.

II

The Court apparently does not disagree with any of this—except, of course, for the conclusion. According to the Court, if we assume that Congress did not intend that there be a private federal cause of action under a particular federal law (and, presumably, *a fortiori* if Congress' decision not to create a private remedy is express), we must also assume that Congress did not intend that there be federal jurisdiction over a state cause of action that is determined by that federal law. Therefore, assuming—only because the parties

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way of stating that the federal question must be colorable and have a reasonable foundation. This understanding is consistent with the manner in which the *Smith* test has always been applied, as well as with the way we have used the concept of a "substantial" federal question in other cases concerning federal jurisdiction. See, *e. g.*, *Hagans* v. *Lavine*, 415 U. S. 528, 536–537 (1974); *Bell* v. *Hood*, 327 U. S. 678, 682 (1946).

have made a similar assumption—that there is no private cause of action under the FDCA,[4] the Court holds that there is no federal jurisdiction over the plaintiffs' claim:

> "The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law." *Ante*, at 812 (footnotes omitted).

The Court nowhere explains the basis for this conclusion. Yet it is hardly self-evident. Why should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law? Clearly, the decision not to provide a private federal remedy should not affect federal jurisdiction unless the reasons Congress withholds a federal remedy are also reasons for withholding federal jurisdiction. Thus, it is nec-

[4] It bears emphasizing that the Court does *not* hold that there is no private cause of action under the FDCA. Rather, it expressly states that "[f]or purposes of our decision, we assume that this is a correct interpretation of the FDCA." *Ante*, at 810. The Court simply holds petitioner to its concession that the FDCA provides no private remedy, and decides petitioner's claim on the basis of this concession. I shall do the same. Under the Court's analysis, however, if a party persuaded a court that there is a private cause of action under the FDCA, there would be federal jurisdiction under *Smith* and *Franchise Tax Board* over a state cause of action making violations of the FDCA actionable. Such jurisdiction would apparently exist even if the plaintiff did not seek the federal remedy.

essary to examine the reasons for Congress' decisions to grant or withhold both federal jurisdiction and private remedies, something the Court has not done.

A

In the early days of our Republic, Congress was content to leave the task of interpreting and applying federal laws in the first instance to the state courts; with one short-lived exception,[5] Congress did not grant the inferior federal courts original jurisdiction over cases arising under federal law until 1875. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470. The reasons Congress found it necessary to add this jurisdiction to the district courts are well known. First, Congress recognized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin* v. *Hunter's Lessee*, 1 Wheat., at 347–348 (Story, J.) (emphasis in original). See also, Comment, Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule, 51 U. Chi. L. Rev. 634, 636 (1984) (hereinafter Comment); D. Currie, Federal Courts 160 (3d ed. 1982) (hereinafter Currie). Concededly, because federal jurisdiction is not always exclusive and because federal courts may disagree with one another, absolute uniformity has not been obtained even under § 1331. However, while perfect uniformity may not have been achieved, experience indicates that the availability of a federal forum in federal-question cases has done much to advance that goal. This, in fact, was the conclusion of the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts. ALI 164–168.

In addition, § 1331 has provided for adjudication in a forum that specializes in federal law and that is therefore more likely to apply that law correctly. Because federal-question

[5] Congress granted original federal-question jurisdiction briefly in the Midnight Judges Act, ch. 4, § 11, 2 Stat. 92 (1801), which was repealed in 1802, Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

cases constitute the basic grist for federal tribunals, "[t]he federal courts have acquired a considerable expertness in the interpretation and application of federal law." *Id.*, at 164–165. By contrast, "it is apparent that federal question cases must form a very small part of the business of [state] courts." *Id.*, at 165. As a result, the federal courts are comparatively more skilled at interpreting and applying federal law, and are much more likely correctly to divine Congress' intent in enacting legislation.[6] See *ibid.*; Redish 71; Currie 160; Comment 636; Hornstein, Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 Ind. L. J. 563, 564–565 (1981).

These reasons for having original federal-question jurisdiction explain why cases like this one and *Smith*—*i. e.*, cases where the cause of action is a creature of state law, but an

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[6] Another reason Congress conferred original federal-question jurisdiction on the district courts was its belief that state courts are hostile to assertions of federal rights. See Hornstein, Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 Ind. L. J. 563, 564-565 (1981); Comment 636; Redish 71. Although this concern may be less compelling today than it once was, the American Law Institute reported as recently as 1969 that "it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts." ALI 166. In any event, this rationale is, like the rationale based on the expertise of the federal courts, simply an expression of Congress' belief that federal courts are more likely to interpret federal law correctly.

One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly. However, as any experienced observer of this Court can attest, "Supreme Court review of state courts, limited by docket pressures, narrow review of the facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job." Currie 160. Indeed, having served on this Court for 30 years, it is clear to me that, realistically, it cannot even come close to "doing the whole job" and that § 1331 is essential if federal rights are to be adequately protected.

essential element of the claim is federal—"arise under" federal law within the meaning of § 1331. Congress passes laws in order to shape behavior; a federal law expresses Congress' determination that there is a federal interest in having individuals or other entities conform their actions to a particular norm established by that law. Because all laws are imprecise to some degree, disputes inevitably arise over what specifically Congress intended to require or permit. It is the duty of courts to interpret these laws and apply them in such a way that the congressional purpose is realized. As noted above, Congress granted the district courts power to hear cases "arising under" federal law in order to enhance the likelihood that federal laws would be interpreted more correctly and applied more uniformly. In other words, Congress determined that the availability of a federal forum to adjudicate cases involving federal questions would make it more likely that federal laws would shape behavior in the way that Congress intended.

By making federal law an essential element of a state-law claim, the State places the federal law into a context where it will operate to shape behavior: the threat of liability will force individuals to conform their conduct to interpretations of the federal law made by courts adjudicating the state-law claim. It will not matter to an individual found liable whether the officer who arrives at his door to execute judgment is wearing a state or a federal uniform; all he cares about is the fact that a sanction is being imposed—and may be imposed again in the future—because he failed to comply with the federal law. Consequently, the possibility that the federal law will be incorrectly interpreted in the context of adjudicating the state-law claim implicates the concerns that led Congress to grant the district courts power to adjudicate cases involving federal questions in precisely the same way as if it was federal law that "created" the cause of action. It therefore follows that there is federal jurisdiction under § 1331.

B

The only remaining question is whether the assumption that Congress decided not to create a private cause of action alters this analysis in a way that makes it inappropriate to exercise original federal jurisdiction. According to the Court, "the very reasons for the development of the modern implied remedy doctrine" support the conclusion that, where the legislative history of a particular law shows (whether expressly or by inference) that Congress intended that there be no private federal remedy, it must also mean that Congress would not want federal courts to exercise jurisdiction over a state-law claim making violations of that federal law actionable. *Ante*, at 811. These reasons are "'the increased complexity of federal legislation,'" "'the increased volume of federal litigation,'" and "'the desirability of a more careful scrutiny of legislative intent.'" *Ibid.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 377 (1982)).

These reasons simply do not justify the Court's holding. Given the relative expertise of the federal courts in interpreting federal law, *supra*, at 826–827, the increased complexity of federal legislation argues rather strongly in *favor* of recognizing federal jurisdiction. And, while the increased volume of litigation may appropriately be considered in connection with reasoned arguments that justify limiting the reach of § 1331, I do not believe that the day has yet arrived when this Court may trim a statute solely because it thinks that Congress made it too broad.[7]

[7] Cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C. J.) ("It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). The narrow exceptions we have recognized to Chief Justice Marshall's famous dictum have all been justified by compelling judicial concerns of comity and federalism. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943). It would be wholly illegitimate, however, for this Court to deter-

This leaves only the third reason: "'the desirability of a more careful scrutiny of legislative intent.'" *Ante*, at 811. I certainly subscribe to the proposition that the Court should consider legislative intent in determining whether or not there is jurisdiction under § 1331. But the Court has not examined the purposes underlying either the FDCA or § 1331 in reaching its conclusion that Congress' presumed decision not to provide a private federal remedy under the FDCA must be taken to withdraw federal jurisdiction over a private state remedy that imposes liability for violating the FDCA. Moreover, such an examination demonstrates not only that it is consistent with legislative intent to find that there is federal jurisdiction over such a claim, but, indeed, that it is the Court's contrary conclusion that is inconsistent with congressional intent.

The enforcement scheme established by the FDCA is typical of other, similarly broad regulatory schemes. Primary responsibility for overseeing implementation of the Act has been conferred upon a specialized administrative agency, here the Food and Drug Administration (FDA).[8] Congress has provided the FDA with a wide-ranging arsenal of weapons to combat violations of the FDCA, including authority to obtain an *ex parte* court order for the seizure of goods subject to the Act, see 21 U. S. C. § 334, authority to initiate proceedings in a federal district court to enjoin continuing violations of the FDCA, see § 332, and authority to request a United States Attorney to bring criminal proceedings against violators, see § 333. See generally 1 J. O'Reilly, Food and Drug Administration, chs. 6–10 (1979 and Supp. 1985). Significantly, the FDA has no independent enforcement authority; final enforcement must come from the federal courts,

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mine that there was no jurisdiction over a class of cases simply because the Court thought that there were too many cases in the federal courts.

[8] The Federal Trade Commission retains regulatory and enforcement authority over the advertising (as opposed to the labeling) of foods, drugs, and cosmetics. See 15 U. S. C. §§ 52–55.

which have exclusive jurisdiction over actions under the FDCA. See §§ 332(a), 333, 334(a)(1). Thus, while the initial interpretive function has been delegated to an expert administrative body whose interpretations are entitled to considerable deference, final responsibility for interpreting the statute in order to carry out the legislative mandate belongs to the federal courts. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

Given that Congress structured the FDCA so that all express remedies are provided by the federal courts, it seems rather strange to conclude that it either "flout[s]" or "undermine[s]" congressional intent for the federal courts to adjudicate a private state-law remedy that is based upon violating the FDCA. See *ante*, at 812. That is, assuming that a state cause of action based on the FDCA is not pre-empted, it is entirely consistent with the FDCA to find that it "arises under" federal law within the meaning of § 1331. Indeed, it is the Court's conclusion that such a state cause of action must be kept *out* of the federal courts that appears contrary to legislative intent inasmuch as the enforcement provisions of the FDCA quite clearly express a preference for having federal courts interpret the FDCA and provide remedies for its violation.

It may be that a decision by Congress not to create a private remedy is intended to preclude all private enforcement. If that is so, then a state cause of action that makes relief available to private individuals for violations of the FDCA is pre-empted. But if Congress' decision not to provide a private federal remedy does *not* pre-empt such a state remedy, then, in light of the FDCA's clear policy of relying on the federal courts for enforcement, it also should not foreclose federal jurisdiction over that state remedy. Both § 1331 and the enforcement provisions of the FDCA reflect Congress' strong

desire to utilize the federal courts to interpret and enforce the FDCA, and it is therefore at odds with both these statutes to recognize a private state-law remedy for violating the FDCA but to hold that this remedy cannot be adjudicated in the federal courts.

The Court's contrary conclusion requires inferring from Congress' decision not to create a private federal remedy that, while some private enforcement is permissible in state courts, it is "bad" if that enforcement comes from the *federal* courts. But that is simply illogical. Congress' decision to withhold a private right of action and to rely instead on public enforcement reflects congressional concern with obtaining more accurate implementation and more coordinated enforcement of a regulatory scheme. See *National Railroad Passenger Corporation* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 462–465 (1974); *Holloway* v. *Bristol-Myers Corp.*, 158 U. S. App. D. C. 207, 218–220, 485 F. 2d 986, 997–999 (1973); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1208–1209 (1982). These reasons are closely related to the Congress' reasons for giving federal courts original federal-question jurisdiction. Thus, if anything, Congress' decision not to create a private remedy *strengthens* the argument in favor of finding federal jurisdiction over a state remedy that is not pre-empted.

COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL.

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

No. 85-621. Argued April 29, 1986—Decided July 7, 1986*

Section 14 of the Commodity Exchange Act (CEA) provides that any person injured by a commodity broker's violation of the Act or regulations of the Commodity Futures Trading Commission (CFTC) may apply to the CFTC for an order directing the offender to pay reparations to the complainant and may enforce that order in federal district court. The CFTC promulgated a regulation that allows it in a reparations proceeding to adjudicate counterclaims "aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." Respondents filed separate reparations complaints (later consolidated) with the CFTC against petitioner commodity futures broker (petitioner) and one of its employees, alleging that a debit balance in their accounts with petitioner, resulting from respondents' futures trading losses and expenses being in excess of the funds deposited in the accounts, was the result of petitioner's violations of the CEA. In the meantime, petitioner filed a diversity action in Federal District Court to recover the debit balance, but, after respondents moved to dismiss on the ground that the reparations proceeding would resolve all rights of the parties, petitioner voluntarily dismissed the action and presented its debit balance claims as counterclaims in the CFTC reparations proceeding. The Administrative Law Judge (ALJ) in that proceeding ruled in petitioner's favor on both respondents' claims and petitioner's counterclaims. Respondents then for the first time challenged the CFTC's statutory authority to adjudicate the counterclaims. The ALJ rejected the challenge, and the CFTC declined to review the decision, allowing it to become final. Respondents filed a petition for review with the Court of Appeals, which upheld the CFTC's decision on respondents' claims in most respects, but ordered dismissal of petitioner's counterclaims on the ground that the CFTC lacked authority to adjudicate common law counterclaims. The court held that in light of the constitutional problems posed by the CFTC's adjudication of such counterclaims, the CEA should be con-

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*Together with No. 85-642, *ContiCommodity Services, Inc.* v. *Schor et al.*, also on certiorari to the same court.

strued to authorize the CFTC to adjudicate only counterclaims arising from violations of the CEA or CFTC regulations.

Held:

1. The CEA empowers the CFTC to entertain state law counterclaims in reparations proceedings. Pp. 841–847.

(a) While the Court of Appeals' reading of the CEA permitted it to avoid a potential Article III problem, it did so only by doing violence to the statute, for its distinction between common law counterclaims and counterclaims based on violations of the statute cannot be drawn from the statute's language or history nor reconciled with the congressional purpose in creating reparations proceedings to promote efficient dispute resolution. Pp. 841–842.

(b) Section 8(a)(5) of the CEA, which empowers the CFTC to promulgate such regulations as are reasonably necessary "to effectuate any of the provisions or to accomplish any of the purposes of [the CEA]," clearly authorizes a regulation providing for adjudication of common law counterclaims. To require a bifurcated examination of a single dispute would destroy the efficacy of the reparations remedy. Pp. 842–844.

(c) The CFTC's longstanding interpretation of the statute as empowering it to take jurisdiction over counterclaims such as petitioner's is reasonable, is well within the scope of its delegated authority, and accordingly is entitled to considerable weight, especially where Congress has twice amended the CEA since the CFTC issued its counterclaim regulation without overruling it and indeed has explicitly affirmed the CFTC's authority to dictate the scope of its counterclaim jurisdiction. Pp. 844–847.

2. The CFTC's assumption of jurisdiction over common law counterclaims does not violate Article III of the Constitution. Pp. 847–858.

(a) As a personal right, Article III's guarantee of an impartial and independent adjudication by the federal judiciary is subject to waiver. Here, respondents indisputably waived any right they may have had to the full trial of petitioner's counterclaims before an Article III court by expressly demanding that petitioner proceed with its counterclaims in the reparations proceedings rather than before the District Court. Even if there were no express waiver, respondents' election to forgo their right to proceed in state or federal court and to seek relief in the CFTC constituted an effective waiver. Pp. 847–850.

(b) Nor does the CFTC's common law counterclaim jurisdiction contravene the nonwaivable protections Article III affords separation of powers principles. Examination of the congressional scheme in light of a number of factors, including the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the

range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III, yields the conclusion that the limited jurisdiction the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not impermissibly threaten the institutional integrity of the Judicial Branch. Pp. 850–856.

(c) Even assuming that principles of federalism are relevant to Article III analysis, those principles do not require invalidation of the CFTC's counterclaim jurisdiction. The fact that petitioner's counterclaims are resolved by a federal rather than a state tribunal is not objectionable because federal courts can, without constitutional hazard, decide such counterclaims under their ancillary jurisdiction. Moreover, respondents have identified no historical support for the argument that Article III embodies a compact among the Framers that all state law claims heard in a federal forum be adjudicated by judges possessing the tenure and salary protections of Article III. Pp. 856–858.

248 U. S. App. D. C. 155, 770 F. 2d 211, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, JJ., joined, *post*, p. 859.

Deputy Solicitor General Wallace argued the cause for petitioner in No. 85–621. With him on the briefs were *Solicitor General Fried*, *Bruce N. Kuhlik*, *Kenneth M. Raisler*, *Pat G. Nicolette*, *Whitney Adams*, and *Anne H. Wright*. *Robert L. Byman* argued the cause for petitioner in No. 85–642. With him on the briefs were *Howard R. Barron* and *Lawrence G. Weppler*.

Leslie J. Carson, Jr., argued the cause for respondents. With him on the brief was *H. Bartow Farr III*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the Commodity Exchange Act (CEA or Act), 7 U. S. C. § 1 *et seq.*, empowers the Commodity Futures Trading Commission (CFTC or Commission) to entertain state law counterclaims in repara-

tion proceedings and, if so, whether that grant of authority violates Article III of the Constitution.

I

The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. In 1974, Congress "overhaul[ed]" the Act in order to institute a more "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." H. R. Rep. No. 93–975, p. 1 (1974). See Pub. L. 93–463, 88 Stat. 1389. Congress also determined that the broad regulatory powers of the CEA were most appropriately vested in an agency which would be relatively immune from the "political winds that sweep Washington." H. R. Rep. No. 93–975, at 44, 70. It therefore created an independent agency, the CFTC, and entrusted to it sweeping authority to implement the CEA.

Among the duties assigned to the CFTC was the administration of a reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers' violations of the Act or CFTC regulations. Thus, § 14 of the CEA, 7 U. S. C. § 18 (1976 ed.),[1] provides that any person injured by such violations may apply to the Commission for an order directing the offender to pay reparations to the complainant and may enforce that order in federal district court. Congress intended this administrative procedure to be an "inexpensive and expeditious" alternative to existing fora available to aggrieved customers, namely, the courts and arbitration. S. Rep. No. 95–850, p. 11 (1978). See also 41 Fed. Reg. 3994 (1976)

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[1] Respondents' suit was governed by the Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389. Congress again significantly revised the Act in early 1983. See Futures Trading Act of 1982, Pub. L. 97–444, 96 Stat. 2294. The changes effected by the 1983 amendments that are relevant to CFTC proceedings became effective only as of May 1983, and therefore do not control in this proceeding. See § 239, 96 Stat. 2327.

