UNITED STATES REPORTS

VOLUME 450

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1980

FEBRUARY 23 THROUGH APRIL 8, 1981

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1982

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
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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, *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, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, 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.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

HCSC–LAUNDRY *v.* UNITED STATES

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

No. 80–338. Decided February 23, 1981

Held: A cooperative hospital service organization cannot qualify for exemption from federal income taxation as a charitable organization under § 501 (c)(3) of the Internal Revenue Code of 1954, but instead may qualify only if it performs one of the services listed in § 501 (e)(1)(A). This conclusion is supported both by the principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, and by the legislative history. Since laundry service was deliberately omitted from the list of services in subsection (e), petitioner, a nonprofit corporation organized to provide laundry services for exempt hospitals and an exempt ambulance service, is not entitled to tax-exempt status.

Certiorari granted; 624 F. 2d 428, affirmed.

PER CURIAM.

Petitioner HCSC–Laundry is a Pennsylvania nonprofit corporation. It was organized in 1967 under the law of that Commonwealth "[t]o operate and maintain a hospital laundry and linen supply program for those public hospitals and non-profit hospitals or related health facilities organized and

operated exclusively for religious, charitable, scientific, or educational purposes that contract with [it]." [1]

Petitioner provides laundry and linen service to 15 nonprofit hospitals and to an ambulance service. All these are located in eastern Pennsylvania. Each organization served possesses a certificate of exemption from federal income taxation under § 501 (c)(3) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(3).[2] Each participating hospital pays petitioner annual membership dues based upon bed capacity. The ambulance service pays no dues. Petitioner's only other income is derived from (a) a charge for laundry and linen service based upon budgeted costs and (b) a charge of 1½ cents per pound of laundry. Budgeted costs include operat-

[1] The quoted language is from petitioner's articles of incorporation, as amended May 29, 1970. The articles further state that petitioner's corporate purposes are to be accomplished "in a manner consistent with the provisions of Section 501 (c)(3) of the Internal Revenue Code of 1954." See 624 F 2d 428, 429, n. 1 (CA3 1980).

[2] Subsections (a) and (c) of § 501, to the extent pertinent here, read:

"(a) Exemption from taxation

"An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

. . . . .

"(c) List of exempt organizations

"The following organizations are referred to in subsection (a):

. . . . .

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

ing expenses, debt retirement, and linen replacement. The amounts charged in excess of costs have been placed in a fund for equipment acquisition and replacement.

No part of petitioner's net earnings inures to the benefit of any individual.

Petitioner was formed after the Lehigh Valley Health Planning Council determined that a shared, nonprofit, off-premises laundry would best accommodate the requirements of the member hospitals with respect to both quality of service and economies of scale. The Council had investigated various alternatives. It had rejected a joint service concept because no member hospital had sufficient laundry facilities to serve more than itself. A commercial laundry had declined an offer for the laundry business of all the hospitals, and most of the other available commercial laundries were not capable of managing the heavy total volume.

Petitioner's laundry plant was built and equipped at a cost of about $2 million. This was financed through loans from local banks, with 15-year contracts from 10 of the hospitals used as collateral. Petitioner employs approximately 125 persons.

In 1976, petitioner applied for exemption under § 501 (c)(3) from federal income taxation. The Internal Revenue Service denied the exemption application on the grounds that § 501 (e) [3] of the Code was the exclusive provision under which a

[3] Section 501 (e) reads:

"(e) Cooperative hospital service organizations

"For purposes of this title, an organization shall be treated as an organization organized and operated exclusively for charitable purposes, if—

"(1) such organization is organized and operated solely—

"(A) to perform, on a centralized basis, one or more of the following services which, if performed on its own behalf by a hospital which is an organization described in subsection (c)(3) and exempt from taxation under subsection (a), would constitute activities in exercising or performing the purpose or function constituting the basis for its exemption: data processing, purchasing, warehousing, billing and collection, food, clinical, industrial engineering, laboratory, printing, communications, record center,

cooperative hospital service organization could qualify as "an organization organized and operated exclusively for charitable purposes" and therefore exempt. Because subsection (e)(1)(A) does not mention laundry, the Service reasoned that petitioner was not entitled to tax exemption.

Petitioner duly filed its federal corporate income tax return for its fiscal year ended June 30, 1976. That return showed taxable income of $123,521 and a tax of $10,395. The tax was paid. Shortly thereafter, petitioner filed a claim for refund of that tax and, when the Internal Revenue Service took no action on the claim within six months, see 26 U. S. C. § 6532(a)(1), petitioner commenced this refund suit in the United States District Court for the Eastern District of Pennsylvania.

On stipulated facts and cross-motions for summary judgment, the District Court ruled in favor of petitioner, holding that it was entitled to exemption as an organization described in § 501(c)(3). 473 F. Supp. 250 (1979). The United States Court of Appeals for the Third Circuit, however, reversed. It held that § 501(e) was the exclusive provision under which a cooperative hospital service organization could obtain an income tax exemption, and that the omission of laundry services from § 501(e)(1)(A)'s specific list of activities demonstrated that Congress intended to deny exempt status to cooperative hospital service laundries. 624 F. 2d 428 (1980).

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and personnel (including selection, testing, training, and education of personnel) services; and

"(B) to perform such services solely for two or more hospitals each of which is—

"(i) an organization described in subsection (c)(3) which is exempt from taxation under subsection (a),

"(ii) a constituent part of an organization described in subsection (c)(3) which is exempt from taxation under subsection (a) and which, if organized and operated as a separate entity, would constitute an organization described in subsection (c)(3), or

"(iii) owned and operated by the United States, a State, the District of Columbia, or a possession of the United States, or a political subdivision or an agency or instrumentality of any of the foregoing."

1 Per Curiam

Because the ruling of the Court of Appeals is in conflict with decisions elsewhere,[4] we grant certiorari, and we now affirm.

This Court has said: "The starting point in the determination of the scope of 'gross income' is the cardinal principle that Congress in creating the income tax intended 'to use the full measure of its taxing power.'" *Commissioner* v. *Kowalski,* 434 U. S. 77, 82 (1977), quoting from *Helvering* v. *Clifford,* 309 U. S. 331, 334 (1940). See § 61 (a) of the Code, 26 U. S. C. § 61 (a). Under our system of federal income taxation, therefore, every element of gross income of a person, corporate or individual, is subject to tax unless there is a statute or some rule of law that exempts that person or element.

Sections 501 (a) and (c)(3) provide such an exemption, and a complete one, for a corporation fitting the description set forth in subsection (c)(3) and fulfilling the subsection's requirements. But subsection (e) is also a part of § 501. And it expressly concerns the tax status of a cooperative hospital service organization. It provides that such an organization is exempt if, among other things, its activities consist of "data processing, purchasing, warehousing, billing and collection, food, clinical, industrial engineering, laboratory, printing, communications, record center, and personnel (including selection, testing, training, and education of personnel) services." Laundry and linen service, so essential to a hospital's opera-

[4] Among the cases in conflict with the Third Circuit's ruling are *Northern California Central Services, Inc.* v. *United States,* 219 Ct. Cl. 60, 591 F. 2d 620 (1979), and *United Hospital Services, Inc.* v. *United States,* 384 F. Supp. 776 (SD Ind. 1974). See also *Chart, Inc.* v. *United States,* 491 F. Supp. 10 (DC 1979) (appeals pending, Nos. 80–1138 and 80–1139 (CADC)).

Decisions in accord with the ruling of the Third Circuit include *Hospital Central Services Assn.* v. *United States,* 623 F. 2d 611 (CA9 1980), cert. denied, *post,* p. 911, and *Metropolitan Detroit Area Hospital Services, Inc.* v. *United States,* 634 F. 2d 330 (CA6 1980). See also *Associated Hospital Services, Inc.* v. *Commissioner,* 74 T. C. 213, 231 (1980) (reviewed by the court, with four dissents; appeal pending, No. 80–3596 (CA5)).

tion, is not included in that list and, indeed, is noticeable for its absence. The issue, thus, is whether that omission prohibits petitioner from qualifying under § 501 as an organization exempt from taxation. The Government's position is that subsection (e) is controlling and exclusive, and because petitioner does not qualify under it, exemption is not available. Petitioner takes the opposing position that § 501 (c)(3) clearly entitles it to the claimed exemption.

Without reference to the legislative history, the Government would appear to have the benefit of this skirmish, for it is a basic principle of statutory construction that a specific statute, here subsection (e), controls over a general provision such as subsection (c)(3), particularly when the two are interrelated and closely positioned, both in fact being parts of § 501 relating to exemption of organizations from tax. See *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 761 (1961).