(accompanying CFTC regulations promulgated pursuant to § 14).

In conformance with the congressional goal of promoting efficient dispute resolution, the CFTC promulgated a regulation in 1976 which allows it to adjudicate counterclaims "aris-[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." *Id.*, at 3995, 4002 (codified at 17 CFR § 12.23(b)(2) (1983)). This permissive counterclaim rule leaves the respondent in a reparations proceeding free to seek relief against the reparations complainant in other fora.

The instant dispute arose in February 1980, when respondents Schor and Mortgage Services of America, Inc., invoked the CFTC's reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc. (Conti), a commodity futures broker, and Richard L. Sandor, a Conti employee.[2] Schor had an account with Conti which contained a debit balance because Schor's net futures trading losses and expenses, such as commissions, exceeded the funds deposited in the account. Schor alleged that this debit balance was the result of Conti's numerous violations of the CEA. See App. to Pet. for Cert. in No. 85–621, p. 53a.

Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in Federal District Court to recover the debit balance. *Conti-Commodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80–C–1089 (ND Ill., filed Mar. 4, 1980). Schor

[2] Two complaints, relating to separate trading accounts, were filed on behalf of Schor and the mortgage banking company, Mortgage Services of America, Inc., of which Schor was president and 90% shareholder. The complaints contained virtually identical allegations and were consolidated at the administrative level. The Court of Appeals also consolidated the two separate petitions for review of the CFTC's final reparation order filed by Schor and Mortgage Services of America, Inc. Because the legal issues involved in the two actions are for all relevant purposes identical, we refer to Schor and Mortgage Services of America, Inc., jointly as "Schor," and to ContiCommodity Services, Inc., and Sandor jointly as "Conti."

counterclaimed in this action, reiterating his charges that the debit balance was due to Conti's violations of the CEA. Schor also moved on two separate occasions to dismiss or stay the District Court action, arguing that the continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants in view of the fact that "[t]he reparations proceedings . . . will fully . . . resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action." App. 13. See also *id.*, at 19.

Although the District Court declined to stay or dismiss the suit, see *id.*, at 15, 16, Conti voluntarily dismissed the federal court action and presented its debit balance claim by way of a counterclaim in the CFTC reparations proceeding. See *id.*, at 29–32. Conti denied violating the CEA and instead insisted that the debit balance resulted from Schor's trading, and was therefore a simple debt owed by Schor. *Schor* v. *Commodity Futures Trading Comm'n*, 239 U. S. App. D. C. 159, 162, 740 F. 2d 1262, 1265 (1984); App. to Pet. for Cert. in No. 85–621, p. 53a.

After discovery, briefing, and a hearing, the Administrative Law Judge (ALJ) in Schor's reparations proceeding ruled in Conti's favor on both Schor's claims and Conti's counterclaims. After this ruling, Schor for the first time challenged the CFTC's statutory authority to adjudicate Conti's counterclaim. See *id.*, at 62a. The ALJ rejected Schor's challenge, stating himself "bound by agency regulations and published agency policies." *Id.*, at 62a–63a. The Commission declined to review the decision and allowed it to become final, *id.*, at 50a–52a, at which point Schor filed a petition for review with the Court of Appeals for the District of Columbia Circuit. Prior to oral argument, the Court of Appeals, *sua sponte*, raised the question whether CFTC could constitutionally adjudicate Conti's counterclaims in light of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), in which this Court held that "Congress may

not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 584 (1985).

After briefing and argument, the Court of Appeals upheld the CFTC's decision on Schor's claim in most respects, but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counterclaims. 239 U. S. App. D. C., at 161, 740 F. 2d, at 1264. In support of this latter ruling, the Court of Appeals reasoned that the CFTC's exercise of jurisdiction over Conti's common law counterclaim gave rise to "[s]erious constitutional problems" under *Northern Pipeline*. 239 U. S. App. D. C., at 174, 740 F. 2d, at 1277. The Court of Appeals therefore concluded that, under well-established principles of statutory construction, the relevant inquiry was whether the CEA was "'fairly susceptible' of [an alternative] construction," such that Article III objections, and thus unnecessary constitutional adjudication, could be avoided. *Ibid.* (quoting *Ralpho* v. *Bell*, 186 U. S. App. D. C. 368, 380, 569 F. 2d 607, 619 (1977)).

After examining the CEA and its legislative history, the court concluded that Congress had no "clearly expressed" or "explicit" intention to give the CFTC constitutionally questionable jurisdiction over state common law counterclaims. See 239 U. S. App. D. C., at 166, 178, 740 F. 2d, at 1269, 1281. The Court of Appeals therefore "adopt[ed] the construction of the Act that avoids significant constitutional questions," reading the CEA to authorize the CFTC to adjudicate only those counterclaims alleging violations of the Act or CFTC regulations. *Id.*, at 175, 740 F. 2d, at 1278. Because Conti's counterclaims did not allege such violations, the Court of Appeals held that the CFTC exceeded its authority in adjudicating those claims, and ordered that the

ALJ's decision on the claims be reversed and the claims dismissed for lack of jurisdiction. *Id.*, at 161, 740 F. 2d, at 1264.

The Court of Appeals denied rehearing en banc by a divided vote. In a dissenting statement, Judge Wald, joined by Judge Starr, urged that rehearing be granted because the panel's holding would "resul[t] in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act . . . violations" and would in practical effect "decimat[e]" the efficacy of this "faster and less expensive alternative forum." App. to Pet. for Cert. in No. 85–621, p. 71a. This Court granted the CFTC's petition for certiorari, vacated the Court of Appeals' judgment, and remanded the case for further consideration in light of *Thomas*, *supra*, at 582–593. 473 U. S. 568 (1985). We had there ruled that the arbitration scheme established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. § 136 *et seq.*, does not contravene Article III and, more generally, held that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." 473 U. S., at 593.

On remand, the Court of Appeals reinstated its prior judgment. It reaffirmed its earlier view that *Northern Pipeline* drew into serious question the Commission's authority to decide debit-balance counterclaims in reparations proceedings; concluded that nothing in *Thomas* altered that view; and again held that, in light of the constitutional problems posed by the CFTC's adjudication of common law counterclaims, the CEA should be construed to authorize the CFTC to adjudicate only counterclaims arising from violations of the Act or CFTC regulations. See 248 U. S. App. D. C. 155, 157–158, 770 F. 2d 211, 213–214 (1985).

We again granted certiorari, 474 U. S. 1018 (1985), and now reverse.

II

The Court of Appeals was correct in its understanding that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Machinists* v. *Street*, 367 U. S. 740, 749 (1961). See also *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979). Where such "serious doubts" arise, a court should determine whether a construction of the statute is "fairly possible" by which the constitutional question can be avoided. *Crowell* v. *Benson*, 285 U. S. 22 (1932). See also *Machinists* v. *Street*, *supra*, at 750. It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; "'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964) (quoting *Scales* v. *United States*, 367 U. S. 203, 211 (1961)). See also *Heckler* v. *Mathews*, 465 U. S. 728, 742–743 (1984).

Assuming that the Court of Appeals correctly discerned a "serious" constitutional problem in the CFTC's adjudication of Conti's counterclaim, we nevertheless believe that the court was mistaken in finding that the CEA could fairly be read to preclude the CFTC's exercise of jurisdiction over that counterclaim. Our examination of the CEA and its legislative history and purpose reveals that Congress plainly intended the CFTC to decide counterclaims asserted by respondents in reparations proceedings, and just as plainly delegated to the CFTC the authority to fashion its counterclaim jurisdiction in the manner the CFTC determined necessary to further the purposes of the reparations program.

Congress' assumption that the CFTC would have the authority to adjudicate counterclaims is evident on the face of

the statute. See, *e. g.*, 7 U. S. C. § 18(c) (providing that before action will be taken on complaints filed by nonresident complainants, a bond must be filed which must cover, *inter alia*, "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent") (emphasis added); § 18(d) ("*any person* for whose benefit [a reparation award] was made" may enforce the judgment in district court) (emphasis added). See also § 18(e) (judicial review available to "any party"). Accordingly, the court below did not seriously contest that Congress intended to authorize the CFTC to adjudicate *some* counterclaims in reparations proceedings. Rather, the court read into the facially unqualified reference to counterclaim jurisdiction a distinction between counterclaims arising under the Act or CFTC regulations and all other counterclaims. See 239 U. S. App. D. C., at 173, 740 F. 2d, at 1278. While the court's reading permitted it to avoid a potential Article III problem, it did so only by doing violence to the CEA, for its distinction cannot fairly be drawn from the language or history of the CEA, nor reconciled with the congressional purposes motivating the creation of the reparations proceedings.

We can find no basis in the language of the statute or its legislative history for the distinction posited by the Court of Appeals. Congress empowered the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary *to effectuate any of the provisions or to accomplish any of the purposes of* [the CEA]." 7 U. S. C. § 12a(5) (emphasis added). The language of the congressional Report that specifically commented on the scope of the CFTC's authority over counterclaims unambiguously demonstrates that, consistent with the sweeping authority Congress delegated to the CFTC generally, Congress intended to vest in the CFTC the power to define the scope of the counterclaims cognizable in reparations proceedings:

> "Counterclaims will be recognized in the [reparations] proceedings . . . on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section." H. R. Rep. No. 93–975, p. 23 (1974).

Moreover, quite apart from congressional statements of intent, the broad grant of power in § 12a(5) clearly authorizes the promulgation of regulations providing for adjudication of common law counterclaims arising out of the same transaction as a reparations complaint because such jurisdiction is necessary, if not critical, to accomplish the purposes behind the reparations program.

Reference to the instant controversy illustrates the crippling effect that the Court of Appeals' restrictive reading of the CFTC's counterclaim jurisdiction would have on the efficacy of the reparations remedy. The dispute between Schor and Conti is typical of the disputes adjudicated in reparations proceedings: a customer and a professional commodities broker agree that there is a debit balance in the customer's account, but the customer attributes the deficit to the broker's alleged CEA violations and the broker attributes it to the customer's lack of success in the market. The customer brings a reparations claim; the broker counterclaims for the amount of the debit balance. In the usual case, then, the counterclaim "arises out of precisely the same course of events" as the principal claim and requires resolution of many of the same disputed factual issues. *Friedman* v. *Dean Witter & Co.*, [1980–1982 Transfer Binder] CCH Comm. Fut. L. Rep. ¶21,307, p. 25,538 (1981).

Under the Court of Appeals' approach, the entire dispute may not be resolved in the administrative forum. Consequently, the entire dispute will typically end up in court, for when the broker files suit to recover the debit balance, the customer will normally be compelled either by compulsory counterclaim rules or by the expense and inconvenience of

litigating the same issues in two fora to forgo his reparations remedy and to litigate his claim in court. See, *e. g.*, App. 13 (Schor's motion to dismiss Conti's federal court action) ("[C]ontinuation of this action, in light of the prior filed reparations proceedings, would be unjust to [Schor] in that it would require [him], at a great cost and expense, to litigate the same issues in two forums. If this action proceeds, defendants will be required pursuant to [Federal Rule of Civil Procedure 13(a)] to file a counterclaim in this action setting forth all the claims that they have already filed before the CFTC"). In sum, as Schor himself aptly summarized, to require a bifurcated examination of the single dispute "would be to emasculate if not destroy the purposes of the Commodity Exchange Act to provide an efficient and relatively inexpensive forum for the resolution of disputes in futures trading." *Ibid.* See also App. to Pet. for Cert. in No. 85–621, p. 71a (Wald, J., dissenting from denial of rehearing) ("To bifurcate, as the panel's decision now requires, the main reparations proceeding from counterclaims between the same parties . . . will realistically mean that the *courts*, not the agency, will end up dealing with *all* of these claims. The faster and less expensive alternative forum will be decimated").

As our discussion makes manifest, the CFTC's long-held position that it has the power to take jurisdiction over counterclaims such as Conti's is eminently reasonable and well within the scope of its delegated authority. Accordingly, as the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845 (1984); *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367, 380–381 (1969). The Court of Appeals declined to defer to the CFTC's interpretation because, in its view, the Commission had not maintained a consistent position on the scope of its authority to adjudicate counterclaims and the

question was not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, had superior expertise. 239 U. S. App. D. C., at 176, 740 F. 2d, at 1279. We find both these reasons insubstantial.

First, the CFTC issued the counterclaim rule currently in force at the time that the reparations program first took effect and has never altered that rule. The only "inconsistency" identified by the Court of Appeals was a *proposed* rule, published by the Commission for notice and comment, that would have allowed a narrower class of counterclaims. 40 Fed. Reg. 55666–55667, 55672–55673 (1975). It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U. S. C. § 553, to tax an agency with "inconsistency" whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment.

Second, the Court of Appeals was incorrect to state on the facts of this case that the CFTC's expertise was not deserving of deference because of the "statutory interpretation-jurisdictional" nature of the question at issue. 239 U. S. App. D. C., at 176, 740 F. 2d, at 1279. An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is "reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

Such deference is especially warranted here, for Congress has twice amended the CEA since the CFTC declared by regulation that it would exercise jurisdiction over counterclaims arising out of the same transaction as the principal

reparations dispute but has not overruled the CFTC's assertion of jurisdiction. See *Red Lion Broadcasting Co., Inc.* v. *FCC, supra,* at 380–381. It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974) (footnotes omitted). See also *FDIC* v. *Philadelphia Gear Corp.*, 476 U. S. 426 (1986).

Moreover, we need not, as the Court of Appeals argued, rely simply on congressional "silence" to find approval of the CFTC's position in the subsequent amendments to the CEA, see 239 U. S. App. D. C., at 177, 740 F. 2d, at 1280. Congress explicitly affirmed the CFTC's authority to dictate the scope of its counterclaim jurisdiction in the 1983 amendments to the Act:

> "The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, . . . the nature and scope of . . . counterclaims, . . . and all other matters governing proceedings before the Commission under this section." 7 U. S. C. § 18(b).

See also H. R. Rep. No. 97–565, pt. 1, p. 55 (1982) ("[T]he reparations program seeks to pass upon the whole controversy surrounding each claim, including counter-claims arising out of the same set of facts"). Where, as here, "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation," we cannot but deem that construction virtually conclusive. See *Red Lion Broadcasting Co., Inc.* v. *FCC, supra,* at 380–381. See also *Bell* v. *New Jersey*, 461 U. S. 773, 785, and n. 12 (1983).

In view of the abundant evidence that Congress both contemplated and authorized the CFTC's assertion of jurisdiction over Conti's common law counterclaim, we conclude that the Court of Appeals' analysis is untenable. The canon of construction that requires courts to avoid unnecessary constitutional adjudication did not empower the Court of Appeals to manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and to reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate. See *Heckler* v. *Mathews*, 465 U. S., at 742–743. We therefore are squarely faced with the question whether the CFTC's assumption of jurisdiction over common law counterclaims violates Article III of the Constitution.

III

Article III, § 1, directs that the "judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish," and provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office. Schor claims that these provisions prohibit Congress from authorizing the initial adjudication of common law counterclaims by the CFTC, an administrative agency whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III.

Although our precedents in this area do not admit of easy synthesis, they do establish that the resolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III. See, *e. g.*, *Thomas*, 473 U. S., at 583. Rather, the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. See, *e. g.*, *id.*, at 590; *Northern Pipeline*, 458 U. S., at 64. This inquiry, in turn, is guided

by the principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas, supra*, at 587. See also *Crowell* v. *Benson*, 285 U. S., at 53.

A

Article III, § 1, serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," *Thomas, supra*, at 583, and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U. S. 200, 218 (1980). See also *Thomas, supra*, at 582–583; *Northern Pipeline*, 458 U. S., at 58. Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests. See, *e. g.*, *id.*, at 90 (REHNQUIST, J., concurring in judgment) (noting lack of consent to non-Article III jurisdiction); *id.*, at 95 (WHITE, J., dissenting) (same). See also Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 460, n. 108 (1983) (Article III, § 1, "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision"). Cf. *Crowell* v. *Benson, supra*, at 87 (Brandeis, J., dissenting).

Our precedents also demonstrate, however, that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. See, *e. g.*, *Thomas, supra*, at 583; *Crowell* v. *Benson, supra*. Moreover, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil

and criminal matters must be tried. See, *e. g.*, *Boykin* v. *Alabama*, 395 U. S. 238 (1969) (waiver of criminal trial by guilty plea); *Duncan* v. *Louisiana*, 391 U. S. 145, 158 (1968) (waiver of right to trial by jury in criminal case); Fed. Rule of Civ. Proc. 38(d) (waiver of right to trial by jury in civil cases). Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication. See, *e. g.*, 458 U. S., at 80, n. 31; *id.*, at 91 (REHNQUIST, J., concurring in judgment); *id.*, at 95 (WHITE, J., dissenting). See also *Thomas*, *supra*, at 584, 591. Cf. *Kimberly* v. *Arms*, 129 U. S. 512 (1889); *Heckers* v. *Fowler*, 2 Wall. 123 (1865).

In the instant cases, Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, see App. 13, 19, and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration of Conti's counterclaim.

Even were there no evidence of an express waiver here, Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver. Three years before Schor instituted his reparations action, a private right of action under the CEA was explicitly recognized in the Circuit in which Schor and Conti filed suit in District Court. See *Hirk* v. *Agri-Research Council, Inc.*, 561 F. 2d 96, 103, n. 8 (CA7 1977). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982) (affirming the existence of a private cause of action under the

CEA). Moreover, at the time Schor decided to seek relief before the CFTC rather than in the federal courts, the CFTC's regulations made clear that it was empowered to adjudicate all counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3995 (1976) (codified in 17 CFR § 12.23(b)(2) (1983)). Thus, Schor had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but, with full knowledge that the CFTC would exercise jurisdiction over that claim, chose to avail himself of the quicker and less expensive procedure Congress had provided him. In such circumstances, it is clear that Schor effectively agreed to an adjudication by the CFTC of the entire controversy by seeking relief in this alternative forum. Cf. *McElrath* v. *United States*, 102 U. S. 426, 440 (1880).

B

As noted above, our precedents establish that Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as "an inseparable element of the constitutional system of checks and balances." *Northern Pipeline*, *supra*, at 58. See also *United States* v. *Will*, *supra*, at 217. Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts, *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 644 (1949) (Vinson, C. J., dissenting), and thereby preventing "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*. See *Thomas*, 473 U. S., at 582–583; *Northern Pipeline*, 458 U. S., at 57–58, 73–74, 83, 86; *id.*, at 98, 115–116 (WHITE, J., dissenting). To the extent that this structural principle is

implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. See, *e. g.*, *United States* v. *Griffin*, 303 U. S. 226, 229 (1938). When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. *Thomas*, 473 U. S., at 587. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. *Id.*, at 590. Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. See, *e. g.*, *id.*, at 587, 589–593; *Northern Pipeline*, *supra*, at 84–86.

An examination of the relative allocation of powers between the CFTC and Article III courts in light of the considerations given prominence in our precedents demonstrates that the congressional scheme does not impermissibly intrude

on the province of the judiciary. The CFTC's adjudicatory powers depart from the traditional agency model in just one respect: the CFTC's jurisdiction over common law counterclaims. While wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties, we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical "slippery slope" may deposit us. Indeed, the CFTC's exercise of this type of jurisdiction is not without precedent. Thus, in *RFC* v. *Bankers Trust Co.*, 318 U. S. 163, 168–171 (1943), we saw no constitutional difficulty in the initial adjudication of a state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute. Similarly, in *Katchen* v. *Landy*, 382 U. S. 323 (1966), this Court upheld a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction. We reasoned that, as a practical matter, requiring the trustee to commence a plenary action to recover on its counterclaim would be a "meaningless gesture." *Id.*, at 334.

In the instant cases, we are likewise persuaded that there is little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme. Aside from its authorization of counterclaim jurisdiction, the CEA leaves far more of the "essential attributes of judicial power" to Article III courts than did that portion of the Bankruptcy Act found unconstitutional in *Northern Pipeline*. The CEA scheme in fact hews closely to the agency model approved by the Court in *Crowell* v. *Benson*, 285 U. S. 22 (1932).

The CFTC, like the agency in *Crowell*, deals only with a "particularized area of law," *Northern Pipeline*, *supra*, at 85, whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly "all civil proceedings arising under title 11 or arising in or *related*

to cases under title 11." 28 U. S. C. § 1471(b) (quoted in *Northern Pipeline*, 458 U. S., at 85) (emphasis added). CFTC orders, like those of the agency in *Crowell*, but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court. See 7 U. S. C. § 18(f); *Northern Pipeline*, *supra*, at 85–86. CFTC orders are also reviewed under the same "weight of the evidence" standard sustained in *Crowell*, rather than the more deferential standard found lacking in *Northern Pipeline*. See 7 U. S. C. § 9; *Northern Pipeline*, *supra*, at 85. The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell*, are subject to *de novo* review. Finally, the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts," and thus may not, for instance, preside over jury trials or issue writs of habeas corpus. 458 U. S., at 85.

Of course, the nature of the claim has significance in our Article III analysis quite apart from the method prescribed for its adjudication. The counterclaim asserted in this litigation is a "private" right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the "core" of matters normally reserved to Article III courts. See, *e. g.*, *Thomas*, *supra*, at 587; *Northern Pipeline*, 458 U. S., at 70–71, and n. 25; *id.*, at 90 (REHNQUIST, J., concurring in judgment). Yet this conclusion does not end our inquiry; just as this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights, *Thomas*, *supra*, at 585–586, there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries. See, *e. g.*, *Northern Pipeline*, 458 U. S., at 68, n. 20; *id.*, at 98 (WHITE, J., dissenting).

We have explained that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could

be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers" is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication. *Thomas*, 473 U. S., at 589 (quoting *Northern Pipeline, supra*, at 68). Similarly, the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts. See *Northern Pipeline*, 458 U. S., at 68, n. 20, 84; *id.*, at 90 (REHNQUIST, J., concurring in judgment). The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress "withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty" and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). Accordingly, where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching. See, *e. g.*, *Northern Pipeline*, 458 U. S., at 84; *id.*, at 90 (REHNQUIST, J., concurring in judgment). In this litigation, however, "[l]ooking beyond form to the substance of what" Congress has done, we are persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers. *Thomas, supra*, at 589.

It is clear that Congress has not attempted to "withdraw from judicial cognizance" the determination of Conti's right to

the sum represented by the debit balance in Schor's account. Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. See, *e. g.*, *Northern Pipeline*, *supra*, at 73–74. But this case obviously bears no resemblance to such a scenario, given the degree of judicial control saved to the federal courts, see *supra*, at 852–853, as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.

When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers. Its decision to endow the CFTC with jurisdiction over such reparations claims is readily understandable given the perception that the CFTC was relatively immune from political pressures, see H. R. Rep. No. 93–975, pp. 44, 70 (1974), and the obvious exper-

tise that the Commission possesses in applying the CEA and its own regulations. This reparations scheme itself is of unquestioned constitutional validity. See, *e. g.*, *Thomas*, *supra*, at 589; *Northern Pipeline*, *supra*, at 80–81; *Crowell* v. *Benson*, 285 U. S. 22 (1932). It was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed, as was explained above, absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded.

It also bears emphasis that the CFTC's assertion of counterclaim jurisdiction is limited to that which is necessary to make the reparations procedure workable. See 7 U. S. C. § 12a(5). The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.

In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*. Conversely, were we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson*, *supra*, at 46. See also *Thomas*, *supra*, at 583–584. We do not think Article III compels this degree of prophylaxis.

Nor does our decision in *Bowsher* v. *Synar*, *ante*, p. 714, require a contrary result. Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable ex-

pansion of its own power, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher*, looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this litigation.

In so doing, we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. See, *e. g.*, *Thomas*, 473 U. S. 568 (1985). Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III. We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.

C

Schor asserts that Article III, § 1, constrains Congress for reasons of federalism, as well as for reasons of separation of powers. He argues that the state law character of Conti's counterclaim transforms the central question in this litigation from whether Congress has trespassed upon the judicial powers of the Federal Government into whether Congress has invaded the prerogatives of state governments.

At the outset, we note that our prior precedents in this area have dealt only with separation of powers concerns, and have not intimated that principles of federalism impose limits on Congress' ability to delegate adjudicative functions to non-Article III tribunals. This absence of discussion regarding federalism is particularly telling in *Northern Pipeline*, where the Court based its analysis solely on the separation of powers principles inherent in Article III despite the fact that the claim sought to be adjudicated in the bankruptcy court was

created by state law. See, *e. g.*, 458 U. S., at 57–60, and n. 11.

Even assuming that principles of federalism are relevant to Article III analysis, however, we are unpersuaded that those principles require the invalidation of the CFTC's counterclaim jurisdiction. The sole fact that Conti's counterclaim is resolved by a *federal* rather than a *state* tribunal could not be said to unduly impair state interests, for it is established that a federal court could, without constitutional hazard, decide a counterclaim such as the one asserted here under its ancillary jurisdiction, even if an independent jurisdictional basis for it were lacking. See, *e. g.*, *Baker* v. *Gold Seal Liquors*, 417 U. S. 467, 469, n. 1 (1974); *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 609 (1926). Given that the federal courts can and do exercise ancillary jurisdiction over counterclaims such as the one at issue here, the question becomes whether the fact that a federal agency rather than a federal Article III court initially hears the state law claim gives rise to a cognizably greater impairment of principles of federalism.

Schor argues that those Framers opposed to diversity jurisdiction in the federal courts acquiesced in its inclusion in Article III only because they were assured that the federal judiciary would be protected by the tenure and salary provisions of Article III. He concludes, in essence, that to protect this constitutional compact, Article III should be read to absolutely preclude any adjudication of state law claims by federal decisionmakers that do not enjoy the Article III salary and tenure protections. We are unpersuaded by Schor's novel theory, which suffers from a number of flaws, the most important of which is that Schor identifies no historical support for the critical link he posits between the provisions of Article III that protect the independence of the federal judiciary and those provisions that define the extent of the judiciary's jurisdiction over state law claims.

The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It further specifies that the federal judicial power must be exercised by judges who "shall hold their Offices during good Behaviour, and [who] shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch. The Court has, however, recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts, see, *e. g.*, *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828); courts-martial, see, *e. g.*, *Dynes* v. *Hoover*, 20 How. 65 (1857); and courts that adjudicate certain disputes concerning public rights, see, *e. g.*, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856); *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); *Crowell* v. *Benson*, 285 U. S. 22 (1932); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568 (1985). See generally *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (opinion of BRENNAN, J.). Unlike the Court, I would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate.

I

The Framers knew that "[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands,

whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 46, p. 334 (H. Dawson ed. 1876) (J. Madison). In order to prevent such tyranny, the Framers devised a governmental structure composed of three distinct branches—"a vigorous Legislative Branch," "a separate and wholly independent Executive Branch," and "a Judicial Branch equally independent." *Bowsher* v. *Synar*, *ante*, at 722. The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*. "'The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.'" *Bowsher*, *ante*, at 725 (quoting *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935)). The federal judicial power, then, must be exercised by judges who are independent of the Executive and the Legislature in order to maintain the checks and balances that are crucial to our constitutional structure.

The Framers also understood that a principal benefit of the separation of the judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures. Article III's salary and tenure provisions promote impartial adjudication by placing the judicial power of the United States "in a body of judges insulated from majoritarian pressures and thus able to enforce [federal law] without fear of reprisal or public rebuke." *United States* v. *Raddatz*, 447 U. S. 667, 704 (1980) (MARSHALL, J., dissenting). As Alexander Hamilton observed, "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individ-

uals, which we perceive to be indispensable in the Courts of justice can certainly not be expected from Judges who hold their offices by a temporary commission." The Federalist No. 78, p. 546 (H. Dawson ed. 1876). This is so because

> "[i]f the power of making [periodic appointments] was committed either to the Executive or Legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the People, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." *Ibid.*

"Next to permanency in office," Hamilton added, "nothing can contribute more to the independence of the Judges than a fixed provision for their support" because "*a power over a man's subsistence amounts to a power over his will.*" *Id.*, at 548 (emphasis in original). See also *United States* v. *Will*, 449 U. S. 200, 217–218 (1980) ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government"); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955) (Black, J.) ("The provisions of Article III were designed to give judges maximum freedom from the possible coercion or influence by the executive or legislative branches of the Government").

These important functions of Article III are too central to our constitutional scheme to risk their incremental erosion. The exceptions we have recognized for territorial courts, courts-martial, and administrative courts were each based on "certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus." *Northern Pipeline*, *supra*, at 70 (opinion of BRENNAN, J.). Here, however, there is no equally forceful reason to extend further these exceptions to situations that are distinguishable from

existing precedents. Cf. Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 445 (1983). The Court, however, engages in just such an extension. By sanctioning the adjudication of state-law counterclaims by a federal administrative agency, the Court far exceeds the analytic framework of our precedents.

More than a century ago, we recognized that Congress may not "withdraw from [Article III] judicial cognizance any matter *which, from its nature, is the subject of a suit at the common law*, or in equity, or admiralty." *Murray's Lessee*, 18 How., at 284 (emphasis added). More recently, in *Northern Pipeline*, 458 U. S. 50 (1982), the view of a majority of the Court that the breach-of-contract and misrepresentation claims at issue in that case lay "at the core of the historically recognized judicial power," *id.*, at 70 (opinion of BRENNAN, J.), and were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *id.*, at 90 (opinion of REHNQUIST, J.), contributed significantly to the Court's conclusion that the bankruptcy courts could not constitutionally adjudicate Northern Pipeline's common-law claims. In the instant litigation, the Court lightly discards both history and our precedents. The Court attempts to support the substantial alteration it works today in our Article III jurisprudence by pointing, *inter alia*, to legislative convenience; to the fact that Congress does not altogether eliminate federal-court jurisdiction over ancillary state-law counterclaims; and to Schor's "consent" to CFTC adjudication of ContiCommodity's counterclaims.* In my view, the Court's effort fails.

*The Court also rests its holding on the fact that Congress has not assigned the same sweeping judicial powers to the CFTC that it had assigned to the bankruptcy courts under the Bankruptcy Act of 1978 and that we held violated Article III in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982). While I agree with the Court that the grant of judicial authority to the CFTC is significantly narrower in scope than the grant to the bankruptcy courts under the 1978 Act, in my view, that difference does not suffice to cure the constitutional defects raised by the grant of authority over state-law counterclaims to the CFTC.

II

The Court states that in reviewing Article III challenges, one of several factors we have taken into account is "the concerns that drove Congress to depart from the requirements of Article III." *Ante*, at 851. The Court identifies the desire of Congress "to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers" as the motivating congressional concern here. *Ante*, at 855. The Court further states that "[i]t was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common-law counterclaims[;] . . . absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded." *Ante*, at 856. Were we to hold that the CFTC's authority to decide common-law counterclaims offends Article III, the Court declares, "it is clear that we would 'defeat the obvious purpose of the legislation.'" *Ibid.* Article III, the Court concludes, does not "compe[l] this degree of prophylaxis." *Ibid.*

I disagree—Article III's prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience. The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence. See Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L. J. 197, 221–222. The danger of the Court's balancing approach is, of course, that as individual cases accumulate in which the

Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.

Perhaps the resolution of reparations claims such as respondents' may be accomplished more conveniently under the Court's decision than under my approach, but the Framers foreswore this sort of convenience in order to preserve freedom. As we explained in *INS* v. *Chadha*, 462 U. S. 919, 959 (1983):

> "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. . . . With all the obvious flaws of delay [and] untidiness . . . , we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

Moreover, in *Bowsher* v. *Synar*, *ante*, p. 714, we rejected the appellant's argument that legislative convenience saved the constitutionality of the assignment by Congress to the Comptroller General of essentially executive functions, stating: "'[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .'" *Ante*, at 736 (quoting *Chadha*, *supra*, at 944). We recognized that "'[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.'" *Ante*, at 727 (quoting *Chadha*, *supra*, at 951). Despite the "conflicts, confusion, and discordance" that separation of powers may at times generate, *ante*, at

722, we held that it is necessary to endure the inconvenience of separated powers in order "'to secure liberty.'" *Ante*, at 721 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)).

It is impossible to reconcile the radically different approaches the Court takes to separation of powers in this litigation and in *Bowsher*. The Framers established *three* coequal branches of government and intended to preserve *each* from encroachment by either of the others. The Constitution did not grant Congress the general authority to bypass the Judiciary whenever Congress deems it advisable, any more than it granted Congress the authority to arrogate to itself executive functions.

III

According to the Court, the intrusion into the province of the Federal Judiciary caused by the CFTC's authority to adjudicate state-law counterclaims is insignificant, both because the CFTC *shares* in, rather than displaces, federal district court jurisdiction over these claims and because only a very narrow class of state-law issues are involved. The "sharing" justification fails under the reasoning used by the Court to support the CFTC's authority. If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance. Thus, any "sharing" of jurisdiction is more illusory than real.

More importantly, the Court, in emphasizing that *this litigation* will permit solely a narrow class of state-law claims to be decided by a non-Article III court, ignores the fact that it establishes a broad principle. The decision today may authorize the administrative adjudication only of state-law claims that stem from the same transaction or set of facts that allow the customer of a professional commodity broker to initiate reparations proceedings before the CFTC, but the

reasoning of this decision strongly suggests that, given "legislative necessity" and party consent, any federal agency may decide state-law issues that are ancillary to federal issues within the agency's jurisdiction. Thus, while in this litigation "the magnitude of any intrusion on the Judicial Branch" may conceivably be characterized as "*de minimis*," *ante*, at 856, the potential impact of the Court's decision on federal-court jurisdiction is substantial. The Court dismisses warnings about the dangers of its approach, asserting simply that it does not fear the slippery slope, *ante*, at 852, and that this litigation does not involve the creation by Congress of a "phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts." *Ante*, at 855. A healthy respect for the precipice on which we stand is warranted, however, for this reason: Congress can seriously impair Article III's structural and individual protections without assigning away "the *entire* business of the Article III courts." *Ibid.* (emphasis added). It can do so by *diluting* the judicial power of the federal courts. And, contrary to the Court's intimations, dilution of judicial power operates to impair the protections of Article III regardless of whether Congress acted with the "good intention" of providing a more efficient dispute resolution system or with the "bad intention" of strengthening the Legislative Branch at the expense of the Judiciary.

IV

The Court's reliance on Schor's "consent" to a non-Article III tribunal is also misplaced. The Court erroneously suggests that there is a clear division between the separation of powers and the impartial adjudication functions of Article III. *Ante*, at 848. The Court identifies Article III's structural, or separation-of-powers, function as preservation of the Judiciary's domain from encroachment by another branch. *Ante*, at 850. The Court identifies the impartial adjudication function as the protection afforded by Article III to individ-

ual litigants against judges who may be dominated by other branches of government. *Ante*, at 848.

In my view, the structural and individual interests served by Article III are inseparable. The potential exists for individual litigants to be deprived of impartial decisionmakers only where federal officials who exercise judicial power are susceptible to congressional and executive pressure. That is, individual litigants may be harmed by the assignment of judicial power to non-Article III federal tribunals only where the Legislative or Executive Branches have encroached upon judicial authority and have thus threatened the separation of powers. The Court correctly recognizes that to the extent that Article III's structural concerns are implicated by a grant of judicial power to a non-Article III tribunal, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, §2." *Ante*, at 851. Because the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required. In other words, consent is irrelevant to Article III analysis.

V

Our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" be reposed in an independent Judiciary. It is our obligation zealously to guard that independence so that our tripartite system of government remains strong and that individuals continue to be protected against decisionmakers subject to majoritarian pressures. Unfortunately, today the Court forsakes that obligation for expediency. I dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 867 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.

JUNE 30, 1986

Appeal Dismissed

No. 85-6900. RICHARDSON *v.* L. S. U. MEDICAL CENTER ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Affirmed. (See No. 85-1500, *ante*, p. 251, and No. 85-6593, *ante*, p. 255.)

Certiorari Granted—Vacated and Remanded

No. 84-1426. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* MCCRAY. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Allen* v. *Hardy*, *ante*, p. 255, and *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Reported below: 750 F. 2d 1113.

No. 85-97. PETROLEUM HELICOPTERS, INC. *v.* SINCOX, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, SINCOX ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207 (1986). Reported below: 759 F. 2d 19.

No. 85-1028. MICHIGAN *v.* BOOKER. C. A. 6th 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 *Allen* v. *Hardy*, *ante*, p. 255, and *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Reported below: 775 F. 2d 762.

CHIEF JUSTICE BURGER, dissenting.