Additionally, however, the legislative history provides strong and conclusive support for the Government's position. It persuades us that Congress intended subsection (e) to be exclusive and controlling for cooperative hospital service organizations. Prior to the enactment of subsection (e) in 1968, the law as to the tax status of shared hospital service organizations was uncertain. The Internal Revenue Service took the position that if two or more tax-exempt hospitals created an entity to perform commercial services for them, that entity was not entitled to exemption. See Rev. Rul. 54–305, 1954–2 Cum. Bull. 127.[5] See also § 502, as amended, of the 1954 Code, 26 U. S. C. § 502. This position, however, was rejected by the Court of Claims in *Hospital Bureau of Standards and Supplies, Inc.* v. *United States,* 141 Ct. Cl. 91, 158 F. Supp.

[5] Since the enactment of subsection (e), the Internal Revenue Service has adhered to its view that laundry service provided by a cooperative hospital service organization is not entitled to exemption under § 501. See Rev. Rul. 69–160, 1969–1 Cum. Bull. 147; Rev. Rul. 69–633, 1969–2 Cum. Bull. 121.

560 (1958). After expressly noting the uncertainty in the law,[6] Congress enacted subsection (e). See Revenue and Expenditure Control Act of 1968, Pub. L. 90–364, § 109 (a), 82 Stat. 269.

In considering the provisions of the tax adjustment bill of 1968 that ultimately became subsection (e), the Senate sought to include laundry in the list of services that a cooperative hospital service organization could provide and still maintain its tax-exempt status. The Treasury Department supported the Senate amendment. See 114 Cong. Rec. 7516, 8111–8112 (1968). At the urging of commercial interests, however (see Hearings on Certain Committee Amendments to H. R. 10612 before the Senate Committee on Finance, 94th Cong., 2d Sess., 608 (1976)), the Conference Committee would accept only a limited version of the Senate amendment. In recommending the adoption of subsection (e), the managers on the part of the House emphasized that shared hospital service organizations performing laundry services were not entitled to tax-exempt status under the new provision. See H. R. Conf. Rep. No. 1533, 90th Cong., 2d Sess., 43 (1968); Senate Committee on Finance and House Committee on Ways and Means, Revenue and Expenditure Control Act of 1968, Explanation of the Bill H. R. 15414, 90th Cong., 2d Sess., 1, 20 (Comm. Print 1968).

Later, in 1976, at the urging of the American Hospital Association, the Senate Committee on Finance proposed an amendment that would have added laundry to the list of services specified in subsection (e)(1)(A). Hearings on H. R. 10612 before the Senate Committee on Finance, 94th Cong., 2d Sess., 2765–2772 (1976); S. Rep. No. 94–938, pt. 2, pp. 76–77 (1976). The amendment, however, was defeated on the floor of the Senate. 122 Cong. Rec. 25915 (1976).

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[6] See S. Rep. No. 744, 90th Cong., 1st Sess, 200–201 (1967); H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 73 (1967); 114 Cong. Rec. 7516, 8111–8112 (1968).

In view of all this, it seems to us beyond dispute that subsection (e)(1)(A) of § 501, despite the seemingly broad general language of subsection (c)(3), specifies the types of hospital service organizations that are encompassed within the scope of § 501 as charitable organizations. Inasmuch as laundry service was deliberately omitted from the statutory list and, indeed, specifically was refused inclusion in that list, it inevitably follows that petitioner is not entitled to tax-exempt status. The Congress easily can change the statute whenever it is so inclined.[7]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE WHITE dissents and would set the case for plenary consideration.

JUSTICE STEVENS, dissenting.

Today the Court summarily decides that § 501, read in light of the legislative history of § 501 (e), requires that nonprofit cooperative hospital laundries be denied an exemption from federal income tax, even though they may satisfy the requirements of §§ 501 (a) and 501 (c)(3). In my opinion, the Court's summary disposition is ill-advised because a full understanding of the question presented in this case requires an examination of the history underlying the present state of the law with respect to the tax status of cooperative hos-

[7] We do not agree with the suggestion made by the Court of Claims in *Northern California Central Services, Inc.* v. *United States*, 219 Ct. Cl., at 67, 591 F. 2d, at 624, that Congress "may have wished not to encourage cooperative hospital laundries by new tax exemptions, to which commercial laundries made vehement objections, yet to leave such laundries free to obtain from the courts the exemptions that existing law might afford them." The extended hearings, the Committee considerations, and the floor debates all reveal that Congress was well informed on the issue and made a deliberate decision. We necessarily recognize that congressional choice.

pital service organizations. When the statute is read against that background—indeed, even when it is read in isolation—its plain language unambiguously entitles this petitioner to an exemption.

I

In 1950, Congress amended § 101 of the Internal Revenue Code of 1939 by adding to that section a paragraph dealing with so-called "feeder organizations." Revenue Act of 1950, § 301 (b), Pub. L. 814, ch. 994, 64 Stat. 953. This paragraph was subsequently reenacted without substantial change as § 502(a) of the Internal Revenue Code of 1954.[1] In 1952, the Treasury Department adopted a regulation designed to implement the feeder provision of § 101. Treas. Regs. 111, § 29.101–3 (b).[2] Although this regulation did not specifi-

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[1] Section 502 (a) provides:

"An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt from taxation under section 501 on the ground that all of its profits are payable to one or more organizations exempt from taxation under section 501." 26 U. S. C. § 502 (a).

[2] The feeder regulation was subsequently redesignated Treas. Regs. 118, § 39.101–2 (b) (1953). This regulation, insofar as relevant to this case, appears substantially in its original form as Treas. Reg. § 1.502–1 (b), 26 CFR § 1.502–1 (b) (1980). It provides, in pertinent part:

"If a subsidiary organization of a tax-exempt organization would itself be exempt on the ground that its activities are an integral part of the exempt activities of the parent organization, its exemption will not be lost because, as a matter of accounting between the two organizations, the subsidiary derives a profit from its dealings with its parent organization, for example, a subsidiary organization which is operated for the sole purpose of furnishing electric power used by its parent organization, a tax-exempt educational organization, in carrying on its educational activities. However, the subsidiary organization is not exempt from tax if it is operated for the primary purpose of carrying on a trade or business which would be an unrelated trade or business (that is, unrelated to exempt activities) if regularly carried on by the parent organization. For example, if a subsidiary organization is operated primarily for the purpose of furnishing electric power to consumers other than its parent organization

cally address cooperative hospital service organizations, it did indicate that the Treasury considered cooperative ventures operated by tax-exempt entities for the purpose of providing necessary services to those entities nonexempt feeder organizations.[3]

The Internal Revenue Service first applied this regulation to cooperative hospital service organizations in a 1954 Revenue Ruling, Rev. Rul. 54–305, 1954–2 Cum. Bull. 127. In that Ruling, the Service held that a corporation organized and operated for the primary purpose of operating and maintaining a purchasing agency for the benefit of its members—tax-exempt hospitals and other charitable institutions—fell within the feeder regulation and thus was not entitled to an income tax exemption. The corporation at issue realized substantial

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(and the parent's tax-exempt subsidiary organizations), it is not exempt since such business would be an unrelated trade or business if regularly carried on by the parent organization. Similarly, if the organization is owned by several unrelated exempt organizations, and is operated for the purpose of furnishing electric power to each of them, it is not exempt since such business would be an unrelated trade or business if regularly carried on by any one of the tax-exempt organizations."

[3] These cooperative ventures apparently were considered feeder organizations whether or not they were operated for the purpose of generating profits. Despite the fact that the governing statute, § 502 (a), is applicable only to organizations "operated for the primary purpose of carrying on a trade or business for profit," the implementing regulation, § 1.502–1 (b), does not mention the "for profit" requirement. In several cases rejecting the Treasury's contention that cooperative hospital service organizations are nonexempt feeders, the courts have emphasized the Treasury's failure to take into account the "for profit" requirement of the statute. See, *e. g.*, *Hospital Bureau of Standards & Supplies, Inc.* v. *United States*, 141 Ct. Cl. 91, 95–96, 158 F. Supp. 560, 563–564 (1958); *Hospital Central Services Assn.* v. *United States*, 40 AFTR 2d 77–5646, 77–5648 (WD Wash. 1977); *Community Hospital Services, Inc.* v. *United States*, 43 AFTR 2d 79–934, 79–939 to 79–940 (ED Mich. 1979); 473 F. Supp. 250, 254–255 (ED Pa. 1979) (case below); *Associated Hospital Services, Inc.* v. *Commissioner*, 74 T. C. 213, 234–235 (1980) (Tannenwald, J., dissenting), appeal pending, No. 80–3596 (CA5).

profits from its operations and distributed only a portion of those profits to its members. *Ibid.* Accordingly, the Service found that the corporation was operated for the primary purpose of carrying on a trade or business for profit within the meaning of § 101 of the 1939 Code. This Revenue Ruling, and the regulation on which it was based, are the sources of the Treasury's pre-1968 position that cooperative hospital service organizations were not entitled to tax-exempt status.