I would reverse the decision of the Court of Appeals. The court concluded that the Sixth Amendment prohibits parties in a criminal case from using peremptory challenges to exclude black persons from the petit jury. In *Batson* v. *Kentucky*, 476 U. S. 79, 84-85, n. 4 (1986), petitioner raised precisely this Sixth Amendment argument. JUSTICE REHNQUIST and I rejected this posi-

tion, observing that "because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community." *Id.*, at 138. The Court in *Batson* did not challenge this conclusion and indeed, it refused to even discuss the Sixth Amendment issue. *Id.*, at 84–85, n. 4. Instead, the Court took the highly irregular step of considering an argument not raised by the petitioner, *id.*, at 112 (BURGER, C. J., dissenting), and concluded that the Equal Protection Clause was violated by the case-specific use of peremptory challenges on the basis of race.

It is apparent that the Sixth Amendment argument raised here is without merit. I would therefore simply reverse the decision of the Court of Appeals.

Miscellaneous Orders

No. — — ——. CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–1011. KEMP, WARDEN *v.* FLEMING. Application of the Attorney General of Georgia for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. 27, Orig. OHIO *v.* KENTUCKY. Accounting of the Special Master is received and ordered filed. The Special Master appointed by the Court is discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, 471 U. S. 153.]

No. 85–663. WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES *v.* PURSER ET AL. Sup. Ct. Wash.; and

No. 85–1821. UTAH ET AL. *v.* UTE INDIAN TRIBE. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85–793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for divided argument granted.

No. 85-889. COLORADO *v.* BERTINE. Sup. Ct. Colo. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1433. RICHARDSON, WARDEN *v.* MARSH. C. A. 6th Cir. [Certiorari granted, 476 U. S. 1168.] Motion for appointment of counsel granted, and it is ordered that R. Steven Whalen, Esquire, of Detroit, Mich., be appointed to serve as counsel for respondent in this case.

No. 85-1563. CALIFORNIA *v.* BROWN. Sup. Ct. Cal. [Certiorari granted, 476 U. S. 1157.] Motion for appointment of counsel granted, and it is ordered that Monica Knox, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 85-1939. IN RE BRANNEN; and
No. 85-6872. IN RE THAPER. Petitions for writs of mandamus denied.

No. 85-1965. IN RE GAUNCE. Petition for writ of mandamus and/or petition for writ of certiorari denied. C. A. 9th Cir. Reported below: 779 F. 2d 1434.

No. 85-6899. IN RE FISHER. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 85-1199. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE *v.* COUNTY OF LOS ANGELES, CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted.

No. 85-1206. ROSE *v.* ROSE ET AL. Appeal from Ct. App. Tenn. Probable jurisdiction noted.

Certiorari Granted

No. 85-1520. ANDERSON *v.* CREIGHTON ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 766 F. 2d 1269.

No. 85-1656. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* PETTY. C. A. 5th Cir. Certiorari granted. Reported below: 779 F. 2d 299.

No. 85-1672. UNITED STATES *v.* MERCHANT. C. A. 9th Cir. Certiorari granted. Reported below: 760 F. 2d 963.

No. 85–1804. WEST *v.* CONRAIL ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 780 F. 2d 361.

No. 85–1043. PILOT LIFE INSURANCE CO. *v.* DEDEAUX. C. A. 5th Cir. Certiorari granted and case set for oral argument in tandem with No. 85–686, *Metropolitan Life Insurance Co.* v. *Taylor* [certiorari granted, 475 U. S. 1009], and No. 85–688, *General Motors Corp.* v. *Taylor* [certiorari granted, 475 U. S. 1009]. Reported below: 770 F. 2d 1311.

Certiorari Denied. (See also Nos. 85–6900 and 85–1965, *supra.*)

No. 85–1494. FORELAWS ON BOARD ET AL. *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–1587. AGEE ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 884.

No. 85–1624. ROSENFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 10.

No. 85–1659. COAST CATAMARAN CORP. ET AL. *v.* HASSINGER, ADMINISTRATOR OF THE ESTATE OF HASSINGER, ET AL.; and

No. 85–1786. TIDELAND ELECTRIC MEMBERSHIP CORP. *v.* HASSINGER, ADMINISTRATOR OF THE ESTATE OF HASSINGER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 2d 1022.

No. 85–1717. WRODA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 1158, 497 N. E. 2d 1041.

No. 85–1755. LEBER *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 372.

No. 85–1805. ROSS ET AL. *v.* AFP IMAGING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 780 F. 2d 202.

No. 85–1809. MILLER CURTAIN CO., INC. *v.* RUIZ. Sup. Ct. Tex. Certiorari denied. Reported below: 702 S. W. 2d 183.

No. 85–1816. ALPINE CONSTRUCTION CO. ET AL. *v.* FRICK CONSTRUCTION CO., BY ITS TRUSTEE, RAVICK. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 581.

No. 85–1822. WILLIS *v.* CLEVELAND TRUST CO., AKA AMERITRUST CO., EXECUTOR OF THE ESTATE OF FIRESTONE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 20 Ohio St. 3d 66, 485 N. E. 2d 1052.

No. 85–1824. HAREN *v.* CITY OF CANTON, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 85–1825. EVANS ET AL. *v.* OUACHITA LOCAL NUMBER 654, UNITED PAPERWORKERS INTERNATIONAL UNION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1062.

No. 85–1827. GRIDER *v.* TEXAS OIL & GAS CORP. ET AL. Sup. Ct. Okla. Certiorari denied.

No. 85–1828. RHOADES *v.* ACLI GOVERNMENT SECURITIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 85–1831. OTIS ELEVATOR CO. *v.* RUST ENGINEERING CO. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 85–1834. BILLER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 5 Conn. App. 616, 501 A. 2d 1218.

No. 85–1838. MCKENNA *v.* WILLOW PRACTICE. Sup. Ct. S. C. Certiorari denied.

No. 85–1843. RETTIG ET AL. *v.* KENT CITY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 328.

No. 85–1845. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. Fed. Cir. Certiorari denied.

No. 85–1847. MINEO ET AL. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 939.

No. 85–1848. KOEHLER *v.* ILLINOIS CENTRAL GULF RAILROAD CO. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 473, 488 N. E. 2d 542.

No. 85–1851. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 174 Cal. App. 3d 1114, 220 Cal. Rptr. 475.

No. 85–1857. CHOW ET AL., DBA HEALING ART PHARMACY *v.* CALIFORNIA STATE BOARD OF PHARMACY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–1858. JACKSON *v.* PEPSI-COLA BOTTLERS OF TOLEDO, INC. C. A. 6th Cir. Certiorari denied. Reported below: 783 F. 2d 50.

No. 85–1863. MICHIGAN *v.* PAYNE. Sup. Ct. Mich. Certiorari denied. Reported below: 424 Mich. 475, 381 N. W. 2d 391.

No. 85–1865. BERGER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–1874. BARTEL DENTAL BOOK CO. INC. ET AL. *v.* SCHULTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 486.

No. 85–1876. COMSIA *v.* MAGNONE ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 85–1897. MACKECHNIE ET AL. *v.* COUNTY OF SULLIVAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 52, 490 N. E. 2d 523.

No. 85–1911. BAILEY *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 4th Cir. Certiorari denied.

No. 85–1912. MARR *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 85–1926. HART *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1017.

No. 85–1943. PEARCE *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 328, 784 F. 2d 1132.

No. 85–1952. BASKETT ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 85–1955. SAVINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–1956. NATHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85–1969. CITY OF OAKLAND *v.* OAKLAND RAIDERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 174 Cal. App. 3d 414, 220 Cal. Rptr. 153.

No. 85–1984. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85–1995. SHORTT ACCOUNTANCY CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1448.

No. 85–6337. DEJESUS *v.* PERALES, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 316.

No. 85–6386. HOGAN ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 769 F. 2d 886.

No. 85–6848. CHEATEM *v.* ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 85–6859. GRIFFIN *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 1226.

No. 85–6863. MOBLEY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1177.

No. 85–6866. PRUITT *v.* LANDMARK SAVINGS ASSN. ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–6869. CHICCO *v.* JOMAR REALTY, INC. C. A. 1st Cir. Certiorari denied.

No. 85–6870. THRASHER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 784 F. 2d 327.

No. 85–6874. PLIES *v.* WILLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 318.

No. 85–6877. MIDWIFE *v.* TUCSON CITIZEN NEWSPAPER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 316.

No. 85-6880. MYER *v.* DORSEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6881. LEDAY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 177 Cal. App. 3d 461, 221 Cal. Rptr. 398.

No. 85-6888. BAKER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 487 So. 2d 26.

No. 85-6894. PEREZ *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1156.

No. 85-6895. PACE *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-6896. SCOTT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 85-6898. KNIGHT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1154.

No. 85-6902. SIMS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6905. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-6907. HEATH *v.* LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT. Sup. Ct. Ky. Certiorari denied.

No. 85-6908. MABERY *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1154.

No. 85-6910. MATTHEWS *v.* SPEARS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 179.

No. 85-6912. MATHIAS *v.* GREENSPAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6922. SAMPLEY *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 610.

No. 85-6936. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6943. ROBERTSON *v.* ROBERTSON ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85-6954. MILLER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6961. MABERY *v.* KEITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6975. KIMBERLIN *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 788 F. 2d 434.

No. 85-6979. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 696.

No. 85-6996. NAVE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6999. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85-7006. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1180.

No. 85-7020. HOGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 653.

No. 85-7032. MELHEM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 75.

No. 84-1304. SYNANON CHURCH ET AL. *v.* READER'S DIGEST ASSN., INC., ET AL. Sup. Ct. Cal. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 37 Cal. 3d 244, 690 P. 2d 610.

No. 84-6698. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 756 F. 2d 310.

No. 85–1499. LANDAHL, BROWN & WEED ASSOCIATES, INC. *v.* CITY OF CAPE CORAL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 470 So. 2d 25.

No. 85–5823. WELCH *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 770 F. 2d 162.

No. 84–6895. SIRECI *v.* FLORIDA. Sup. Ct. Fla.;
No. 85–1525. HARTMAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85–6011. TUGGLE *v.* VIRGINIA. Sup. Ct. Va.;
No. 85–6273. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 85–6440. ZAGORSKI *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85–6649. EVANS *v.* MARYLAND. Ct. App. Md.;*
No. 85–6650. FOSTER *v.* MARYLAND. Ct. App. Md.;*
No. 85–6749. WICKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85–6846. WALLACE *v.* INDIANA. Sup. Ct. Ind.; and
No. 85–6891. GALL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 84–6895, 469 So. 2d 119; No. 85–1525, 703 S. W. 2d 106; No. 85–6011, 230 Va. 99, 334 S. E. 2d 838; No. 85–6273, 772 F. 2d 668; No. 85–6440, 701 S. W. 2d 808; No. 85–6649, 304 Md. 487, 499 A. 2d 1261, and 305 Md. 306, 503 A. 2d 1326; No. 85–6650, 304 Md. 439, 499 A. 2d 1236, and 305 Md. 306, 503 A. 2d 1326; No. 85–6749, 783 F. 2d 487; No. 85–6846, 486 N. E. 2d 445; No. 85–6891, 702 S. W. 2d 37.

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. 85–1353. BOX *v.* A & P TEA CO. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 772 F. 2d 1372.

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*[REPORTER'S NOTE: For separate dissenting opinion of JUSTICE MARSHALL in these cases, see *post*, p. 1023.]

No. 85–1403. KANSAS GAS & ELECTRIC CO. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 780 F. 2d 1505.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

In this case, the United States Court of Appeals for the Tenth Circuit has held that 42 U. S. C. § 5851(a),[1] which protects employees of nuclear facilities against retaliation by their employers for offering assistance to the Nuclear Regulatory Commission in carrying out its responsibilities under the Atomic Energy Act of 1954,[2] prohibits an employer from terminating a quality control inspector because the inspector has filed internal safety complaints—that is, complaints directed not to the Commission, but only to the employer itself. 780 F. 2d 1505 (1985). The Tenth Circuit concluded that although the statutory language does not unambiguously include such cases, the statute's purpose and its legislative history indicate that its extension to purely internal complaints is appropriate. *Id.*, at 1510–1513. In so holding, the Court of Appeals took note that the Court of Appeals for the Fifth Circuit had considered precisely the same statutory language and legislative history and reached the opposite conclusion in *Brown & Root, Inc.* v. *Donovan*, 747 F. 2d 1029 (1984). The Tenth Circuit specifically rejected the Fifth Circuit's ruling in *Brown & Root* and instead aligned itself with an earlier ruling of the Ninth Cir-

[1] The statute provides as follows:

"No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

"(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended." 92 Stat. 2951.

[2] 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.*

cuit that internal complaints are covered. *Mackowiak* v. *University Nuclear Systems*, 735 F. 2d 1159 (1984).

This direct conflict among the Courts of Appeals should be resolved by this Court. The issue is one of importance to both employees and operators of nuclear installations, and it is an issue that has surfaced either directly or indirectly in at least five appellate decisions in the past four years. See, in addition to the decision below and the cases cited above, the Second Circuit's decision in *Consolidated Edison Co.* v. *Donovan*, 673 F. 2d 61 (1982), and the Illinois Supreme Court's ruling in *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N. E. 2d 372 (1985), cert. denied, 475 U. S. 1122 (1986). I would grant certiorari to resolve the issue.

No. 85–1481. IOWA EX REL. MILLER, ATTORNEY GENERAL OF IOWA, ET AL. *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL.; and

No. 85–1818. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* IOWA EX REL. MILLER, ATTORNEY GENERAL OF IOWA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 771 F. 2d 347.

No. 85–1514. MICHIGAN *v.* ESSA. Ct. App. Mich. Certiorari denied. Reported below: 146 Mich. App. 315, 380 N. W. 2d 96.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent's home began to burn at about 6:20 p.m. on November 27, 1983. Within a short time the fire department responded, extinguished the fire, and departed. An hour and 20 minutes later an arson investigator of the city entered the home to conduct an investigation as to the cause. The Michigan Court of Appeals held that this was a search without a warrant which violated the Fourth Amendment. 146 Mich. App. 315, 380 N. W. 2d 96 (1985). That court relied on the concurrence in *Michigan* v. *Clifford*, 464 U. S. 287, 299 (1984) (STEVENS, J., concurring in judgment), since the inspector gave respondent no notice of the inspection.

In *Michigan* v. *Tyler*, 436 U. S. 499 (1978), we held that the Fourth Amendment was not violated when investigators returned to the scene of a building fire the morning after a fire in order to

continue a warrantless search which had commenced immediately following the fire the night before, but which could not be completed because of darkness, steam, and smoke. We reasoned that "the morning entries were no more than an actual continuation of the first." *Id.*, at 511.

Clifford involved a warrantless search following reentry of a home six hours after a fire had been extinguished. We granted certiorari in that case "to clarify doubt that appears to exist as to the application of our decision in *Tyler*." 464 U. S., at 289. Our effort at clarification, however, proved illusive. A plurality held that an administrative warrant was required for a nonconsensual reentry onto fire-damaged premises. *Id.*, at 291–292 (opinion of POWELL, J.). JUSTICE STEVENS, writing separately, held that a postfire warrantless entry would be reasonable so long as "the inspector either had given the owner sufficient advance notice to enable him or an agent to be present, or had made a reasonable effort to do so." *Id.*, at 303 (footnote omitted). JUSTICE REHNQUIST's dissent for four Members of the Court pointed out that these opinions, "far from clarifying the doubtful aspects of *Tyler*, sow[ed] confusion broadside." *Id.*, at 306.

This case provides another opportunity for the Court to clarify the confusion arising out of the opinions in *Tyler*. Local authorities need direction for their fire inspectors, who are presently left with no clear guidance for conducting important and oft-occurring arson inspections in the wake of *Clifford*'s divided reasoning. Such inspections must be conducted promptly before vandals or weather conditions blur or destroy relevant evidence. I would grant the State's petition for certiorari and set the case for argument.

No. 85–1632. ILLINOIS *v.* HATTERY. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 109 Ill. 2d 449, 488 N. E. 2d 513.

No. 85–1814. EUBANK *v.* INTERNATIONAL PAPER CO. ET AL. C. A. 5th Cir. Motion of respondent International Paper Co. for award of damages denied. Certiorari denied. Reported below: 779 F. 2d 681.

No. 85–1855. JONES *v.* DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA ET AL. C. A. 11th Cir. Motion of respondents to strike petition as frivolous denied. Certiorari denied.

No. 85–1894. FALKOWSKI *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Motion of Christic Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 246 U. S. App. D. C. 274, 764 F. 2d 907, and 251 U. S. App. D. C. 254, 783 F. 2d 252.

Rehearing Denied

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL., 476 U. S. 267;

No. 84–1513. CALIFORNIA *v.* CIRAOLO, 476 U. S. 207;

No. 85–121. KEMP, WARDEN *v.* YOUNG, 476 U. S. 1123;

No. 85–1537. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL, 476 U. S. 1110;

No. 85–1652. KEMP, WARDEN *v.* COLEMAN; and KEMP, WARDEN *v.* ISAACS ET AL., 476 U. S. 1164;

No. 85–5273. DAVID *v.* LOUISIANA, 476 U. S. 1130;

No. 85–5491. HOUSTON *v.* TENNESSEE, 476 U. S. 1164;

No. 85–6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL., 476 U. S. 1118;

No. 85–6531. SPRAGGINS *v.* GEORGIA, 476 U. S. 1120;

No. 85–6554. YOUNG *v.* MISSOURI, 476 U. S. 1109;

No. 85–6563. BUFFALOE *v.* ANDERSON, 476 U. S. 1120;

No. 85–6565. GODBEE *v.* NEWSOME, WARDEN, 476 U. S. 1120;

No. 85–6591. LAGRANGE *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL., 476 U. S. 1121;

No. 85–6610. MYERS *v.* GUILLORY, WARDEN, ET AL., 476 U. S. 1121;

No. 85–6623. BROWN *v.* JEFFERSON, 476 U. S. 1143;

No. 85–6647. DAVIDSON *v.* DAVIS, WARDEN, 476 U. S. 1143;

No. 85–6658. NOVEL *v.* PICARIELLO, JUDGE, ET AL., 476 U. S. 1143;

No. 85–6677. TRAWICK *v.* FLORIDA, 476 U. S. 1143;

No. 85–6737. RANDOLPH *v.* MUNCY, WARDEN, ET AL., 476 U. S. 1173; and

No. 85–6823. IN RE THAPER, 476 U. S. 1139. Petitions for rehearing denied.

No. 85–584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP., 476 U. S. 1124. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JULY 7, 1986

Affirmed on Appeal

No. 85–1693. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN POSTAL WORKERS UNION, AFL–CIO, ET AL. Affirmed on appeal from D. C. D. C.