The first judicial consideration of this position came in 1958 in *Hospital Bureau of Standards & Supplies, Inc.* v. *United States,* 141 Ct. Cl. 91, 158 F. Supp. 560.[4] In that case, a group of nonprofit, tax-exempt hospitals formed a nonprofit corporation to act as their joint purchasing agent and to perform certain research functions on their behalf. The corporation brought suit against the Government to recover income taxes assessed for 1952 and 1953, alleging that it was entitled to a tax exemption under § 101 (6) of the 1939 Code, the predecessor of present § 501 (c)(3). The Government opposed the claimed exemption, arguing primarily that the corporation was a feeder organization under Treas. Regs. 118, § 39.101–2 (b) (1953). The Court of Claims held that the feeder provision was inapplicable in that case because the corporation was not organized and operated for the primary purpose of carrying on a trade or business for profit as required by the statute, even though it had reported net income for the two tax years in question. 141 Ct. Cl., at 95–96, 158 F. Supp., at 563–564. Accordingly, the court ruled that the corporation was entitled to a tax exemption under § 101 (6).[5]

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[4] Justice Stanley Reed, then recently retired from service on this Court, sat by designation as a member of the Court of Claims in the *Hospital Bureau* case

[5] The Commissioner never expressly announced a nonacquiescence in this decision. However, in an apparent response to the *Hospital Bureau* case, the feeder regulation, § 1 502–1 (b), was amended in several respects in 1963. See T. D. 6662, 1963–2 Cum. Bull. 214, 215–216. See also *Associated Hospital Services, Inc.* v. *Commissioner, supra,* at 219.

Almost 10 years passed before the next important development in this area. In 1967, in connection with the Social Security Amendments of 1967, the original version of § 501 (e) was proposed as an amendment to § 501. The proposed amendment provided that a cooperative hospital service organization would be exempt from income taxation as long as it satisfied certain requirements, among them a requirement that it perform only services which, if performed by the member hospitals themselves, would constitute an integral part of their exempt activities. See S. Rep. No. 744, Social Security Amendments of 1967, Report of the Senate Committee on Finance, 90th Cong., 1st Sess., 201–202, 318–319 (1967). The legislative history indicates that laundry services were considered within the scope of the proposed amendment. *Id.*, at 201. The legislative history also indicates that Congress was aware of the Treasury's belief that such cooperative ventures were not tax exempt because of the Code's feeder provision. *Id.*, at 200–201.[6] However, the Senate Report noted as well that the Court of Claims in *Hospital Bureau,* "the leading case in point," had rejected the Treasury's position. S. Rep. No. 744, at 201, and n. 1.

The proposed amendment was not accepted by the House in its original form. See H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 73 (1967). Rather, during 1968, § 501 (e) in

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[6] Under the heading "Present law," the Senate Report contains the following statement:

"If two or more tax-exempt hospitals join together in creating an entity to perform services for the hospitals, the Internal Revenue Service takes the position that the entity constitutes a 'feeder organization' and is not entitled to income tax exemption because of a special provision of the code applicable to such organizations. This is true even though the service performed, if performed by each of the hospitals individually, would be considered an integral part of their exempt activities. In spite of this position of the Service, the leading case in point held such an entity furnishing services to hospitals to be exempt from tax." S. Rep. No. 744, at 200–201.

its present form was enacted into law as part of the Revenue and Expenditure Control Act of 1968.[7] The 1968 legislative history is set forth in adequate detail in the majority opinion, *ante,* at 6–7, and in the opinion of the Court of Appeals, 624 F. 2d 428, 433–434 (CA3 1980), and does not warrant repetition here.[8] As I read that legislative history, it establishes that Congress deliberately omitted laundry services

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[7] Section 501 (e) provides, in pertinent part:

"For purposes of this title, an organization shall be treated as an organization organized and operated exclusively for charitable purposes, if—

"(1) such organization is organized and operated solely—

"(A) to perform, on a centralized basis, one or more of the following services which, if performed on its own behalf by a hospital which is an organization described in subsection (c)(3) and exempt from taxation under subsection (a), would constitute activities in exercising or performing the purpose or function constituting the basis for its exemption: data processing, purchasing, warehousing, billing and collection, food, clinical, industrial engineering, laboratory, printing, communications, record center, and personnel (including selection, testing, training, and education of personnel) services; and

"(B) to perform such services solely for two or more hospitals each of which is—

"(i) an organization described in subsection (c)(3) which is exempt from taxation under subsection (a),

"(ii) a constituent part of an organization described in subsection (c)(3) which is exempt from taxation under subsection (a) and which, if organized and operated as a separate entity, would constitute an organization described in subsection (c)(3), or

"(iii) owned and operated by the United States, a State, the District of Columbia, or a possession of the United States, or a political subdivision or an agency or instrumentality of any of the foregoing;

"(2) such organization is organized and operated on a cooperative basis and allocates or pays, within 8½ months after the close of its taxable year, all net earnings to patrons on the basis of services performed for them; and

"(3) if such organization has capital stock, all of such stock outstanding is owned by its patrons." 26 U. S C. § 501 (e).

[8] See also *Metropolitan Detroit Area Hospital Services, Inc.* v. *United States,* 634 F. 2d 330, 334–335 (CA6 1980).

from § 501 (e) and clearly intended that joint hospital laundries not be entitled to claim an income tax exemption under § 501 (e). These conclusions are reinforced by Congress' rejection in 1976 of a proposed amendment to § 501 (e) that would have added laundry services to that subsection's list of eligible services. See *ante*, at 7.

Despite the enactment of § 501 (e) in 1968, it was not until 1980 that a federal court decided that nonprofit cooperative hospital laundries were not entitled to an income tax exemption under § 501.[9] Between 1968 and 1980, six federal courts rejected the Treasury's contention that hospital service organizations providing services other than those listed in § 501 (e) were not entitled to claim an exemption under § 501 (c) (3).[10] These courts also rejected the Treasury's alternative contention that, even if such entities were not automatically excluded from consideration under § 501 (c)(3), they nonetheless were nonexempt feeder organizations under § 502 (a) and Treas. Reg. § 1.502–1 (b). In 1980, however, three Courts of Appeals concluded that § 501 (e) provides the ex-

[9] The Internal Revenue Service, shortly after enactment of § 501 (e), ruled that § 501 (e) did not provide an exemption for hospital service organizations that performed laundry services. Rev. Rul. 69–160, 1969–1 Cum. Bull 147. The Service also ruled that because laundry services were not among those listed in § 501 (e), a joint hospital laundry service could not claim a tax exemption under § 501 (c)(3). Rev. Rul. 69–633, 1969–2 Cum. Bull. 121.

[10] See *United Hospital Services, Inc.* v. *United States*, 384 F. Supp. 776 (SD Ind. 1974); *Hospital Central Services Assn.* v. *United States*, 40 AFTR 2d 77–5646 (WD Wash. 1977); *Metropolitan Detroit Area Hospital Services, Inc.* v. *United States*, 445 F. Supp. 857 (ED Mich. 1978); *Northern California Central Services, Inc.* v. *United States*, 219 Ct. Cl. 60, 591 F. 2d 620 (1979); *Community Hospital Services, Inc.* v. *United States*, 43 AFTR 2d 79–934 (ED Mich. 1979); 473 F. Supp. 250 (ED Pa. 1979) (case below). See also *Chart, Inc.* v. *United States*, 491 F. Supp. 10 (DC 1979), appeal pending, Nos. 80–1138, 80–1139 (CADC), in which the District Court held that an organization that qualifies for exemption under § 501 (e) may nonetheless also claim the broader exemption provided by § 501 (c)(3).

clusive means by which a hospital service organization may acquire an income tax exemption.[11] These courts relied primarily upon the 1968 and 1976 legislative history cited by the majority. The decision of the Third Circuit, the first in this series of Court of Appeals decisions, is presently before us.

II

In the District Court in this case, the Government argued, as it had on five previous occasions, that because Congress deliberately omitted hospital laundries from § 501 (e), it necessarily followed that they also were outside the scope of § 501 (c)(3). See 473 F. Supp. 250, 252 (ED Pa. 1979). The District Court rejected this argument, choosing instead to align itself with the then-unbroken line of precedent. *Id.*, at 253–254.[12] The District Court also rejected the Government's alternative argument based upon § 502 (a). On appeal, the Government abandoned this argument, see 624 F. 2d, at 432, n. 6, and relied solely upon § 501 (e).[13] Thus, as

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[11] See 624 F 2d 428 (CA3 1980) (case below); *Hospital Central Services Assn.* v. *United States*, 623 F. 2d 611 (CA9 1980), cert. denied, *post*, p. 911; *Metropolitan Detroit Area Hospital Services, Inc.* v. *United States*, *supra*.

In *Associated Hospital Services, Inc.* v. *Commissioner*, 74 T. C. 213 (1980), appeal pending, No. 80–3596 (CA5), a sharply divided Tax Court held that a nonprofit cooperative hospital laundry was not entitled to tax exemption under § 501, because of the feeder regulation, Treas. Reg. § 1.502–1 (b). However, as explained in note 13, *infra*, the Tax Court's reasoning is in conflict with that in the above-cited cases and, in fact, supports the position of the petitioner in the instant case.

[12] See cases cited in note 10, *supra*.

[13] In *Associated Hospital Services, Inc.* v. *Commissioner*, *supra*, the Tax Court, over the dissent of four judges, accepted the Government's argument that the hospital laundry cooperative was a "feeder organization" under § 502 and Treas. Reg. § 1.502–1 (b) and therefore nonexempt. For the reasons stated in the dissenting opinions of Judge Tannenwald and Judge Wilbur, I disagree with that decision. What is significant about the Tax Court's holding, however, is that even the majority did not accept the

shaped by the proceedings below, the question presented here is whether Congress, in enacting § 501 (e), intended that cooperative hospital service organizations must qualify for tax exemption under that statute or not at all. The Court concludes that the statutory language and legislative history require an affirmative answer to that question. Neither factor, in my judgment, supports the Court's conclusion.

A

Correct analysis of the income tax exemption provisions at issue in this case should focus upon the language of the statutory provision which actually creates the exemption. That provision is § 501 (a), which states:

> "An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." 26 U. S. C. § 501 (a).

This language is clear and unambiguous. Insofar as relevant in this case, it provides that organizations meeting the requirements of § 501 (c)(3) shall be exempt from the federal income tax.[14] Such organizations are to be denied exemption

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Government's present contention that § 501 (e) precludes any tax exemption for a laundry cooperative *even if it is not a feeder organization under § 502*. The Tax Court observed that laundry services had been intentionally omitted from § 501 (e), but nonetheless went on to consider § 502 (a) and Treas. Reg. § 1.502–1 (b). This inquiry would have been wholly unnecessary if, as the Government argues in this case, hospital service organizations not listed in § 501 (e) are not entitled to claim an exemption under § 501 (c)(3). For, as explained in Part II–A, *infra*, § 502 operates to deny a tax exemption to certain organizations which otherwise would be entitled to exemption under § 501 (c)(3).

[14] Section 501 (c) provides, in pertinent part:

"The following organizations are referred to in subsection (a):

. . . . . .

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster na-

only if they fall within the provisions of §§ 502 or 503. Section 501 (a) contains no reference to § 501 (e), nor does § 501 (c)(3) indicate that it is in any way limited by § 501 (e).

Applying this plain statutory language to the facts of this case, it is clear that, but for § 501 (e), petitioner is entitled to a tax exemption under §§ 501 (a) and 501 (c)(3). It is undisputed that petitioner satisfies the requirements of § 501 (c)(3).[15] Therefore, under § 501 (a) petitioner is exempt from taxation unless one of the two express exceptions identified in that subsection applies. The District Court found § 502 inapplicable because petitioner was not operated on a "for profit" basis. 473 F. Supp., at 254–255. This finding has not been challenged by the Government. Section 503 is simply irrelevant in this case. Therefore, the plain language of the relevant statutes clearly states that petitioner is a tax-exempt organization.

The majority overrides this plain statutory language by construing § 501 (e) as an exception to the broad charitable

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tional or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U. S. C. § 501 (c)(3).

[15] After rejecting the Government's contention that § 501 (e) controlled this case, the District Court found that petitioner is a charitable organization within the meaning of § 501 (c)(3). 473 F. Supp., at 254 Although it reversed the District Court's decision, the Court of Appeals did not disturb this finding. Rather, it concluded that petitioner was not entitled even to attempt to qualify for an income tax exemption under § 501 (c)(3), because § 501 (e) exclusively governs the tax status of cooperative hospital service organizations. Thus, the Court of Appeals considered its inquiry ended once it was established that petitioner provided a service not listed in § 501 (e).

exemption created by §§ 501 (a) and 501 (c)(3). Construed in this manner, § 501 (e) operates to deny a tax exemption to organizations that otherwise satisfy the express statutory requirements for exemption. The § 501 (e) exception itself, however, is not express: rather than identifying particular organizations as nonexempt, § 501 (e) identifies particular organizations as exempt and, apparently by implication, denies all similar but unlisted organizations the exemption otherwise available under §§ 501 (a) and 501 (c)(3).

The Court silently dismisses the fact that §§ 501 (a) and 501 (c)(3) contain no reference indicating that § 501 (e) is to have this limiting effect; the necessary connection between the statutes is supplied instead by the Court's finding that § 501 (e) is "interrelated" with and "closely positioned" to § 501 (c)(3). *Ante*, at 6. It cannot be denied that § 501 (e) is close in position to § 501 (c)(3). But a statute's text is surely more significant than its physical location.[16] And to state, as the majority does, that §§ 501 (c)(3) and 501 (e) are "interrelated" is to substitute conclusion for analysis. Apart from their proximity to one another, the only express relationship between these statutes is that certain entities described in § 501 (e) are to be treated as charitable organizations under § 501 (c)(3) for federal income tax purposes. Nothing in any of the relevant statutes suggests that § 501 (e) is to have the effect of denying an exemption to organizations that satisfy the requirements of § 501 (c)(3). When Congress wanted a statute to have such an effect, it had no difficulty making its intention unmistakably plain, as is evident from § 501 (a)'s reference to §§ 502 and 503. The language Congress em-

[16] If Congress, in a wholly separate section of the Tax Code, had clearly stated that all hospital service organizations except those specifically enumerated shall be denied income tax exemption, the Court would not decline to give that statute effect merely because it was not a part of § 501. Similarly, in this case it seems to me that § 501 (e)'s position cannot take the place of a congressional declaration that certain organizations be denied tax exemption.

ployed in § 501 (e) reflects an intention to enlarge, not to reduce, the category of organizations entitled to exemption under § 501 (c)(3).[17]

B

The Court supports its interpretation of § 501 with a discussion of legislative history. However, this discussion makes no reference to the legislative history of the statutory provisions primarily at issue in this case, §§ 501 (a) and 501 (c)(3). Instead, the Court focuses upon the legislative history of § 501 (e). In my opinion, insofar as the Court relies upon this legislative history, its decision rests upon a non sequitur. Because the text and legislative history of § 501(e), which was enacted in 1968, persuade the Court that petitioner is not entitled to an exemption under that section, the Court concludes that petitioner also is not entitled to claim exemption under § 501 (c)(3), which was enacted in 1954.[18] Unless the later statute limited the scope of the earlier statute, the conclusion is not supported by the premise.

The legislative history of § 501 (e) might support the Court's position if it unambiguously revealed: (1) that Congress in 1968 believed that no cooperative hospital service organization could satisfy the requirements of § 501 (c)(3) and it therefore enacted § 501 (e) to extend a tax exemption to certain entities previously not entitled to exemption; or (2) that Congress in 1968 believed that cooperative hospital

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[17] Indeed, several courts have specifically concluded that § 501 (e) was intended to expand, not to contract, the category of organizations eligible for tax exemption under § 501 (c)(3). See, *e. g., Northern California Central Services, Inc.* v. *United States,* 219 Ct. Cl., at 67, 591 F. 2d, at 624; 473 F. Supp., at 253; *Metropolitan Detroit Area Hospital Services, Inc.* v. *United States,* 445 F. Supp., at 860; *United Hospital Services, Inc.* v. *United States,* 384 F. Supp., at 781.