Appeals Dismissed

No. 85–532. SPORTS & HEALTH CLUB, INC., DBA ST. LOUIS PARK SPORTS & HEALTH CLUB, ET AL. *v.* MINNESOTA, BY GOMEZ-BETHKE, COMMISSIONER OF DEPARTMENT OF HUMAN RIGHTS. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Reported below: 370 N. W. 2d 844.

No. 85–1170. RAPPLEYEA *v.* CAREY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. JUSTICE STEVENS would vacate the judgment and remand the case for further consideration in light of *Davis* v. *Bandemer*, *ante*, p. 109. Reported below: 66 N. Y. 2d 657, 486 N. E. 2d 830.

Certiorari Granted—Vacated and Remanded

No. 84–1447. SALCER ET AL. *v.* ENVICON EQUITIES CORP. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Randall* v. *Loftsgaarden*, *ante*, p. 647. Reported below: 744 F. 2d 935.

No. 84–1793. CITY OF MCKEESPORT ET AL. *v.* CUNNINGHAM. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Riverside* v. *Rivera*, 477 U. S. 561 (1986). Reported below: 753 F. 2d 262.

No. 85–50. SHULTZ, SECRETARY OF STATE *v.* PALMER ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Library of Congress* v. *Shaw*, *ante*, p. 310.

No. 85–377. FRESCHI, AS TRUSTEE OF WILLIAM FRESCHI TRUST *v.* GRAND COAL VENTURE ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Randall* v. *Loftsgaarden*, *ante*, p. 647, and *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985). Reported below: 767 F. 2d 1041.

No. 85–553. KEMP, WARDEN *v.* BROOKS. C. A. 11th 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 *Rose* v. *Clark*, *ante*, p. 570. Reported below: 762 F. 2d 1383.

No. 85–736. KEMP, WARDEN *v.* THOMAS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 766 F. 2d 452.

No. 85–1067. UNITED STATES *v.* BEN M. HOGAN CO., INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 769 F. 2d 1293.

No. 85–1218. KEMP, WARDEN *v.* CORN. C. A. 11th 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 *Rose* v. *Clark*, *ante*, p. 570. Reported below: 772 F. 2d 681.

No. 85–1300. COLLINS ET AL. *v.* CITY OF NORFOLK ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thornburg* v. *Gingles*, *ante*, p. 30. Reported below: 768 F. 2d 572.

No. 85–1309. KOEHLER, WARDEN *v.* MCGHAR. C. A. 6th 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 *Rose* v. *Clark*, *ante*, p. 570. Reported below: 780 F. 2d 1022.

No. 85–1345. J. A. CROSON CO. *v.* CITY OF RICHMOND. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). Reported below: 779 F. 2d 181.

No. 85–1461. AIKEN, WARDEN *v.* HYMAN; and

No. 85–6638. HYMAN *v.* AIKEN, WARDEN. C. A. 4th Cir. Motions of William G. Hyman for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases

remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570, and *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 777 F. 2d 938.

No. 85–1639. GREER, WARDEN *v.* GRAY. C. A. 7th 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 *Murray* v. *Carrier*, 477 U. S. 478 (1986). Reported below: 778 F. 2d 350.

No. 85–1853. CALIFORNIA *v.* HAMILTON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 41 Cal. 3d 408, 710 P. 2d 981.

No. 85–5513. POTTS *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570, and *Francis* v. *Franklin*, 471 U. S. 307 (1985). Reported below: 734 F. 2d 526 and 764 F. 2d 1369.

No. 85–6094. BUCKHALTER *v.* PEPSI-COLA GENERAL BOTTLERS, INC., ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *University of Tennessee* v. *Elliott*, *ante*, p. 788. Reported below: 768 F. 2d 842.

Certiorari Dismissed

No. 85–1265. MICHIGAN *v.* SHABAZ. Sup. Ct. Mich. [Certiorari granted, 475 U. S. 1094.] The order entered March 31, 1986, granting the petition for writ of certiorari is vacated. The petition for writ of certiorari is dismissed as moot.

Miscellaneous Orders

No. A–980. KADANS *v.* GUNDERSON ET AL. Sup. Ct. Nev. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–553. IN RE DISBARMENT OF VELASQUEZ. Disbarment entered. [For earlier order herein, see 476 U. S. 1102.]

No. D–554. IN RE DISBARMENT OF WOOD. Disbarment entered. [For earlier order herein, see 475 U. S. 1115.]

No. D–555. IN RE DISBARMENT OF KERPAN. Disbarment entered. [For earlier order herein, see 475 U. S. 1115.]

No. D–558. IN RE DISBARMENT OF MISHKIN. It is ordered that Stephen A. Mishkin, of Katonah, 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–559. IN RE DISBARMENT OF BURKE. It is ordered that Norman Edmund Burke, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–560. IN RE DISBARMENT OF HEYSER. It is ordered that Fred Peter Heyser, of Upper Marlboro, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–561. IN RE DISBARMENT OF STANTON. It is ordered that Nile Stanton, of Indianapolis, Ind., 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. 105, Orig. KANSAS *v.* COLORADO. It is ordered that the Honorable Wade H. McCree, Jr., of Ann Arbor, Mich., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 475 U. S. 1079.]

No. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 815.] Case restored to the calendar for reargument insofar as it poses the issue whether a presumptively reasonable attorney's fee award under § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d), may be "multiplied" or otherwise enhanced to reflect the risk that plaintiffs might not have prevailed and, therefore, might have obtained from defendants no attorney's fees at all.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. [Certiorari granted, 476 U. S. 1139.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. John H. Corbett, Jr., Esquire, of Pittsburgh, Pa., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

Certiorari Granted

No. 85–1129. JOHNSON *v.* TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 770 F. 2d 752.

No. 85–999. UNITED STATES *v.* PARADISE ET AL. C. A. 11th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 767 F. 2d 1514.

No. 84–6811. MCCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1, 2, 3, 4, and 5 presented by the petition. Reported below: 753 F. 2d 877.

Certiorari Denied

No. 84–5878. LOCKETT *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 407.

No. 84-6791. EARNEST *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 95, 703 P. 2d 872.

No. 84-6983. BOSQUE *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-177. ORR, SECRETARY OF THE AIR FORCE, ET AL. *v.* TURNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 817.

No. 85-276. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* WALKER. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 942.

No. 85-556. KEMP, WARDEN *v.* DRAKE. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1449.

No. 85-908. CRANKE ET AL. *v.* HAYGOOD. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 1350.

No. 85-1071. RAYBURN *v.* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 1164.

No. 85-1085. AFRO-AMERICAN POLICE ASSN., INC., ET AL. *v.* UNITED STATES; and

No. 85-1404. UNITED STATES *v.* AFRO-AMERICAN POLICE ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 881.

No. 85-1104. SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION *v.* FUSON. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 55.

No. 85-1341. JOHNSON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* MANZIE. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1161.

No. 85-1394. HAGLER *v.* CALLAHAN, WARDEN; and

No. 85-1550. CALLAHAN, WARDEN, ET AL. *v.* HAGLER. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 711.

No. 85-1592. BURKE ET AL. *v.* MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 780 F. 2d 5.

No. 85–1635. BUTTS ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 141.

No. 85–1688. JOHNS-MANVILLE SALES CORP. *v.* CATHEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 1565.

No. 85–1837. BLOCK ET AL. *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 85–5474. AILLON *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–5589. RUSSELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–5624. STEINBERG *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–5913. MARTIN *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 711.

No. 85–6045. LESCALLETT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–6064. MIDDLETON *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 2d 1083.

No. 85–6158. AGNEW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85–6283. SLINKER *v.* KEPLINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 52.

No. 85–6329. BOWEN *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 672.

No. 85–492. DEVEREAUX ET AL. *v.* GEARY ET AL. C. A. 1st Cir. Motion of Phil Caruso for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 765 F. 2d 268.

No. 85–976. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 773 F. 2d 136.

No. 85–1225. BAKER *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, ET AL.;

No. 85–1251. TEXAS *v.* HILL, 47TH DISTRICT ATTORNEY OF TEXAS;

No. 85–1412. HILL, 47TH DISTRICT ATTORNEY OF TEXAS *v.* TEXAS; and

No. 85–1512. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, ET AL. *v.* BAKER. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 769 F. 2d 289 and 774 F. 2d 1285.

No. 85–1317. TUCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 773 F. 2d 136.

No. 85–5802. BROOKS *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 762 F. 2d 1383.

No. 85–6022. CHURCH *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 767 F. 2d 639.

No. 85–6240. HAMILTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 478 So. 2d 123.

No. 85–1583. JOHNS-MANVILLE SALES CORP. ET AL. *v.* JACKSON. C. A. 5th Cir. Motion of Keene Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 781 F. 2d 394.

No. 85–5451. RILEY *v.* DELAWARE. Sup. Ct. Del.;

No. 85–6447. TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir.;

No. 85–6671. ROBERTS *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas S. C., Berkeley County;

No. 85–6748. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 85–6818. WILLIAMS *v.* KEMP, WARDEN. Sup. Ct. Ga.; and

No. 85–6834. ROOK *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: No. 85–5451, 496 A. 2d 997; No. 85–6447, 776 F. 2d 1487; No. 85–6748, 109 Ill. 2d 391,

488 N. E. 2d 255; No. 85–6818, 255 Ga. 380, 338 S. E. 2d 669; No. 85–6834, 783 F. 2d 401.

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. 85–6648. HUFFINGTON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 559, 500 A. 2d 272, and 305 Md. 306, 503 A. 2d 1326.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting in this case and in No. 85–6649, *Evans* v. *Maryland*, cert. denied, *ante*, p. 1010, and No. 85–6650, *Foster* v. *Maryland*, *ante*, p. 1010.

Petitioners were sentenced to death pursuant to a procedural scheme that they strenuously contend is unconstitutional. The Maryland Court of Appeals, through a highly creative reading of Maryland law and a heavy dose of procedural technicality, managed to affirm petitioners' sentences without reaching their constitutional claim. I consider such evasion repugnant, and I dissent from the Court's denial of certiorari.

The dispute in these cases rests on Md. Ann. Code, Art. 27, § 413(h) (1957). That section, designed to guide the deliberations of the sentencing jury in capital cases, provides:

> "(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> "(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

> "(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life."

The language of these provisions is clear: death shall be imposed *whenever* mitigating circumstances do not outweigh aggravating circumstances. It follows that death must be imposed when mitigating and aggravating circumstances are in equipoise. Put another way, death must be imposed *unless* mitigating circumstances outweigh aggravating circumstances: the burden of proof on the question of whether mitigating circumstances outweigh aggravating circumstances is on the defendant.

This understanding of the statute is confirmed by Maryland Rule 4–343, a recodification of Md. Rules Proc. 772A (superseded), which prescribes the verdict sheet used in Maryland capital sentencing proceedings. In Section I of that verdict sheet, the jury lists the aggravating circumstances it has found. In Section II, it lists the mitigating circumstances it has found. In Section III, it is instructed to answer "yes" or "no" to the following statement: "Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in Section II outweigh the aggravating circumstances marked 'yes' in Section I." The jury is further instructed that if Section III is marked "no," it must enter a sentence of death. This rule, enacted contemporaneously with § 413, effectuates the plain language of the statute—the jury must return a sentence of death unless the defendant affirmatively proves that mitigating outweigh aggravating circumstances.

Despite the apparent clarity of the statutory language and the verdict sheet, the Maryland Court of Appeals in *Tichnell* v. *State*, 287 Md. 695, 730, 415 A. 2d 830, 848–849 (1980), appeared to read the statute differently. It stated:

> "Section 413 does not explicitly specify which party has the burden of producing evidence and the burden of persuasion. . . . [I]f the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. § 413(h)(2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion

> on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

The court did not attempt to reconcile this reading with the language of § 413(h), or indeed with the court rule it had approved two years earlier.

Pronouncements of the Maryland Court of Appeals in cases subsequent to *Tichnell* were conflicting. The Maryland courts continued to agree that the rule established by that court as Md. Rules Proc. 772A and 4–343, instructing the jury that it must return a sentence of death if mitigating circumstances do not outweigh aggravating, was valid under the Court of Appeals' decisions. Capital defendants, in case after case, continued unsuccessfully to challenge § 413(h) as unconstitutionally allocating that burden. See *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (MARSHALL, J., dissenting from denial of certiorari) (Court should review constitutionality of § 413(h) because it appears to place burden on defendant); *Foster* v. *State*, 304 Md. 439, 471, 499 A. 2d 1236, 1253 (1985) (argument that Maryland capital punishment statute places improper burden on defendants at sentencing phase "made in virtually all death sentence appeals in this Court"). The Maryland Court of Appeals did not return to the point directly, except occasionally to refer back to *Tichnell* or to quote or paraphrase the language of the statute. *E. g.*, *Johnson* v. *State*, 303 Md. 487, 537, 495 A. 2d 1, 26 (1985), cert. denied, 474 U. S. 1093 (1986); *Trimble* v. *State*, 300 Md. 387, 415, n. 16, 478 A. 2d 1143, 1157, n. 16 (1984), cert. denied, 469 U. S. 1230 (1985); *Johnson* v. *State*, 292 Md. 405, 438, 439 A. 2d 542, 560–561 (1982). The jury instruction required by Rules 772A and 4–343 continued in use.

In these cases, petitioners were convicted of murder and sentenced to death. At the trial and appellate levels, they strenuously challenged the burdens established by Maryland law, attacking § 413(h) "as implemented by Md. Rule 772A" as placing the burden on the capital defendant to convince the sentencer that mitigating circumstances outweigh aggravating circumstances. See *Evans* v. *State*, 304 Md. 487, 554, 499 A. 2d 1261, 1296 (1985) (McAuliffe, J., concurring and dissenting) (quoting petitioner Evans' appellate brief).

The Maryland Court of Appeals rejected petitioners' challenge. Their attack, it explained, reflected a misunderstanding of *Tichnell* and of Maryland law. The language of the Maryland statute,

the court stated, in fact did not speak to the "case where the sentencing authority found the aggravating and mitigating circumstances to be evenly balanced or was unable to determine which outweighed the other." *Foster, supra,* at 478–479, 499 A. 2d, at 1256. The burden of proof in such cases, the court definitively stated, was on the prosecution.

One might think that this ruling would have been cause for celebration by petitioners. Petitioners were condemned to death pursuant to instructions that had put the burden of proof on them at a key point in the sentencing proceeding. They had strenuously challenged that scheme both at the trial and appellate levels. And the Maryland Court of Appeals had just held that state law would not permit such an imposition of the burden. One might forgive petitioners for believing that they were therefore due to receive new sentencing proceedings. The Maryland Court of Appeals, however, disagreed.

The Maryland Court of Appeals did not contest that petitioners had challenged the constitutionality of the *statute* at length both at the trial and appellate levels. It held, however, that petitioners had committed a fatal error in drafting their appellate briefs. They had limited their challenge to the statute, and had neglected explicitly to challenge the state-prescribed instructions and verdict sheet, which tracked the statutory language. Since the statute as interpreted was constitutional, the court reasoned, and petitioners had preserved no other challenges, there was no cause for reversal. The court noted that counsel for at least one petitioner had expressly objected at trial when the trial judge, instructing the jury on the weighing of aggravating and mitigating circumstances, used the language of § 413(h). Even were the issue not waived on appeal, the court ruled, there was no error, because the language of § 413(h) itself "'does not place any burden . . . upon the accused.'" *Foster* v. *State*, 305 Md. 306, 318, 503 A. 2d 1326, 1332 (1986).

I find this result unconscionable. I have long believed that the Maryland statute, as written, unconstitutionally places the burden of proof on capital defendants at the sentencing phase of their trials. See *Stebbing* v. *Maryland, supra.* I am gratified that the Maryland Court of Appeals has read that burden of proof out of the statute. But I am wholly unconvinced by the reasoning that that court used to avoid extending the benefits of its decision to petitioners.

First, it is plain that any rational juror would understand the language of § 413(h) and Rule 4–343 as placing the burden of persuasion on the accused. Indeed, I cannot imagine any other way to read the statute that does not completely ignore its words. No fair-minded juror could have understood from these instructions that the burden was upon the State to prove by a preponderance of the evidence that aggravating circumstances must outweigh mitigating circumstances before a sentence of death could be returned. "It is distressing to accept a judicial construction that black is white; it is folly to suggest that jurors will arrive at the same conclusion." *Evans*, *supra*, at 558, 499 A. 2d, at 1298 (McAuliffe, J., concurring and dissenting).

The Court of Appeals' resolution of the waiver issue, further, allowed it to frustrate key federal rights only by means of technicality worthy of 17th-century pleading. Once petitioners attacked the burden of proof imposed by the language of the statute, their failure explicitly to argue that instructions precisely tracking the language of the statute were similarly flawed was, to say the least, understandable. Reasonably prudent counsel could have assumed that if the Court of Appeals had found that the language of the statute impermissibly imposed the ultimate burden on defendants, it would have similarly disapproved instructions to the same effect. Only the court's "interpretation" of § 413(h) to obviate the constitutional claim created petitioners' dilemma. The court stated that it was merely reaffirming what had been the law since *Tichnell;* yet, as the partially dissenting judge below remarked:

> "[T]he frequency with which defense counsel have argued since *Tichnell I* that the statute improperly places the burden of ultimate persuasion upon the defendant, and the failure of experienced and able defense counsel to argue for an instruction to the opposite effect upon the authority of *Tichnell I* suggests to me that the 'interpretation' announced [in this case] must be ranked among the best kept secrets in this State." *Evans*, *supra*, at 556, n. 5, 499 A. 2d, at 1297, n. 5 (McAuliffe, J., concurring and dissenting).

I do not complain about the fact that the Maryland Court of Appeals has chosen to correct the error of the Maryland Legislature in drafting § 413(h). Its decision to deny petitioners the benefit of that change, however, epitomizes the arbitrary and capricious

administration of the death penalty in this Nation. I would grant the petitions for certiorari.

Rehearing Denied

No. 85–1823. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 476 U. S. 1154;

No. 85–5022. RUSHING *v.* LOUISIANA, 476 U. S. 1153;

No. 85–5082. WATSON *v.* BLACKBURN, WARDEN, 476 U. S. 1153;

No. 85–5640. LILES *v.* OKLAHOMA, 476 U. S. 1164;

No. 85–5736. MCDOWELL *v.* NORTH CAROLINA, 476 U. S. 1165;

No. 85–5957. IN RE SHEWCHUN, 476 U. S. 1156;

No. 85–6639. TORNERO *v.* UNITED STATES, 476 U. S. 1143;

No. 85–6729. GORDON *v.* NUCCI ET AL., 476 U. S. 1173; and

No. 85–6774. JUDD *v.* UNITED STATES ET AL., 476 U. S. 1184.

Petitions for rehearing denied.

JULY 8, 1986

Miscellaneous Order

No. A–5. MESSER *v.* KEMP, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

JULY 11, 1986

Dismissal Under Rule 53

No. 85–1985. WALDRON ET UX. *v.* SHELL OIL CO. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 936.

JULY 14, 1986

Dismissal Under Rule 53

No. 85–2073. NORTHERN PETROCHEMICAL CO. *v.* STUDIENGESELLSCHAFT KOHLE, MBH. C. A. Fed. Cir. Certiorari dis-

missed under this Court's Rule 53. Reported below: 784 F. 2d 351.

JULY 22, 1986

Dismissals Under Rule 53

No. 85–663. WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES *v.* PURSER ET AL. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 53. Reported below: 104 Wash. 2d 159, 702 P. 2d 1196.

No. 85–2009. COCA-COLA BOTTLING COMPANY OF THE SOUTHWEST ET AL. *v.* TEXAS. Appeal from Ct. App. Tex., 4th Sup. Jud. Dist., dismissed under this Court's Rule 53. Reported below: 697 S. W. 2d 677.

No. 85–1726. ESCALANTE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 782 F. 2d 1052.

JULY 28, 1986

Miscellaneous Order

No. A–53. ARAVE, WARDEN, ET AL. *v.* CREECH. Application of the Solicitor General of Idaho for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Ninth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE STEVENS took no part in the consideration or decision of this application.

JULY 31, 1986

Miscellaneous Order

No. A–72. SMITH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application. JUSTICE STEVENS took no part in the consideration or decision of this application.

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 in order

to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

AUGUST 5, 1986

Miscellaneous Order

No. A–75 (86–5026). WINGO *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

AUGUST 6, 1986

Miscellaneous Order

No. A–67. BERRY *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

AUGUST 12, 1986

Dismissal Under Rule 53

No. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1157.] Writ of certiorari as to petitioners Alumex Inc. and Hunter Engineering Inc. dismissed under this Court's Rule 53.

AUGUST 19, 1986

Dismissal Under Rule 53

No. 86–187. TEXACO INC. ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari dismissed under this Court's Rule 53. Reported below: 795 F. 2d 1021.

Miscellaneous Orders

No. A–940 (85–7002). DAWSON *v.* UNITED STATES. C. A. 3d Cir. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–1006. CITY OF YONKERS ET AL. *v.* UNITED STATES ET AL. D. C. S. D. N. Y. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–1008 (85–1535). VEREZ ET AL. *v.* VIRGINIA. Sup. Ct. Va. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

Certiorari Denied

No. 86–5299 (A–114). WOOLLS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 798 F. 2d 695.

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 the petition for writ of certiorari, and would vacate the death sentence in this case.

Rehearing Denied

No. 84–1948. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL., 476 U. S. 926;

No. 85–755. REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER, 476 U. S. 852;

No. 85–1411. MCCALLUM *v.* UNITED STATES, 476 U. S. 1182;

No. 85–1459. POWELL *v.* POWELL, 476 U. S. 1180;

No. 85–1641. MULLIGAN *v.* HAZARD ET AL., 476 U. S. 1174;

No. 85–1648. CALIFORNIA HOSPITAL ASSN. ET AL. *v.* HENNING, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA, 477 U. S. 904; and

No. 85–1711. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD CO., 476 U. S. 1160. Petitions for rehearing denied.

No. 85–1740. KANANEN ET UX. *v.* SUN BANK OKEECHOBEE, FKA COMMERCIAL BANK OKEECHOBEE, FLORIDA, ET AL., 476 U. S. 1182;

No. 85–1793. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH, 477 U. S. 905;

No. 85–1872. COOK *v.* PETER KIEWIT SON'S CO. ET AL., 476 U. S. 1183;

No. 85–1875. SCHUCHMAN ET UX. *v.* UNITED STATES ET AL., 477 U. S. 905;

No. 85–5466. CELESTINE *v.* BLACKBURN, WARDEN, 476 U. S. 1164;

No. 85–5886. RAULT *v.* LOUISIANA, 476 U. S. 1178;

No. 85–5986. JONES *v.* LOUISIANA, 476 U. S. 1178;

No. 85–6308. LOWENFIELD *v.* LOUISIANA, 476 U. S. 1153;

No. 85–6347. BIRDSELL *v.* UNITED STATES, 476 U. S. 1119;

No. 85–6389. FOSTER, AKA LEE *v.* MISSOURI, 476 U. S. 1178;

No. 85–6498. CARDINAL *v.* UNITED STATES, 476 U. S. 1161;

No. 85–6710. KOENIG *v.* FOSHEIM ET AL., 476 U. S. 1172;

No. 85–6717. OBOLENSKY *v.* POTTER ET AL., 476 U. S. 1172;

No. 85–6742. JOHNSTON *v.* PERROTT, 476 U. S. 1166;

No. 85–6826. SELLNER *v.* PANAGOULIS, AKA HUDNALL, ET AL., 477 U. S. 907;

No. 85–6843. BRYANT *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, 477 U. S. 907; and

No. 85–6948. IN RE GAY, 477 U. S. 903. Petitions for rehearing denied.

No. 85–6404. KEPFORD *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL., 476 U. S. 1158. Motion for leave to file petition for rehearing denied.

AUGUST 21, 1986

Miscellaneous Order

No. A–131. SMITH *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this application.

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 in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

AUGUST 25, 1986

Miscellaneous Order

No. A–140. WICKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

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 in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

SEPTEMBER 2, 1986

Dismissal Under Rule 53

No. 86–5137. PARK HUNG QUAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 789 F. 2d 711.

SEPTEMBER 3, 1986

Miscellaneous Orders

No. A–12 (85–1722). O'LONE, ADMINISTRATOR, LEESBURG PRISON COMPLEX, ET AL. *v.* ESTATE OF SHABAZZ ET AL. C. A. 3d Cir. Application for recall and stay of mandate, addressed to JUSTICE WHITE and referred to the Court, denied. JUSTICE REHNQUIST would grant this application.

No. A–49 (85–2132). KEHOE *v.* HOFMANN. C. A. 3d Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–550. IN RE DISBARMENT OF MICHAELS. Disbarment entered. [For earlier order herein, see 475 U. S. 1092.]

No. D–551. IN RE DISBARMENT OF NICHOLS. Disbarment entered. [For earlier order herein, see 475 U. S. 1093.]

No. D–562. IN RE DISBARMENT OF DRAKE. It is ordered that Robert F. Drake, of Hattiesburg, Miss., 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–563. IN RE DISBARMENT OF JAMES. It is ordered that Edith L. James, of Austin, Tex., 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. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. [Certiorari granted, 475 U. S. 1118.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motions of Council on Religious Freedom, Catholic League for Religious and Civil Rights, American Jewish Congress, and General Conference of Seventh-day Adventists for leave to file briefs as *amici curiae* granted.

No. 85–608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. [Certiorari granted, 475 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–693. ASAHI METAL INDUSTRY CO., LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST). Sup. Ct. Cal. [Certiorari granted, 475 U. S. 1044.] Motion of California Manufacturers Association for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 85–792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85–793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1081.] Motion of respondents Brotherhood of Locomotive Engineers et al. for divided argument granted.

No. 85–1180. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* KEENE. D. C. E. D. Cal. [Probable jurisdiction noted, 475 U. S. 1117.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 85–1513. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* AGUILLARD ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 476 U. S. 1103.] Motion of appellants for divided argument denied.

No. 85–5221. GRIFFITH *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 476 U. S. 1157.] Motion of petitioner to reschedule oral argument denied.

No. 85–5915. WRIGHT ET AL. *v.* CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY. C. A. 4th Cir. [Certiorari granted, 474 U. S. 1081.] Motion of National Association of Housing and Redevelopment Officials et al. for leave to file a brief as *amici curiae* out of time denied.

No. 85–6461. MARTIN *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 475 U. S. 1119.] Motion of Ohio Public Defender Commission for leave to file a brief as *amicus curiae* granted. Motion of Ohio Public Defender Commission for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

Rehearing Denied

No. 84–2015. MACDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL., 477 U. S. 340;

No. 85–162. NEW MEXICO *v.* EARNEST, 477 U. S. 648;

No. 85–1225. BAKER *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, ET AL., *ante*, p. 1022;

No. 85–1317. TUCKER *v.* UNITED STATES, *ante*, p. 1022; and

No. 85–1380. WOODHOUSE *v.* UNITED STATES BUREAU OF INDIAN AFFAIRS ET AL., 476 U. S. 1181. Petitions for rehearing denied.

No. 85–1500. ACOSTA *v.* LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL., *ante*, p. 251;

No. 85–1876. COMSIA *v.* MAGNONE ET AL., *ante*, p. 1006;

No. 85–1965. IN RE GAUNCE, *ante*, p. 1003;

No. 85–5319. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 477 U. S. 168;

No. 85–5990. MONTGOMERY *v.* SEITER ET AL., 476 U. S. 1160;

No. 85–6022. CHURCH *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, *ante*, p. 1022;

No. 85–6541. SPANN *v.* CLARK, 475 U. S. 1143;

No. 85–6671. ROBERTS *v.* AIKEN, WARDEN, ET AL., *ante*, p. 1022;

No. 85–6748. WILLIAMS *v.* ILLINOIS, *ante*, p. 1022;

No. 85–6877. MIDWIFE *v.* TUCSON CITIZEN NEWSPAPER ET AL., *ante*, p. 1007; and

No. 85–6899. IN RE FISHER, *ante*, p. 1003. Petitions for rehearing denied.

SEPTEMBER 4, 1986

Miscellaneous Order

No. A–161 (86–5379). WATSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

SEPTEMBER 11, 1986

Miscellaneous Orders

No. A–87 (86–5436). GLASS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. A–130. MOORE *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending appeal to the United States Court of Appeals for the Fifth Circuit. THE CHIEF JUSTICE would deny the application for stay.

No. A–186 (86–5426). BRODGON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–557. IN RE DISBARMENT OF KEIDEN. Disbarment entered. [For earlier order herein, see 476 U. S. 1138.]

No. D–564. IN RE DISBARMENT OF HOLZER. It is ordered that Reginald Jack Holzer, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–565. IN RE DISBARMENT OF MCCLOSKEY. It is ordered that James Burns McCloskey, of Timonium, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–566. IN RE DISBARMENT OF FRAZIN. It is ordered that Barry Stephan Frazin, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–567. IN RE DISBARMENT OF KIRWAN. It is ordered that Joseph Kevin Kirwan, of St. Joseph, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–568. IN RE DISBARMENT OF MOUNTAIN. It is ordered that Richard Keith Mountain, of Newton, Kan., be suspended from the practice of law in this Court and that a rule issue, return-

able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–569. IN RE DISBARMENT OF CHRISTAKIS. It is ordered that Lee J. Christakis, of Gary, Ind., 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–570. IN RE DISBARMENT OF PAYNE. It is ordered that K. Richard Payne, of Fort Wayne, Ind., 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–571. IN RE DISBARMENT OF WILLIAMS. It is ordered that David F. Williams, of Springfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–573. IN RE DISBARMENT OF SHIELDS. It is ordered that William J. Shields, of Garfield Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–574. IN RE DISBARMENT OF BRANNEN. It is ordered that Joseph Carchner Brannen, of Coral Gables, 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–575. IN RE DISBARMENT OF SICKMEN. It is ordered that Russell T. Sickmen, of Hauppauge, 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–576. IN RE DISBARMENT OF WEISS. It is ordered that Steven J. Weiss, 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–577. IN RE DISBARMENT OF HARRISON. It is ordered that Charles Julian Harrison, of Towson, Md., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 85-140. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL., *ante*, p. 186. Petition for rehearing denied.

SEPTEMBER 15, 1986

Dismissal Under Rule 53

No. 85-2122. HOPE ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245 ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 826.

SEPTEMBER 16, 1986

Miscellaneous Orders

No. A-205. RILES *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, 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 in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

No. A-213. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* RILES. Application of the Attorney General of Texas for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Southern District of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied.

SEPTEMBER 17, 1986

Miscellaneous Order

No. A-207. RAULT *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE

WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay teminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 18, 1986

Miscellaneous Order

No. A–211 (86–5500). ROOK *v.* RICE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the stay application and the petition for certiorari and would vacate the sentence in this case.

II

But even if I did not hold this view, I would grant the stay of execution in this case and vote to hold the petition for certiorari pending this Court's disposition of *McCleskey* v. *Kemp*, cert. granted, *ante*, p. 1019, and *Hitchcock* v. *Wainwright*, cert. granted, 476 U. S. 1168 (1986). Rook contends that newly available social science evidence demonstrates unconstitutional, systemwide racial disparities in North Carolina's capital sentencing system. He maintains that the evidence is sufficient to warrant a hearing on his claim. These questions are similar to those presented in *McCleskey* and *Hitchcock*, cases that will be argued in October of the 1986 Term, and other petitions that are before the Court and upon which the Court has not yet acted.

Other petitioners have presented similar claims of systemwide racial disparities in capital sentencing and have requested stays of execution from this Court in light of our grants of certiorari in *McCleskey* and *Hitchcock*. This Court has granted stays of

execution in *Berry* v. *Phelps*, *ante*, p. 1030; *Wingo* v. *Blackburn*, *ante*, p. 1030; *Watson* v. *Blackburn*, *ante*, p. 1036; *Glass* v. *Blackburn*, *ante*, p. 1036; *Moore* v. *Blackburn*, *ante*, p. 1037; *Brogdon* v. *Blackburn*, *ante*, p. 1037; and most recently, *Rault* v. *Blackburn*, *ante*, p. 1039.

In this case, the District Court and the Fourth Circuit, 783 F. 2d 401 (1986), have refused to grant a stay of execution on the ground that Rook's petition for habeas corpus relief is successive and therefore barred pursuant to Habeas Corpus Rule 9(b). Rook concedes that his arguments regarding the unconstitutional application of the death penalty in North Carolina were presented in his previous federal petition; he maintains, however, that his petition should be heard pursuant to the "ends of justice" exception recognized by this Court in *Sanders* v. *United States*, 373 U. S. 1 (1963). He contends that a new study, Arbitrariness of the Capital Death Penalty (to be published in January 1987 by University Press), authored by Professors Nakell and Hardy of the University of North Carolina, does not suffer from the inadequacies which the District Court found in the evidence submitted in support of his first petition. Moreover, the study was not available at the time Rook filed his initial petition for habeas relief. He further argues that the new study provides substantial support for his theory that the administration of the death penalty in North Carolina suffers from a systemic unconstitutional flaw.

The Fourth Circuit held that Rook had not made the necessary showing that he did not receive a "full and fair" hearing on the question and found that the new evidence did not "bear upon the constitutionality of the applicant's detention." See *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). This Court evidently agrees that the petition is successive, and I therefore dissent.

Initially, I note that Rule 9(b) is phrased in permissive, and not mandatory terms:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In *Sanders* v. *United States*, *supra*, this Court set forth guidelines for cases involving potentially successive petitions:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15.

The Court recently stated that, as a means of identifying those cases in which federal courts should exercise their discretion to hear a successive petition, we will "continue to rely on the reference in *Sanders* to the 'ends of justice.'" *Kuhlmann* v. *Wilson*, 477 U. S. 436, 451 (1986) (plurality opinion). See also *id.*, at 470–471 (BRENNAN, J., dissenting).

Petitioner has made the necessary showing that the "ends of justice" will be served by the hearing of his second petition. When petitioner initially raised his racial-disparity claim in petitions for both state and federal postconviction relief, the study upon which he now relies, which examines the imposition of the death penalty in North Carolina between 1977 and 1978, was not available. When Rook filed the instant petition, he raised only the racial-disparity claim and presented in support of that claim the Nakell and Hardy manuscript.

The Fourth Circuit felt that petitioner's new evidence was inadequate because (1) it does not address the time period in which Rook's punishment was assessed, and (2) it does not demonstrate that Rook's sentence was the result of intentional discrimination. As to the first point, the significance of the new study is a matter to be determined at an evidentiary hearing and not in haste on a stay application. The question presented in *Hitchcock* involves the evidentiary showing necessary to obtain a hearing on one's claim that the imposition of the death penalty in a certain State is tainted by a systemic flaw. We simply do not now know whether the Nakell and Hardy study would raise a serious question about the constitutionality of petitioner's sentence. The Court has, in effect, prejudged the value of petitioner's proffered evidence. As to the second point, the necessity of proof of intentional discrimination is the subject of the upcoming *McCleskey* case.

Under these circumstances, it cannot be said that petitioner has not presented sufficient evidence to invoke the "ends of justice"

exception to the successive petition rule. Petitioner has not deliberately withheld evidence; he has at no point abandoned his claim. He has persisted in asserting the unconstitutionality of his sentence and now seeks to present evidence supporting his claim, *which he could not have presented at any earlier moment.* His petition is nonetheless deemed successive and is summarily rejected. I suggest that today's action leaves habeas petitioners with a cold choice: omit the claim from the initial federal petition and be deemed to abuse the writ when the claim is raised in a second petition after the discovery of new evidence, or include the claim in the initial petition and be deemed to have filed a successive petition in the event new evidence arises to justify a second petition. Under well-established standards of this Court, the petition is not successive.*

III

Finally, the Court finds itself once again in the morally compromised position taken in *Straight* v. *Wainwright*, 476 U. S. 1132, 1134 (1986). Four Justices have voted to stay Rook's execution and hold the case until a decision is reached in *McCleskey*. Thus, there are four votes to stay the execution, and four votes to hold the petition for certiorari, but not a fifth vote to stay the execution. Under normal circumstances, then, this case would be held pending the decision of this Court in *McCleskey*. "It is unthinkable to me that the practice that four votes to grant certiorari trigger an 'automatic' fifth vote to stay an execution should not apply to a 'hold' when a man's life is in the balance." 476 U. S., at 1135.

I dissent.

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*Most recently, in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), this Court examined the boundaries of the "ends of justice" exception to the successive petition rule, and a plurality suggested that the "ends of justice" are served by successive review only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. Initially, I note that the plurality's analysis plainly has no bearing on the instant case, which involves the constitutionality of a sentence of death, rather than the constitutionality of a conviction. The presence of aggravating circumstances and the legitimacy of the sentencing procedures are the crucial questions when one assesses the validity of the death sentence, not the justification for the conviction. See *id.*, at 471–472, n. 7 (BRENNAN, J., dissenting).