[18] In fact, § 501 (c)(3) had as its predecessor § 101 (6) of the Internal Revenue Code of 1939. However, for purposes of the analysis in the text, the precise point of origin of § 501 (c)(3) is unimportant; it is sufficient that § 501 (c)(3) was enacted well before § 501 (e).

service organizations were at least arguably entitled to tax exemption under § 501 (c)(3) and it enacted § 501 (e) to withdraw this exemption from some, but not all, of these entities. The legislative history provides persuasive support for neither proposition.

In my opinion, § 501 (e) unambiguously granted a tax exemption to certain entities that arguably already were entitled to an exemption under § 501 (c)(3). There is absolutely no evidence that the 1968 statute was intended to withdraw any benefits that were already available under the 1954 Act. Proper analysis, therefore, should focus on the question whether petitioner would have been entitled to an exemption under pre-1968 law.

The 1954 Act created a broad category of exempt organizations, including corporations "operated exclusively for . . . charitable . . . purposes." That hospitals could qualify for exemption has always been clear. The question whether a cooperative organization formed by a group of tax-exempt hospitals to provide services for the hospitals could also qualify for exemption was less clear. As discussed in Part I, *supra,* prior to 1968 the Treasury took the position that such a cooperative was a "feeder organization" within the meaning of § 502 of the Code.[19] This position, however, was rejected by the Court of Claims which—quite properly in my opinion—held that such a cooperative was not a "feeder" and was exempt under what is now § 501 (c)(3). See *Hospital Bureau of Standards & Supplies, Inc.* v. *United States,* 141 Ct. Cl. 91, 158 F. Supp. 560 (1958).

As a matter of history—presumably because cooperative service organizations were fairly common in the hospital in-

[19] According to the Treasury, hospital cooperatives were denied tax exemption, not because they failed to satisfy the requirements of § 501 (c)(3), but because, in the Treasury's judgment, they were feeder organizations and thus within an express exception to the charitable exemption provisions. See Rev. Rul. 54–305, 1954–2 Cum. Bull. 127; Treas. Reg. § 1.502–1 (b).

dustry—the § 502 issue arose in disputes between the Treasury Department and hospital affiliates. Conceptually, however, there is no reason why the identical issue could not arise if other tax-exempt entities, such as schools or churches, might find it advantageous to form cooperatives to perform some of their essential functions for them.[20] In any event, when the issue was brought to the attention of Congress in 1967 and 1968, the focus of the dispute still concerned hospital affiliates. Congress then made an unequivocal policy choice rejecting the position of the Treasury and granting an unambiguous exemption to cooperative hospital service organizations performing certain described functions.[21] Nothing in the 1968 legislation explicitly or implicitly qualified the exemption previously available under § 501.[22]

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[20] Indeed, in its feeder regulation the Treasury clearly indicated that its opposition to tax exemption for cooperative service organizations was not limited to hospital cooperatives, but rather extended to all cooperative service organizations formed by two or more tax-exempt entities. See Treas. Reg. § 1.502–1 (b).

[21] It seems clear from the legislative history that Congress was aware that cooperative hospital service organizations were at least arguably entitled to exemption prior to 1968. Several passages in the legislative history indicate that Congress knew that the Treasury believed that such organizations were not entitled to exemption; nothing in the legislative history suggests that Congress approved of this position. See S. Rep. No. 744, 90th Cong., 1st Sess., 200–201 (1967); 114 Cong. Rec. 7516 (1968); *id.*, at 8112. Congress also was aware that the Treasury's position was based primarily upon § 502 (a), rather than § 501 (c) (3), and that its position had been rejected by "the leading case in point." See *supra*, at 12.

[22] In fact, since the Treasury's opposition to tax-exempt status for hospital service organizations was based on § 502, rather than § 501 (c) (3), it is more reasonable to construe the enactment of § 501 (e) as a congressional attempt to limit § 502, rather than § 501 (c) (3). Some of the language of § 501 (e) supports this view. For example, § 501 (e) (2) provides that a cooperative hospital service organization qualifying for exemption under that subsection must allocate or pay to its members all net earnings within 8½ months after the close of its taxable year. Section

Section 501 (e) does not confer an exemption on cooperative educational or religious service organizations.[23] If such organizations would previously have been exempt under § 501 (c)(3), should the 1968 Act be construed to have withdrawn the exemption by reason of the fact that Congress saw fit to confine the benefit of its clarifying amendment to "cooperative hospital service organizations"? I think the answer is clear and that the same answer should apply to a hospital cooperative that is not expressly covered by the 1968 Act. Its tax status should be evaluated on the basis of the remaining relevant provisions of the Internal Revenue Code.

502, which was the congressional response to the series of "destination of income" cases culminating in the famous case involving the New York University School of Law's noodle factory, *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (CA3 1951), was directed precisely at organizations which funneled their net income to tax-exempt institutions Thus, organizations which might otherwise reasonably be considered feeder organizations are entitled to exemption under § 501 (e). However, there is no reason why a cooperative organization that operates on a nonprofit basis and does not funnel earnings back to its members, such as the petitioner in this case, cannot qualify for an income tax exemption under § 501 (c)(3). Such an organization, deprived of the shield of § 501 (e), should nonetheless be tax exempt if it can avoid challenge as a feeder on its own merits.

The conclusion that § 501 (e) was designed as a shield for certain organizations that otherwise would be considered nonexempt feeders is also supported by the fact that the exemption available under § 501 (e) is more restrictive than that available under § 501 (c)(3). As the District Court in *Chart, Inc.* v. *United States*, 491 F. Supp. 10 (DC 1979), appeal pending, Nos. 80–1138, 80–1139 (CADC), observed, organizations which qualify for tax exemption under § 501 (c)(3) are able to operate with a great deal more flexibility than those qualifying under § 501 (e). *Id.*, at 13–14. Congress may well have designed § 501 (e) to provide a limited form of tax exemption for previously nonexempt feeder organizations.

[23] Section 501 (f) is entitled "Cooperative service organizations of operating educational organizations," but it is not analogous to § 501 (e). Section 501 (f) concerns organizations organized and operated to invest funds on behalf of educational institutions and to pay the resulting income to these institutions.

I recognize that both in 1968 and in 1976 attempts were made to extend the explicit § 501 (e) exemption to encompass hospital laundry cooperatives and that these attempts were rejected. This legislative history proves nothing more than what is already plainly stated in the statute itself: the § 501 (e) exemption is not available to petitioner. That is equally true of a cooperative educational service organization. But that fact does not evidence any intent by Congress to withdraw whatever exemption would be available to such organizations under other provisions of the Code.

Nor does logic compel the conclusion that Congress intended to withdraw a pre-existing exemption. As a matter of tax policy, nothing that I have read provides any obvious legitimate basis for giving hospital service organizations more favorable treatment than other charitable service organizations, or for giving a data processing or food service organization better treatment than a laundry service organization. Furthermore, I cannot accept the kind of reasoning—which unfortunately may characterize our summary dispositions—that interprets a statute that was plainly intended to do nothing more than extend a certain benefit to some taxpayers as though it were intended to withdraw a benefit otherwise available to other taxpayers.

I respectfully dissent.

WEAVER *v.* GRAHAM, GOVERNOR OF FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 79–5780. Argued November 5, 1980—Decided February 24, 1981

Held: A Florida statute repealing an earlier statute and reducing the amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence is unconstitutional as an *ex post facto* law as applied to petitioner, whose crime was committed before the statute's enactment. Pp. 28–36.

(a) For a criminal or penal law to be *ex post facto,* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. *Lindsey* v. *Washington,* 301 U. S 397, 401; *Calder* v. *Bull,* 3 Dall. 386, 390. It need not impair a "vested right." Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the *Ex Post Facto* Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. Pp. 28–31.

(b) The effect, not the form, of the law determines whether it is *ex post facto.* Although the Florida statute on its face applies only after its effective date, respondent conceded that the statute is used to calculate the gain time available to prisoners, such as petitioner, convicted for acts committed before the statute's effective date. Regardless of whether or not the prospect of gain time was in some technical sense part of the petitioner's sentence, the statute substantially alters the consequences attached to a crime already completed, changing the quantum of punishment, and thus is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment. Pp. 31–33.

(c) The Florida statute is disadvantageous to petitioner and other similarly situated prisoners. The reduction in gain time that had been available under the repealed statute for abiding by prison rules and adequately performing assigned tasks lengthens the period that someone in petitioner's position must spend in prison. It is immaterial that other statutory provisions were also enacted whereby a prisoner might earn extra gain time by satisfying extra conditions. The award of such extra gain time is purely discretionary, contingent on both the correctional authorities' wishes and the inmate's special behavior, and thus none of the provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The new provision therefore constricts the inmate's opportunity to earn early release and thereby

makes more onerous the punishment for crimes committed before its enactment. Pp. 33–36.

376 So. 2d 855, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 36. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 37.

Thomas C. MacDonald, Jr., by appointment of the Court, 446 U. S. 916, argued the cause and filed briefs for petitioner.

Wallace E. Allbritton, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.

JUSTICE MARSHALL delivered the opinion of the Court.

Florida, like many other States, rewards each convicted prisoner for good conduct and obedience to prison rules by using a statutory formula that reduces the portion of his sentence that he must serve. In this case, we consider whether a Florida statute altering the availability of such "gain time for good conduct" [1] is unconstitutional as an *ex post facto* law when applied to petitioner, whose crime was committed before the statute's enactment.

I

The relevant facts are undisputed. Petitioner pleaded guilty to second-degree murder. The crime charged occurred on January 31, 1976. On May 13, 1976, petitioner was convicted and sentenced to a prison term of 15 years, less time

[1] Fla. Stat. § 944.275 (1) (1979); Fla. Stat. § 944.27 (1) (1975). At the time of petitioner's offense, Florida used the term "good-time," to refer to extra "allowance for meritorious conduct or exceptional industry." Fla. Stat. § 944.29 (1975). The current Florida law adopts the phrase "gain-time" to apply to various kinds of time credited to reduce a prisoner's prison term. See, *e. g.*, Fla. Stat. § 944.275 (3) (1979).

already served. The state statute in place on both the date of the offense and the date of sentencing provided a formula for deducting gain-time credits from the sentences "of every prisoner who has committed no infraction of the rules or regulations of the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly and peaceful manner, the work, duties and tasks assigned to him." Fla. Stat. § 944.27 (1) (1975).[2] According to the formula, gain-time credits were to be calculated by the month and were to accumulate at an increasing rate the more time the prisoner had already served. Thus, the statute directed that the authorities "shall grant the following deductions" from a prisoner's sentence as gain time for good conduct:

> "(a) Five days per month off the first and second years of his sentence;
>
> "(b) Ten days per month off the third and fourth years of his sentence; and
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> "(c) Fifteen days per month off the fifth and all succeeding years of his sentence." Fla. Stat. § 944.27 (1) (1975).

In 1978, the Florida Legislature repealed § 944.27 (1) and enacted a new formula for monthly gain-time deductions. This new statute provided:

> "(a) Three days per month off the first and second years of the sentence;
>
> "(b) Six days per month off the third and fourth years of the sentence; and
>
> "(c) Nine days per month off the fifth and all succeeding years of the sentence." Fla. Stat. § 944.275 (1) (1979).[3]

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[2] The statute also provided for extra discretionary good time, based on other factors. See n. 18, *infra*.

[3] There are some minor language differences in the new provision directing the correctional authorities at the Department of Offender Rehabilitation to make the gain-time deductions. The phrase "who has performed

The new provision was implemented on January 1, 1979, and since that time the State has applied it not only to prisoners sentenced for crimes committed since its enactment in 1978, but also to all other prisoners, including petitioner, whose offenses took place before that date.[4]

Petitioner, acting *pro se,* sought a writ of habeas corpus from the Supreme Court of Florida on the ground that the new statute as applied to him was an *ex post facto* law prohibited by the United States and the Florida Constitutions.[5] He alleged that the reduced accumulation of monthly gain-time credits provided under the new statute would extend his required time in prison by over 2 years, or approximately 14 percent of his original 15-year sentence.[6] The State Su-

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in a satisfactory and acceptable manner the work, duties, and tasks assigned," Fla Stat. § 944 275 (1) (1979), replaces the former phrase, "who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned," Fla. Stat. § 944.27 (1) (1975) The new version also explicitly adds that the deductions are to be made "on a monthly basis, as earned," which appears to codify the previous practice. The State Supreme Court assigned no significance to these differences in evaluating the *ex post facto* claim, nor does any party here assert that these minor language changes are relevant to our inquiry.

[4] No saving clause limiting the Act's application was included. 1978 Fla. Laws, ch. 78–304. In applying the new schedule to prisoners like petitioner, the Secretary of the Department of Offender Rehabilitation relied on the legal opinion of the Attorney General of Florida. Fla. Op. Atty. Gen. 078–96 (1978).

[5] "No State shall . . . pass any . . . ex post facto Law." U. S. Const., Art. I, § 10, cl. 1. The Florida Constitution similarly provides that "[n]o . . . *ex post facto* law . . . shall be passed." Fla. Const., Art. I, § 10. See also Fla. Const., Art. X, § 9 (forbidding state legislature to enact a statute "affect[ing] [the] prosecution or punishment" for any offense previously committed).

[6] Petitioner estimated that his "tentative expiration date" under Fla. Stat. § 944.27 (1975) would be December 31, 1984. App. 15a. The State calculated that application of the new gain-time provision starting with its effective date resulted in a projected release date of February 2, 1987. *Id.,* at 12a–13a. The State does not dispute petitioner's contention that a difference of over two years is at stake.

preme Court summarily denied the petition. 376 So. 2d 855. The court relied on its decision in a companion case raising the same issue where it reasoned that "gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied." *Harris* v. *Wainwright,* 376 So. 2d 855, 856 (1979).[7] We granted certiorari, 445 U. S. 927, and we now reverse.

II

The *ex post facto* prohibition[8] forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings* v. *Missouri,* 4 Wall. 277, 325–326 (1867). See *Lindsey* v. *Washington,* 301 U. S. 397, 401 (1937); *Rooney* v. *North Dakota,* 196 U. S. 319, 324–325 (1905); *In re Medley,* 134 U. S. 160, 171 (1890); *Calder* v. *Bull,* 3 Dall. 386, 390 (1798).[9] Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explic-

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[7] The Florida court also distinguished cases from other jurisdictions striking down retrospective statutes that eliminated the allowance of gain time in specified situations, revised the entire scheme of criminal penalties, and extended the incarceration of juvenile offenders. 376 So. 2d, at 857 (distinguishing *Dowd* v *Sims,* 229 Ind. 54, 95 N. E. 2d 628 (1950); *Goldsworthy* v. *Hannifin,* 86 Nev. 252, 468 P. 2d 350 (1970); *In re Dewing,* 19 Cal. 3d 54, 560 P. 2d 375 (1977); and *In re Valenzuela,* 275 Cal. App. 2d 483, 79 Cal. Rptr. 760 (1969)).

[8] U. S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. "So much importance did the [C]onvention attach to [the *ex post facto* prohibition], that it is found twice in the Constitution." *Kring* v. *Missouri,* 107 U. S. 221, 227 (1883).

[9] "The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty" after the fact. *Calder* v. *Bull,* 3 Dall., at 397 (Paterson, J.). See also *Fletcher* v. *Peck,* 6 Cranch 87, 138 (1810) ("An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed").

itly changed. *Dobbert* v. *Florida,* 432 U. S. 282, 298 (1977); *Kring* v. *Missouri,* 107 U. S. 221, 229 (1883); *Calder* v. *Bull, supra,* at 387. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy* v. *South Carolina,* 237 U. S. 180, 183 (1915); *Kring* v. *Missouri, supra,* at 229; *Fletcher* v. *Peck,* 6 Cranch 87, 138 (1810); *Calder* v. *Bull, supra,* at 395, 396 (Paterson, J.); the Federalist No. 44 (J. Madison), No. 84 (A. Hamilton).[10]

In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment,[11] and it must disadvantage the offender affected by it.[12] *Lindsey* v. *Washington, supra,* at 401; *Calder* v. *Bull, supra,* at 390. Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the *ex post facto* prohibition.[13] Evaluating whether a right has vested

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[10] The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law. Cf. *Ogden* v. *Blackledge,* 2 Cranch 272, 277 (1804).

[11] See *Jaehne* v. *New York,* 128 U. S. 189, 194 (1888) (portion of legislation void which " 'should endeavor to reach by its retroactive operation acts before committed' ") (quoting T. Cooley, Constitutional Limitations 215 (5th ed. 1883)).