SEPTEMBER 22, 1986

Dismissals Under Rule 53

No. 86-124. HABERSHAM AT NORTHRIDGE *v.* FULTON COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 791 F. 2d 170.

No. 85-2060. MINGEY ET AL. *v.* LLAGUNO ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 804 F. 2d 143.

SEPTEMBER 23, 1986

Miscellaneous Orders

No. A-224. DAVIS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the application for stay.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.*

Allen Davis and Kenneth Hardwick were scheduled to be executed on September 23, 1986. On the morning of September 22, Davis and Hardwick filed habeas corpus petitions in the Florida Supreme Court, that has original jurisdiction to issue extraordinary writs under Florida Rule of Appellate Procedure 9.030(a)(3). The Florida court denied both applications by order, stating in each case that it would "file an opinion at a later date setting forth its reasons for the denial of the Petition." At 10:25 p.m. on that day, less than nine hours before the scheduled executions, Davis and Hardwick filed applications with me, as Circuit Justice, seeking stays of execution until this Court can consider their petitions for writs of certiorari to review the Florida decisions. The sole basis for their request is a claim that in Florida capital punishment

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*[REPORTER'S NOTE: This opinion also applies to No. A-225, *post*, p. 1046.]

is applied discriminatorily on the basis of the race of the victim. I granted a temporary stay until September 23 at 3 p.m. and referred the applications to the full Court.

I

The State asks us to deny the applications, claiming that Davis and Hardwick were barred by state law from raising their claims in the Florida Supreme Court. The State asserts that Davis' claim was barred because he did not raise it on direct appeal from his conviction. See *Stone* v. *State*, 481 So. 2d 478, 479 (Fla. 1985). The State also asserts that Hardwick's claim was filed in the wrong forum. See *Ford* v. *Wainwright*, 451 So. 2d 471 (Fla. 1984) (a claim may not be raised for the first time in original habeas proceedings in the Florida Supreme Court). According to the State, Hardwick's claim should have been filed in a Florida trial court under Florida Rule of Criminal Procedure 3.850. Davis and Hardwick ask us to ignore these procedural questions.

We note that Davis filed a habeas petition last night, September 22, in the Federal District Court for the Middle District of Florida (Black, J.). This morning, that court denied the petition and refused to grant a certificate of probable cause. Judge Black concluded that Davis had abused the writ by "intentionally delaying the raising of grounds for habeas relief."[1] 644 F. Supp. 269, 270 (1986).

Despite this record of unexplained delay, I concur in the Court's decision to grant these applications. They now raise claims similar to the issue presented in *Hitchcock* v. *Wainwright*, 476 U. S. 1168 (1986) (writ of certiorari granted), to be argued here on October 15, 1986. No Florida court has specifically addressed the State's contentions that the claims are procedurally barred. The Florida Supreme Court decisions may rest on those grounds, but that court has not published an opinion. In the past I have found procedural bars apparent on the face of a stay application. See *Woodard* v. *Hutchins*, 464 U. S. 377, 378 (1984) (POWELL, J., concurring). I am reluctant to do so here, however, because the alleged bars depend on an interpretation of state law. In these applications, I am unwilling to assume that the Florida Supreme

[1] Cf. Habeas Corpus Rule 9(a) (a petition may be dismissed if the State is "prejudiced in its ability to respond to the petition by delay in its filing" unless the petitioner shows that it is based on newly discovered grounds).

Court decisions rest on procedural grounds not apparent on the face of the orders.

II

No explanation has been offered either by Davis or by Hardwick for waiting more than a month, and until the eve of the execution date, to assert the present claims in any court, state or federal. It is my understanding that the Florida Bar, at least since 1984, has assured state and federal courts that it would provide counsel promptly when needed in capital cases. Although unlikely, it may be that neither Davis nor Hardwick knew that counsel always were available. Nor are we informed as to when counsel were engaged in these cases. In any event, I suggest that counsel owe this Court a duty to explain why no action was taken until the day before the execution date, making it difficult both for the courts below and for this Court to make the carefully considered judgments so essential in capital cases. In the future, and here I can write only for myself, I will expect counsel whose papers are filed with me as Circuit Justice on the eve of the execution date to make an appropriate explanation.[2] Respect for this Court, as well as duty to the client, requires no less. If there has been deliberate or inexcusable delay, the appropriate Committee of the Florida Bar will be advised.

No. A–225. HARDWICK *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the application for stay.

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[2] Indeed, such an explanation should not be limited to the period following the setting of an execution date. As noted above, counsel are made available in Florida in every capital case. Following conviction and exhaustion of appeal remedies, counsel have a duty to proceed with reasonable promptness to pursue state and federal postconviction remedies *without awaiting* the setting of execution dates.

*[REPORTER'S NOTE: For separate concurring opinion of JUSTICE POWELL in this case, see *ante*, p. 1044.]

SEPTEMBER 24, 1986

Miscellaneous Orders

No. A–35. MELENDEZ-CARRION ET AL. *v.* UNITED STATES. Application for release from pretrial confinement, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–69. BARONOWSKI *v.* SECRETARY OF THE TREASURY ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–93 (86–182). POLYAK *v.* BUFORD EVANS & SONS. C. A. 6th Cir. Application for stay of mandate, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–94 (85–1991). IN RE POLYAK. Application for recall, stay, and other relief, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–223 (86–5544). WELCOME *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–558. IN RE DISBARMENT OF MISHKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 1018.]

No. D–572. IN RE DISBARMENT OF CHASE. It is ordered that Sydney J. Chase, of Plainview, 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. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1157.] Motion of the Solicitor General for divided argument granted.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–899. CONNECTICUT *v.* BARRETT. Sup. Ct. Conn. [Certiorari granted, 476 U. S. 1114.] Motion of National District Attorneys Association for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and

No. 85–972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1044.] Motion of the Solicitor General for divided argument granted.

No. 85–1092. KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DUNCAN, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL. C. A. 3d Cir. [Certiorari granted, 475 U. S. 1080.] Motion of Pennsylvania State Grange et al. for leave to file a brief as *amici curiae* granted.

No. 85–1222. INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL.; and

No. 85–1267. MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 476 U. S. 1157.] Motion of the Solicitor General for divided argument granted.

No. 85–1244. CITY OF PLEASANT GROVE *v.* UNITED STATES. D. C. D. C. [Probable jurisdiction noted, 476 U. S. 1113.] Motion of Democratic National Committee for leave to file a brief as *amicus curiae* granted.

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE. C. A. 11th Cir. [Certiorari granted, 475 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. [Certiorari granted, 476 U. S. 1139.] Motion of Appellate Committee of the District Attorneys Association of California for leave to file a brief as *amicus curiae* granted.

No. 85–1370. ARKANSAS WRITERS' PROJECT, INC. *v.* RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS. Sup. Ct. Ark. [Probable jurisdiction noted, 476 U. S. 1113.] Motions for

leave to file briefs as *amici curiae* filed by the following are granted: City & Regional Magazine Association, Time Inc., Magazine Publishers Association, Times Mirror Co. et al., American Civil Liberties Union Foundation et al., and Miami Herald Publishing Co. et al.

No. 85–1517. COLORADO *v.* SPRING. Sup. Ct. Colo. [Certiorari granted, 476 U. S. 1104.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1581. SOLORIO *v.* UNITED STATES. Ct. Mil. App. [Certiorari granted, 476 U. S. 1181.] Motion of American Civil Liberties Union for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1658. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FLORIDA POWER CORP. ET AL.; and

No. 85–1660. GROUP W CABLE, INC., ET AL. *v.* FLORIDA POWER CORP. ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 476 U. S. 1156.] Motion of the Solicitor General for divided argument granted.

No. 85–1804. WEST *v.* CONRAIL ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1004.] Motion of petitioner to dispense with printing the joint appendix granted.

SEPTEMBER 26, 1986

Assignment Orders

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the District of Columbia Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the Fourth Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the Federal Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE O'CONNOR be, and she is hereby, assigned to the Ninth Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE SCALIA be, and he is hereby, assigned to the Sixth Circuit as Circuit Justice, effective September 26, 1986.

OCTOBER 3, 1986

Dismissal Under Rule 53

No. 86–7. CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* DREDGE ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 746 F. 2d 1420.

Miscellaneous Order

No. A–252. STEWART *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, 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 in order to give applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

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

Roy Allen Stewart was convicted of first-degree murder in Dade County Circuit Court and sentenced to death. The Florida Supreme Court affirmed the conviction and sentence. *Stewart* v. *State*, 420 So. 2d 862 (1982), cert. denied, 460 U. S. 1103 (1983). The Governor signed Stewart's death warrant. Stewart filed a petition for postconviction relief under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel. The court stayed the execution, held an evidentiary hearing, and denied the petition. The Florida Supreme Court affirmed. *Stewart* v. *State*, 481 So. 2d 1210 (1985).

The Governor signed a second death warrant scheduling the execution for 7 a.m. on October 7, 1986. Stewart then filed a post-trial motion and application for stay of execution in the Florida Supreme Court, arguing that the State's administration of the death penalty violates the Eighth and Fourteenth Amend-

ments because capital punishment is imposed disproportionately on prisoners whose victims were members of the white race. This question is similar to those presented in *McCleskey* v. *Kemp*, No. 84–6811, and *Hitchcock* v. *Wainwright*, No. 85–6756, cases that are to be argued before this Court on October 15, 1986. The Florida Supreme Court denied Stewart's motion and application for stay, ruling that "Stewart did not raise this claim in his previous 3.850 motion, and he is procedurally barred from raising it in this petition." *Stewart* v. *Wainwright*, 494 So. 2d 489, 490 (1986). Stewart then filed a second motion for postconviction relief and application for stay in Circuit Court, raising the *McCleskey/Hitchcock* claim. The Circuit Court denied the petition and stay application. *State* v. *Stewart*, No. 79–6621, slip op., at 2 (Sept. 26, 1986). The Florida Supreme Court affirmed the Circuit Court's finding of a procedural bar, reasoning that Stewart had shown no justification for his failure to raise the *McCleskey/Hitchcock* claim in his first motion for postconviction relief. *Stewart* v. *State*, 495 So. 2d 164, 165 (1986).

On October 1, 1986, Stewart filed an application for stay of execution pending filing of a petition for certiorari with this Court. A majority of this Court today denies that application. Because this denial may rest, in part, on an incomplete application of the doctrine of procedural default, as recently set forth in *Smith* v. *Murray*, 477 U. S. 527 (1986), I respectfully dissent.

Smith requires that, before refusing to consider a state prisoner's constitutional challenge to his conviction and sentence on the ground of procedural default, a federal court must answer two separate questions: (1) As a matter of state law, is consideration of the claim foreclosed by a valid procedural bar? And (2) as a matter of federal law, notwithstanding the state procedural bar, would rejection of the claim result in a "fundamental miscarriage of justice?" *Id.*, at 538.

In *Smith*, a state prisoner failed to raise, on direct appeal of his conviction and sentence to the Virginia Supreme Court, his constitutional challenge to the prosecution's use of the testimony of a psychiatrist, to whom the prisoner had related information about a prior incident of deviant sexual conduct on a school bus. This Court, reviewing the denial of Smith's petition for federal habeas corpus relief, held that the prisoner had failed to demonstrate cause for his noncompliance with state procedural rules. The Court then proceeded to the second inquiry of whether appli-

cation of the doctrine of procedural bar would offend principles of justice:

> "As we noted in *Engle* and reaffirmed in *Carrier*, '"[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration."' *Murray* v. *Carrier*, [477 U. S. 478, 495 (1986)], quoting *Engle* v. *Isaac*, 456 U. S. [107, 135 (1982)]. Accordingly, 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.' *Murray* v. *Carrier*, [*supra*, at 496].
>
> "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result in a 'fundamental miscarriage of justice.' *Engle*, *supra*, at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice." *Id.*, at 537–538.

In this case, Roy Allen Stewart predicates his application for a stay of execution on a claim that "because the State of Florida has applied its capital sentencing statute in an arbitrary and capricious manner by allowing race to determine, in significant part, who will receive the death penalty, his sentence was imposed in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States."* As noted, his claim is similar to the claims advanced by the petitioners in *McCleskey* v. *Kemp*, No. 84–6811, and *Hitchcock* v. *Wainwright*, No. 85–6756.

As a matter of Florida law, it appears that Stewart's claim is procedurally barred. No one, however, has yet carried out the second inquiry mandated by *Smith:* whether as a matter of federal law the refusal to consider his claim on the merits would constitute a "fundamental miscarriage of justice" if, as Stewart asserts, the fact that his victim was a member of the white race was a critical element in the decision to impose the death sentence upon him. No federal court has yet decided whether this claimed racially discriminatory factor, in the Court's words in *Smith*, served "to pervert the jury's deliberations concerning the ultimate question" whether he should be put to death.

Today the Court declines to grant Stewart's application for stay of execution even though his procedurally barred claims, if true, raise profoundly serious and as yet unresolved questions about the federal constitutionality of his capital sentence. Arguably, the Court's decision is justified by the facts that this case comes to us as a request for review of the Florida courts' denial of collateral relief and the "fundamental miscarriage of justice" inquiry can better be performed by a federal district court in a federal habeas corpus proceeding which Stewart may now commence. Nevertheless, in order to make sure that this critical inquiry may be performed before the case becomes moot, I would stay Stewart's execution until the Court has decided the *McCleskey* and *Hitchcock* cases.

I respectfully dissent.

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*Application for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari to the Supreme Court of Florida, filed in the Supreme Court of the United States on October 1, 1986, App. 10 (Initial Brief of Appellant in the Supreme Court of Florida filed September 29, 1986).

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1053 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

ARANETA ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–18. Decided July 19, 1986

An application by a daughter and son-in-law of former President Marcos of the Philippines to stay the District Court's contempt order, requiring their incarceration if they failed to testify on July 22, 1986, before a federal grand jury investigating alleged corruption relating to arms contracts made with the Philippine Government, is granted, conditioned upon applicants' filing a petition for certiorari by August 5, 1986. Applicants contended that requiring them to testify would violate their Fifth Amendment privilege against self-incrimination because their testimony might be used against them in related criminal proceedings currently pending in the Philippines. The District Court granted the United States' motion to give applicants use and derivative use immunity as to criminal prosecutions in the United States and also entered a restrictive order to protect the secrecy of their testimony, holding that the constitutional question was not presented because they had not demonstrated a real and substantial danger of prosecution abroad. The Court of Appeals affirmed on different grounds, finding that applicants faced a substantial possibility of prosecution in the Philippines; that the District Court's restrictive order was insufficient to protect against disclosures to the Philippine Government; that therefore the constitutional question was presented; and that the Fifth Amendment privilege was not violated simply because compelled testimony might be used in a foreign prosecution. The application for a stay is granted because (1) there is a reasonable probability that four Justices will vote to grant certiorari to consider the issue whether the Fifth Amendment privilege protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution; (2) there is a fair prospect that a majority of the Justices will decide the issue in applicants' favor; and (3) a balancing of the equities weighs in applicants' favor.

CHIEF JUSTICE BURGER, Circuit Justice.

Applicants, a daughter and son-in-law of former President Ferdinand Marcos, ask that I stay a contempt order of the United States District Court for the Eastern District of Virginia requiring their incarceration if they fail to testify before a grand jury on July 22. They contend that requiring them to so testify would violate their Fifth Amendment privilege against self-incrimination because their testimony might be used against them in related criminal proceedings currently pending in the Philippines. They assert they will file a petition for certiorari on this issue.

Soon after their arrival in the United States, applicants were served with subpoenas requiring their testimony before a grand jury sitting in the Eastern District of Virginia to investigate alleged corruption relating to arms contracts made with the Government of the Philippines. The District Court denied the applicants' motion to quash the subpoenas on Fifth Amendment grounds, and granted instead the Government's motion to give the applicants use and derivative use immunity as to prosecutions in the United States. The court also entered a restrictive order designed to protect the secrecy of their testimony and held that no constitutional question was presented because the applicants had not demonstrated a real and substantial danger of prosecution abroad.

The Court of Appeals affirmed, 794 F. 2d 920 (1986), but on different grounds. It acknowledged that applicants faced a substantial possibility of prosecution in the Philippines. It also found the District Court's restrictive order insufficient to protect against disclosures to the Philippine Government because, *inter alia*, the order itself contemplates permitting disclosure of applicants' testimony at a future date, and because the order does not prohibit the United States from revealing evidence derived from that testimony. The court therefore reached the constitutional question, and held that the Fifth Amendment privilege is not violated simply because

compelled testimony might be used in a foreign prosecution. The court denied rehearing on July 3.

The requirements for obtaining a stay pending certiorari are well established. Such a stay should be granted only when (1) there is a reasonable probability that four Justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the Justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the applicant's favor. See, *e. g.*, *National Collegiate Athletic Assn.* v. *Board of Regents*, 463 U. S. 1311, 1313 (1983) (WHITE, J., in chambers); *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). In assessing whether each of these factors has been met, a Circuit Justice acts as a "surrogate for the entire Court." *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1313 (1973) (MARSHALL, J., in chambers).

As to the first requirement, I conclude that four Justices will likely vote to grant certiorari on the issue that presumably will be presented in the applicants' petition, namely, whether the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution. Substantial confusion exists on this issue.* Moreover, this Court voted to consider the question in *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472, 478 (1972), but did not reach it because, in the view of the majority, the appellant there "was never in real danger of being compelled to disclose information that might incriminate him under foreign

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*Compare *Mishima* v. *United States*, 507 F. Supp. 131, 135 (Alaska 1981); *United States* v. *Trucis*, 89 F. R. D. 671, 673 (ED Pa. 1981); and *In re Cardassi*, 351 F. Supp. 1080, 1085–1086 (Conn. 1972), with *In re Parker*, 411 F. 2d 1067, 1070 (CA10 1969), vacated and remanded, 397 U. S. 96 (1970); and *Phoenix Assurance Co. of Canada* v. *Runck*, 317 N. W. 2d 402, 413 (N.D.), cert. denied, 459 U. S. 862 (1982).

law," *id.*, at 480. We did, however, reserve the issue, observing that if the appellant should later be questioned about "matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, . . . then a constitutional question will be squarely presented." *Id.*, at 481.