[12] We have also held that no *ex post facto* violation occurs if the change effected is merely procedural, and does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt* v. *Utah,* 110 U. S. 574, 590 (1884). See *Dobbert* v. *Florida,* 432 U. S. 282, 293 (1977). Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. *Thompson* v. *Utah,* 170 U. S. 343, 354–355 (1898); *Kring* v. *Missouri, supra,* at 232.

[13] In using the concept of vested rights, *Harris* v. *Wainwright,* 376 So. 2d, at 856, the Florida court apparently drew on the test for evaluating retrospective laws in a civil context. See 2 C. Sands, Sutherland on Statutory Construction § 41.06 (4th ed. 1973); Hochman, The Supreme Court

is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. See, *e. g., Wood* v. *Lovett,* 313 U. S. 362, 371 (1941); *Dodge* v. *Board of Education,* 302 U. S. 74, 78–79 (1937). See also *United States Railroad Retirement Board* v. *Fritz,* 449 U. S. 166, 174 (1980). The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of

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and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 696 (1960); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 782 (1936). Discussion of vested rights has seldom appeared in *ex post facto* analysis, as in identifying whether the challenged change is substantive rather than procedural. *Hopt* v. *Utah, supra,* at 590. When a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights. Several state courts have properly distinguished vested rights from *ex post facto* concerns. *E. g., State* v. *Curtis,* 363 So. 2d 1375, 1379, 1382 (La. 1978); *State ex rel Woodward* v. *Board of Parole,* 155 La 699, 700, 99 So. 534, 535–536 (1924); *Murphy* v. *Commonwealth,* 172 Mass. 264, 272, 52 N. E. 505, 507 (1899).

Respondent here advances several theories that incorporate the vested rights approach. For example, respondent defends Fla. Stat. § 944.275 (1) (1979) on the ground that it does not take away any gain time that petitioner has already earned. Brief for Respondent 39–40. Although this point might have pertinence were petitioner alleging a due process violation, see *Wolff* v. *McDonnell,* 418 U. S. 539 (1974), it has no relevance to his *ex post facto* claim.

the offense.[14] We now consider the Florida statute in light of these two considerations.

A

The respondent maintains that Florida's 1978 law altering the availability of gain time is not retrospective because, on its face, it applies only after its effective date. Brief for Respondent 12, 15–16. This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is *ex post facto*.[15] The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether Fla. Stat. § 944.275 (1) (1979) applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the State uses § 944.275 (1), which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who was convicted of a crime occurring on January 31, 1976.[16] Thus, the provision attaches legal consequences to a crime committed before the law took effect.

Nonetheless, respondent contends that the State's revised gain-time provision is not retrospective because its predecessor was "no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced." Brief for Respondent 12. This contention

[14] *Durant* v. *United States*, 410 F. 2d 689, 691 (CA1 1969); *Adkins* v. *Bordenkircher*, 262 S. E. 2d 885, 887 (W. Va. 1980); *Goldsworthy* v. *Hannifin*, 86 Nev., at 256–257, 468 P. 2d, at 352. See *Murphy* v. *Commonwealth*, *supra*, at 272, 52 N. E., at 507.

[15] "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867).

[16] See App. 12a–13a (Affidavit, Louie Wainwright, Secretary, Department of Corrections).

is foreclosed by our precedents. First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term—and that his effective sentence is altered once this determinant is changed. See *Lindsey* v. *Washington,* 301 U. S., at 401–402; *Greenfield* v. *Scafati,* 277 F. Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U. S. 713 (1968). See also *Rodriguez* v. *United States Parole Comm'n,* 594 F. 2d 170 (CA7 1979) (elimination of parole eligibility held an *ex post facto* violation). We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. *Wolff* v. *McDonnell,* 418 U. S. 539, 557 (1974); *Warden* v. *Marrero,* 417 U. S. 653, 658 (1974). See *United States* v. *De Simone,* 468 F. 2d 1196 (CA2 1972); *Durant* v. *United States,* 410 F. 2d 689, 692 (CA1 1969). Second, we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence. Thus, we have concluded that a statute requiring solitary confinement prior to execution is *ex post facto* when applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively. Compare *In re Medley,* 134 U. S. 160 (1890), with *Holden* v. *Minnesota,* 137 U. S. 483 (1890). See also *Cummings* v. *Missouri,* 4 Wall. 277 (1867).[17]

[17] Even when the sentence is at issue, a law may be retrospective not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory. *Lindsey* v. *Washington,* 301 U. S. 397, 401 (1937). The critical question, as Florida has often acknowledged, is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence. *Greene* v. *State,* 238 So. 2d 296 (Fla. 1970); *Higginbotham* v. *State,* 88 Fla. 26, 31, 101 So. 233, 235 (1924); *Herberle* v. *P. R. O Liquidating Co.,* 186 So. 2d 280, 282 (Fla App. 1966). Thus in *Dobbert* v. *Florida,* 432 U. S. 282 (1977), we held there was no *ex post*

For prisoners who committed crimes before its enactment, § 944.275 (1) substantially alters the consequences attached to a crime already completed, and therefore changes "the quantum of punishment." See *Dobbert* v. *Florida*, 432 U. S., at 293–294. Therefore, it is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment. *Id.*, at 294.

B

Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question. *Lindsey* v. *Washington*, *supra*, at 400. See *Malloy* v. *South Carolina*, 237 U. S., at 184; *Rooney* v. *North Dakota*, 196 U. S., at 325. The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual. *Dobbert* v. *Florida*, *supra*, at 300; *Lindsey* v. *Washington*, *supra*, at 401; *Rooney* v. *North Dakota*, *supra*, at 325.

Under this inquiry, we conclude § 944.275 (1) is disadvantageous to petitioner and other similarly situated prisoners. On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison. In *Lindsey* v. *Washington*, *supra*, at 401–402, we reasoned that "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." Here, petitioner is similarly disadvantaged by the reduced

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facto violation because the challenged provisions changed the role of jury and judge in sentencing, but did not add to the "quantum of punishment." *Id.*, at 293–294. In *Malloy* v. *South Carolina*, 237 U. S. 180 (1915), we concluded that a change in the method of execution was not *ex post facto* because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective. *Id.*, at 185.

opportunity to shorten his time in prison simply through good conduct. In *Greenfield* v. *Scafati, supra,* we affirmed the judgment of a three-judge District Court which found an *ex post facto* violation in the application of a statute denying any gain time for the first six months after parole revocation to an inmate whose crime occurred before the statute's enactment. There, as here, the inmate was disadvantaged by new restrictions on eligibility for release. In this vein, the three-judge court in *Greenfield* found "no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. Each . . . materially 'alters the situation of the accused to his disadvantage.'" 277 F. Supp., at 646 (quoting *In re Medley, supra,* at 171). See also *Murphy* v. *Commonwealth,* 172 Mass. 264, 52 N. E. 505 (1899).

Respondent argues that our inquiry should not end at this point because Fla. Stat. § 944.275 (1) (1979) must be examined in conjunction with other provisions enacted with it. Brief for Respondent 18–26. Respondent claims that the net effect of all these provisions is increased availability of gain-time deductions.[18] There can be no doubt that the legisla-

[18] These other provisions permit discretionary grants of additional gain time for inmates who not only satisfy the good-conduct requirement, but who also deserve extra reward under designated categories. Under § 944.275 (3) (b) (1979), "special gain-time" of 1 to 60 days "may be granted" to an "inmate who does some outstanding deed, such as the saving of a life or assisting in the recapturing of an escaped inmate." Another provision specifies that an inmate "may be granted" one to six extra gain-time days per month if he "faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him" and also either shows "his desire to be a better than average inmate" or "diligently participates in an approved course of academic or vocation study." § 944.275 (3) (a). An inmate may be awarded up to one gain-time credit for labor evaluated "on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work." § 944.275 (2) (b). Finally, for inmates unable to qualify under this previous provision due to "age, illness, infirmity, or confinement for reasons other than

ture intended through these provisions to promote rehabilitation and to create incentives for specified productive conduct. See Fla. Stat. § 944.012 (1979). But none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision, § 944.27 (1) (1975), than he could for the same conduct under the new provision, § 944.275 (1) (1979). To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions.[19] Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program. Fla. Stat. §§ 944.275 (3)(a), (b) (1979). In contrast, under both the new and old statutes, an inmate is automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks. Compare Fla. Stat. § 944.275 (1) (1979) with § 944.27 (1) (1975).[20] Thus, the new provision constricts the inmate's

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discipline," additional gain time of up to six days per month may be granted for "constructive utilization of time." § 944.275 (2)(e).