Against this background, it is more likely than not that at least five Justices will agree with the Court of Appeals that the applicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome. That case held only that the privilege against self-incrimination protects a witness against compelled disclosures in state court which could be used against him in federal court or vice versa. However, the Court also discussed with apparent approval several English cases holding that the privilege protects a witness from disclosures which could be used against him in a foreign prosecution. See *id.*, at 58–63, 77; *United States* v. *McRae*, 3 L. R. 79 (Ch. App. 1867); *Brownsword* v. *Edwards*, 2 Ves. sen. 244, 28 Eng. Rep. 157 (Ex. 1750–1); *East India Co.* v. *Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

Finally, I conclude that the equities weigh in applicants' favor, particularly if the stay is appropriately conditioned. Applicants clearly will suffer irreparable injury if the Court of Appeals is right about the likelihood of prosecution and the inability of the District Court's restrictive order to prevent disclosure. Cf. *Garrison* v. *Hudson*, 468 U. S. 1301, 1302 (1984). If that secrecy order is enforceable under all circumstances, it may afford applicants protection should they later be extradited for trial in the Philippines; however, that will

depend, in part, on what protection is afforded to accused persons under Philippine law.

The Government and the public plainly have a strong interest in moving forward expeditiously with a grand jury investigation, but on balance the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay. Accordingly, I grant the stay, conditioned upon applicants' filing their petition for certiorari by August 5, 1986. This should permit the Court to act on the petition during its first conference of the coming Term.

MIKUTAITIS *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–195. Decided September 17, 1986

An application to stay the District Court's order (and the Court of Appeals' mandate) requiring that applicant report for custody pursuant to the District Court's earlier order finding him in contempt for refusing to testify at a deposition hearing in connection with denaturalization proceedings in another District Court against a third person—applicant having refused to testify despite a grant of immunity and an order sealing his deposition—is granted. Applicant contended that his testimony would tend to prove that he cooperated with the Nazi Government, committed war crimes, and engaged in treasonous activity against the Soviet Union during World War II; that his testimony could be used by the Soviet Union in a criminal proceeding against him if he were denaturalized and deported there and his testimony came to the Soviet Government's attention; and that, because the grant of immunity and the sealing order did not adequately protect against the use of his testimony in a foreign criminal prosecution, he had a Fifth Amendment privilege against testifying. The question raised by this application, concerning the adequacy of the sealing order is sufficiently similar to the question identified in *Araneta* v. *United States*, *ante*, p. 1301 (BURGER, C. J., in chambers), to make it appropriate for the full Court to consider this application at the same time it decides whether or not to grant certiorari in *Araneta*.

JUSTICE STEVENS, Circuit Justice.

The United States District Court for the Northern District of Illinois is holding applicant, Mecislovas Mikutaitis, in civil contempt of court because he refuses to testify at a deposition in Chicago despite a grant of immunity by the United States District Court for the Middle District of Florida, where denaturalization proceedings against one Jurgis Joudis are pending. The papers before me indicate that the testimony the Government seeks from Mikutaitis will tend to prove that he, as well as Joudis, cooperated with the Nazi Government, committed war crimes, and engaged in treasonous activity against the Soviet Union after it invaded Lithuania during

World War II. Mikutaitis asserts that the testimony the Government seeks to compel may be used by the Soviet Union in a criminal proceeding against him in the event that he is denaturalized and deported there and his testimony comes to the attention of the Soviet Government. Thus, he contends that because the grant of immunity does not adequately protect against the use of his testimony against him in a criminal prosecution by a foreign sovereign, he has a Fifth Amendment privilege against testifying.

In support of his theory, Mikutaitis argued before the District Court that there is a probability that he too will eventually be denaturalized and deported since his deposition testimony may be used against him in such a civil proceeding. In this regard, a lawyer for the Government's Office of Special Investigations testified that the United States is actively engaged in seeking to denaturalize and deport those who cooperated with the Nazi Government and concealed their involvement to obtain entry into the United States. Mikutaitis also presented an expert in Soviet law, who testified that the Soviet Union is likely to prosecute Mikutaitis for treason if he is deported there. The District Court recognized that Mikutaitis has a "realistic fear of prosecution," but nonetheless found Mikutaitis in contempt. The District Court held that the court order sealing the deposition sufficiently protected him from the risk that his testimony would ever be disclosed to the Soviet Union. See *United States* v. *Joudis*, 800 F. 2d 159, 161 (CA7 1986). The District Court allowed Mikutaitis to remain free on bail pending appeal.

The United States Court of Appeals for the Seventh Circuit affirmed the contempt order, concluding that "the sealing order [was] adequate to protect Mikutaitis from Soviet acquisition of his testimony and thus override his Fifth Amendment claim." *Id.*, at 162. In light of this conclusion, it was not necessary for the court to decide whether the

constitutional privilege against self-incrimination provides any protection against compelled testimony when there is a substantial risk that a foreign sovereign will prosecute the witness. See *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U. S. 472, 478 (1972) (declining to reach constitutional issue since there was no "real and substantial" danger that witness' testimony would be used against him in a foreign prosecution).

On September 5, 1986, a panel of the Court of Appeals granted the Government's motion for immediate issuance of the mandate, and on September 10, the District Court ordered Mikutaitis to surrender himself to the custody of the United States Marshal on the following day. Mikutaitis complied with that order. He now asks me, in my capacity as Circuit Justice, to stay the issuance of the Court of Appeals' mandate and the District Court's order requiring him to report for custody, thereby allowing him to remain free on bond pending his filing a suggestion for rehearing to the Court of Appeals, or a petition for certiorari to this Court.[1] Pursuant to my request, the United States has filed a memorandum in opposition to the application.

In my opinion the question raised by this application is sufficiently similar to the question identified by THE CHIEF JUSTICE in *Araneta* v. *United States*, *ante*, p. 1301 (BURGER, C. J., in chambers), to make it appropriate for the full Court to consider this application for a stay at the same time it decides whether or not to grant certiorari in *Araneta*.[2] In *Araneta*, THE CHIEF JUSTICE granted a stay of the contempt order pending a petition for certiorari, based in part on his prediction that it is "more likely than not" that five Justices

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[1] A suggestion for rehearing en banc was filed with the Court of Appeals on September 16, 1986.

[2] A petition for certiorari was filed in *Araneta* on August 4, 1986, and the Court should be able to act upon it during its conference later this month. See *Araneta*, *ante*, at 1305.

will agree with the United States Court of Appeals for the Fourth Circuit that the sealing of the grand jury testimony under Federal Rule of Criminal Procedure 6(e) in that case did not provide adequate protection against future disclosure of testimony to the Government of the Philippines. *Ante*, at 1304. That conclusion was supported by the risk that the testimony might be disclosed inadvertently, the fact that the order did not forbid disclosure of evidence derived from the testimony, and the possibility that the grand jury record might be opened at a later date. See *United States* v. *(Under Seal)*, 794 F. 2d 920 (CA4 1986). All of these factors are relevant in this case as well.[3]

It does not appear that the Government will be significantly prejudiced by an additional short delay in obtaining Mikutaitis' deposition.[4] On the other hand, it is possible that continued enforcement of the contempt order may have the practical consequence of rendering the proceeding moot if Mikutaitis is pressured into testifying because of the prospect of lengthy imprisonment pending consideration of his petitions for review by the en banc Court of Appeals or this Court. In light of these considerations, I have decided to grant the application. Accordingly, the enforcement of

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[3] Recognizing that two courts have now ruled that the sealing order eliminates Mikutaitis' substantial fear of disclosure, I nonetheless believe that the legal question of whether sealing orders adequately protect against disclosure for Fifth Amendment purposes is one of the two key issues presented in *Araneta*, and that the full Court should have the opportunity to consider this stay application in light of its action on the petition in *Araneta*. As it stands, some of the United States Courts of Appeals appear to have reached differing conclusions on this issue. See *United States* v. *(Under Seal)*, 794 F. 2d, at 925 (acknowledging that three Circuits have deemed Rule 6(e) orders sufficiently protective, but holding that the "contrary authority [is the] more compelling").

[4] The Government initially sought to depose Mikutaitis in 1983, the order requiring him to testify was issued in October 1985, and he was found to be in contempt on March 11, 1986.

the contempt order entered by the District Court on March 11, 1986, which had been stayed until September 5, 1986, is stayed until further order of this Court.[5]

[5] The entry of this order shall not in any way affect the jurisdiction of the Court of Appeals to take whatever action it deems appropriate in response to the pending suggestion for rehearing. Nor does this order preclude the District Court from entering whatever orders it deems appropriate to insure that Mikutaitis will be available to testify in the event that the judgment of the panel of the Court of Appeals is ultimately upheld. Finally, issuance of this order is in no way intended to discourage either Mikutaitis or the Government from seeking a broader sealing order. See *United States* v. *Joudis*, 800 F. 2d 159, 163 (CA7 1986).

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION *v.* FLANIGAN

ON APPLICATION FOR INJUNCTION

No. A–229. Decided September 25, 1986

An application for an injunction pending appeal is denied because the constitutional issues raised were not presented to the Montana Supreme Court until applicants filed for a rehearing, which was denied without comment, consistent with that court's practice of refusing to consider issues not pressed at every stage of litigation.

JUSTICE REHNQUIST, Circuit Justice.

The application for a writ of injunction pending appeal is denied. The constitutional issues addressed in the application were not properly presented to the Montana Supreme Court until the applicants filed for rehearing. The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation. See *Femling* v. *Montana State University*, —— Mont. ——, 713 P. 2d 996, 999 (1986); *Dodd* v. *East Helena*, 180 Mont. 518, 523, 591 P. 2d 241, 244 (1979). Under these circumstances, the claims presented by the applicants are not properly before me. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . ." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945).

Denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1983, 1984, AND 1985

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1983	1984	1985	1983	1984	1985	1983	1984	1985	1983	1984	1985
Number of cases on dockets	18	15	10	2,688	2,575	2,571	2,349	2,416	2,577	5,100	5,006	5,158
Number disposed of during terms	7	8	2	2,148	2,175	2,095	1,985	2,078	2,178	4,140	4,261	4,275
Number remaining on dockets	11	7	8	540	400	476	409	338	399	960	745	883

	TERMS		
	1983	1984	1985
Cases argued during term	184	175	171
Number disposed of by full opinions	174	159	161
Number disposed of by per curiam opinions	6	11	10
Number set for reargument	4	5	1
Cases granted review this term	152	185	187
Cases reviewed and decided without oral argument	86	82	103
Total cases to be available for argument at outset of following term	80	87	101

JULY 7, 1986

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CIVIL RIGHTS ACT OF 1964.

1. *Racial discrimination—Employer—Public employee—Attorney's fees.*—Section 706(k) of Act, which authorizes award of "reasonable" attorney's fees as part of costs and provides that "United States shall be liable for costs the same as a private person," does not waive Government's immunity from an award of interest; where Government employee's counsel successfully litigated racial discrimination suit under Act, award of attorney's fees could not be increased to compensate counsel for "delay" in receiving payment for his services. Library of Congress v. Shaw, p. 310.

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2. *Racial discrimination—Employer—Public employees.*—Where District Court entered judgment for respondent state and local officials in a suit by petitioners—employees of North Carolina Agricultural Extension Service, recipients of its services, members of its Homemaker Clubs, and parents of members of its 4–H Clubs—alleging racial discrimination by Service in violation of Title VII of Act and Constitution, Court of Appeals, in affirming District Court's judgment, erred (1) in holding that under Title VII Service had no duty to eradicate racial salary disparities originating before Title VII was made applicable to public employees, (2) in ignoring certain evidence related to salary disparities and discrimination presented by petitioners, and (3) in refusing to certify a class of black employees of Service; neither Constitution nor applicable federal regulations required more than what District Court and Court of Appeals found Service had done to disestablish segregation in its 4–H and Homemaker Clubs. Bazemore v. Friday, p. 385.

3. *Racial discrimination—Employer—Public employees—Consent decree.*—In an action by a nonwhite firefighters' organization under Title VII of Act alleging respondent city's discrimination based on race and national origin in its employment practices, § 706(g) of Act did not preclude District Court's entry of a consent decree—over objection of petitioner labor union, which represented majority of firefighters, and which was permitted to intervene as a party-plaintiff—providing for use of race-conscious relief and other affirmative action that might benefit individuals who were not actual victims of city's discriminatory practices. Firefighters v. Cleveland, p. 501.

4. *Racial discrimination—Federal-court action—Earlier state administrative proceeding—Preclusive effect.*—Where (1) respondent, a black employee of petitioner University, requested an administrative hearing upon being informed that he would be discharged for inadequate work performance and misconduct on job, (2) before commencement of hearing, respondent filed a federal-court action against University and others, alleging that his proposed discharge was racially motivated and seeking relief under Title VII of Act, (3) District Court allowed state administrative proceeding to continue, resulting in a ruling that proposed discharge was not racially motivated, and (4) court granted summary judgment against respondent on ground that administrative ruling was entitled to preclusive effect, but Court of Appeals reversed, full faith and credit provisions of 28 U. S. C. § 1738 were not applicable, and Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims; however, federal courts in actions under Reconstruction civil rights statutes must give agency's factfinding same preclusive effect it would be entitled to in State's courts. University of Tennessee v. Elliott, p. 788.

CIVIL RIGHTS ACT OF 1964—Continued.

5. *Racial discrimination—Union and apprenticeship committee—Remedies.*—Where District Court in an action under Title VII of Act against a union and its apprenticeship committee (petitioners) (1) found that they had discriminated against nonwhites in union admission and training practices, (2) established a nonwhite membership goal to be achieved under a court-approved affirmative-action plan to be administered by a court-appointed administrator, (3) found petitioners in civil contempt for failure to comply with court orders, and (4) imposed fines to be placed in a special fund for increasing nonwhite membership, District Court did not err in using certain statistical evidence to evaluate petitioners' membership practices, in imposing remedies of fines and fund order, or in appointing administrator. Sheet Metal Workers v. EEOC, p. 421.

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Vehicle emission control program—Enforcement of State's duty—Attorney's fees.—In extensive federal-court and state and federal administrative proceedings in which respondent organization participated to compel Pennsylvania to implement a vehicle emission inspection and maintenance program required by Act, § 304(d) authorized District Court's award to respondent of attorney's fees for certain phases of proceedings, but it was error to increase lodestar amount on basis of "superior quality" of counsel's performance during one phase. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, p. 546.

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Reparation proceedings against broker—Counterclaims.—Act empowered Commodity Futures Trading Commission—in respondents' reparation proceedings against their commodity futures broker alleging that debit balances in their accounts resulted from broker's violations of Act—to entertain broker's state-law counterclaims to recover debit balances, and Commission's assumption of jurisdiction over common-law counterclaims did not violate Article III of Constitution. Commodity Futures Trading Comm'n v. Schor, p. 833.

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2. *Reapportionment of state legislature—Political gerrymandering.*—Political gerrymandering was properly justiciable under Equal Protection Clause in Indiana Democrats' federal-court action against state officials challenging reapportionment plan for Republican-controlled Indiana Legislature; District Court's judgment, which invalidated reapportionment plan, was reversed. Davis v. Bandemer, p. 109.

II. Freedom of Speech.

1. *Adult bookstore—Solicitation of prostitution—Public health nuisance.*—First Amendment did not bar enforcement of a New York statute—authorizing closure of a building found to be a public health nuisance because it was being used as a place for prostitution and lewdness—against respondents' adult bookstore at which illicit sexual activities, including solicitation of prostitution, occurred. Arcara v. Cloud Books, Inc., p. 697.

2. *Casino gambling—Advertising.*—Where (1) a Puerto Rico statute and regulations legalized certain forms of casino gambling but prohibited advertising casinos to Puerto Rico public, (2) appellant sought a declaratory judgment that advertising restrictions violated Federal Constitution, and (3) Puerto Rico Superior Court interpreted advertising restrictions to apply to local advertising addressed to Puerto Rico residents, but not to certain local advertising addressed to tourists, this Court had jurisdiction to review Puerto Rico Supreme Court's decision dismissing appeal for lack of a substantial constitutional question; statute and regulations did not facially violate First Amendment principles protecting commercial speech, or due process and equal protection guarantees of Constitution. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, p. 328.

3. *High school assembly—Student's lewd speech.*—Where (1) a public high school student, in his nominating speech for a student elective office given at a school assembly, admittedly referred to his candidate in terms of an explicit sexual metaphor, (2) before delivering speech, student was advised by teachers that it should not be given, (3) after speech was given, he was notified that speech violated school's "disruptive-conduct" rule, (4) he

CONSTITUTIONAL LAW—Continued.

was given copies of teachers' reports of his conduct and a chance to explain, (5) he was informed of sanctions that would be imposed, including suspension, and (6) disciplinary action was affirmed under School District's grievance procedures, First Amendment did not prevent School District from disciplining student for giving offensively lewd and indecent speech, and circumstances of suspension did not violate due process. Bethel School Dist. No. 403 v. Fraser, p. 675.

III. Privilege Against Self-Incrimination.

State proceedings to declare a person sexually dangerous—Applicability of privilege.—Where (1) after petitioner was charged with committing crimes of unlawful restraint and deviate sexual assault, Illinois filed a petition to have him declared a sexually dangerous person within meaning of a state Act authorizing commitment of such persons, (2) pursuant to Act, court ordered petitioner to submit to psychiatric examinations, (3) at trial on State's petition, psychiatrists' testimony was presented over petitioner's objection that they had elicited statements from him in violation of his privilege against self-incrimination, and (4) based on such testimony and victim's testimony, court found petitioner to be a sexually dangerous person, proceedings under Act were not "criminal," and Fifth Amendment privilege did not apply. Allen v. Illinois, p. 364.

IV. Right of Access to Criminal Proceedings.

Preliminary hearings—Defendant's right to closure.—Qualified First Amendment right of public and press to access to criminal proceedings applies to preliminary hearings as conducted before magistrates in California; preliminary hearings cannot be closed to protect defendant's right to a fair trial unless defendant shows a "substantial probability" that such right will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect right. Press-Enterprise Co. v. Superior Court of Cal., Riverside County, p. 1.

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2. *State-court action—Removal to Federal District Court—Federal-question jurisdiction.*—Where (1) respondent residents of foreign countries filed Ohio state-court proceedings against petitioner Ohio drug manufacturer, alleging that children were born with deformities as a result of mothers' use of drug during pregnancy and seeking damages on various

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common-law grounds and also on ground that alleged misbranding of drug in violation of Federal Food, Drug, and Cosmetic Act (FDCA) raised a presumption of negligence and proximate cause of injuries, (2) petitioner removed proceedings to Federal District Court, alleging that they were based in part on a "federal question" for purposes of 28 U. S. C. § 1331, (3) District Court denied respondents' motion to remand to state court and granted petitioner's motion to dismiss, and (4) Court of Appeals reversed, proceedings were improperly removed since, assuming (as Court of Appeals held) that FDCA did not create a private right of action, there was no federal-question jurisdiction under § 1331. Merrell Dow Pharmaceuticals Inc. v. Thompson, p. 804.

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