[19] In addition, few of the "new" sources for extra gain time do more than reiterate previous opportunities provided by statute or state regulation. Compare Fla. Stat. § 944.275 (3)(a) (1979) with § 944.29 (1975) ("an extra good-time allowance for meritorious conduct or exceptional industry"); Fla. Stat. § 944.275 (2)(b) (1979) with § 944.27 (1975) (authorizing administrative rules governing additional gain time) and Fla. Admin. Code, Rule 10B–20.04 (1) (1975) (gain time for construction labor project); Fla. Stat. § 944.275 (3)(b) (1979) with Rule 10B–20.04 (2) (1975) (gain time for outstanding deed). Moreover, under the statute in existence when petitioner's crime occurred, the Department of Corrections enjoyed greater discretion as to the reasons for awarding extra gain time, and as to the amount that could be awarded See § 944.29 (1975).

[20] As respondent put it, "all any prisoner had to do . . . was to stay out of trouble." Brief for Respondent 25. The monthly gain-time provision, both at the time of petitioner's offense and now, directed that the

opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws.[21]

III

We find Fla. Stat. § 944.275 (1) (1979) void as applied to petitioner, whose crime occurred before its effective date. We therefore reverse the judgment of the Supreme Court of Florida and remand this case for further proceedings not inconsistent with this opinion.[22]

Reversed and remanded.

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

Were the Court writing on a clean slate, I would vote to affirm the judgment of the Supreme Court of Florida. My

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Department of Corrections "shall" award gain time to those who obey the rules and perform their work satisfactorily. Fla Stat § 944.27 (1) (1975); Fla. Stat. § 944.275 (1) (1979). The discretionary extra gain time cannot fully compensate for the reduced accumulation of gain time for good behavior, for the discretionary credit is more uncertain. Cf. *In re Medley*, 134 U. S. 160, 172 (1890) (rejecting nondisclosure of execution date as *ex post facto* increase of uncertainty and mental anxiety). Moreover, replacement of mandatory sentence reduction with discretionary sentence reduction cannot be permissible in light of *Lindsey* v. *Washington*, 301 U. S., at 401. There, we rejected as an *ex post facto* violation a legislative change from flexible sentencing to mandatory maximum sentencing because the retrospective legislation restricted defendants' opportunity to serve less than the maximum time in prison.

[21] We need not give lengthy consideration to respondent's claim that the challenged statute, Fla. Stat. § 944.275 (1) (1979), is merely procedural because it does not alter the punishment prescribed for petitioner's offense. Brief for Respondent 13, 17–18. This contention is incorrect, given the uncontested fact that the new provision reduces the quantity of gain time automatically available, and does not merely alter procedures for its allocation. See *supra*, Part II–A. Respondent's reliance on a general statement of legislative intent unrelated to the gain-time provision, see Brief for Respondent 17 (citing Fla. Stat. § 944.012 (6) (1979)), is also unpersuasive.

[22] The proper relief upon a conclusion that a state prisoner is being

thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute. In addition, as the Court's 18th footnote reveals, *ante,* at 34–35, the statutory change by no means was entirely restrictive; in certain respects it was more lenient, as the Court's careful preservation for this prisoner of the new statute's other provisions clearly implies. *Ante,* at 36 and this page, n. 22.

The Court's precedents, however, particularly *Lindsey* v. *Washington,* 301 U. S. 397 (1937), and the summary disposition of *Greenfield* v. *Scafati,* 277 F. Supp. 644 (Mass. 1967), aff'd, 390 U. S. 713 (1968), although not warmly persuasive for me, look the other way, and I thus must accede to the judgment of the Court.

JUSTICE REHNQUIST, concurring in the judgment.

I find this case a close one. As the Court recently noted: "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert* v. *Florida,* 432 U. S. 282, 294 (1977). Petitioner was clearly disadvantaged by the loss of the opportunity to accrue gain time through good conduct pursuant to the 5–10–15 formula when the legislature changed to a 3–6–9 formula. The new statute, however, also afforded petitioner opportunities not available

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treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred. See *Lindsey* v. *Washington, supra,* at 402, *In re Medley, supra,* at 173. In remanding for this relief, we note that only the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him. See 2 C. Sands, Sutherland on Statutory Construction § 44.04 (4th ed. 1973).

under prior law to earn additional gain time beyond the good-conduct formula.* The case is not resolved simply by comparing the 5–10–15 formula with the 3–6–9 formula. "We must compare the two statutory procedures *in toto* to determine if the new may be fairly characterized as more onerous." *Ibid.*

I am persuaded in this case, albeit not without doubt, that the new statute is more onerous than the old, because the amount of gain time which is accrued automatically solely through good conduct is substantially reduced, and this reduction is not offset by the availability of discretionary awards of gain time for activities extending beyond simply "staying out of trouble." This is not to say, however, that no reduction in automatic gain time, however slight, can ever be offset by increases in the availability of discretionary gain time, however great, or that reductions in the amount of credit for good conduct can never be offset by increases in the availability of credit which can be earned by more than merely good conduct.

Since the availability of new opportunities for discretionary gain time and the reduction in the amount of automatic gain time can be viewed as a total package, it must be empha-

*While the Court points out that gain time was available under the old scheme beyond the 5–10–15 formula, *ante*, at 35, n. 19, I am not convinced that the new sources simply "reiterate[d]" opportunities previously available. There is, for example, no dispute that several of the new sources of gain time have no analogues in the previous statutory or administrative scheme. See, *e. g.*, Fla. Stat. § 944.275 (2)(e) (1979) (up to six days of gain time per month because of age, illness, infirmity, or confinement for reasons other than discipline); § 944.275 (3)(a) (up to six days per month for inmates who diligently participate in an approved course of academic or vocational study). Other new statutory provisions which had only administrative counterparts improved substantially on the availability of gain time. For example, under the old administrative system, an inmate could receive from 1 to 15 days of gain time per month for constructive labor, Fla. Admin. Code, Rule 10B–20.04 (1) (1975), while under the new statutory scheme, an inmate can receive up to 1 day of gain time for every day of constructive labor, Fla. Stat. § 944.275 (2)(b) (1979).

sized that nothing in today's decision compels Florida to provide prisoners in petitioner's position with the benefits of the new provisions when this Court has held that Florida may not require such prisoners to pay the price. It is not at all clear that the Florida Legislature would have intended to make available the new discretionary gain time to prisoners earning automatic gain time under the old 5–10–15 formula, when the legislature in fact reduced the 5–10–15 formula when it enacted the new provisions. The question is, of course, one for Florida to resolve.

HUDSON *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 79–5688. Argued December 1, 1980—Decided February 24, 1981

Held: Louisiana violated the Double Jeopardy Clause by prosecuting petitioner a second time for first-degree murder after the judge at the first trial granted petitioner's motion for new trial on the ground that the evidence was legally insufficient to support the jury's guilty verdict. This case is controlled by *Burks* v. *United States,* 437 U. S. 1 (decided before the Louisiana Supreme Court affirmed petitioner's conviction after the second trial), which held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support the guilty verdict. *Id.,* at 18. *Burks* is not to be read as holding that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof. The record does not support the State's contention that the trial judge granted a new trial only because, as a "13th juror," he entertained personal doubts about the verdict and would have decided it differently from the other 12 jurors. The record shows instead that he granted the new trial because the State had failed to prove its case as a matter of law. Pp. 42–45.

373 So. 2d 1294, reversed.

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

Richard O. Burst, Sr., argued the cause and filed a brief for petitioner.

James M. Bullers, argued the cause and filed a brief for respondent.*

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether Louisiana violated the Double Jeopardy Clause, as we expounded it in *Burks* v. *United States,* 437 U. S. 1 (1978), by prosecuting petitioner a second time after the trial judge at the first trial granted peti-

**Quin Denvir* and *Laurance S. Smith* filed a brief for the State Public Defender of California as *amicus curiae.*

tioner's motion for new trial on the ground that the evidence was insufficient to support the jury's verdict of guilty.

I

Petitioner Tracy Lee Hudson was tried in Louisiana state court for first-degree murder, and the jury found him guilty. Petitioner then moved for a new trial, which under Louisiana law was petitioner's only means of challenging the sufficiency of the evidence against him.[1] The trial judge granted the motion, stating: "I heard the same evidence the jury did[;] I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of the homicide committed by this defendant of this particular victim." The Louisiana Supreme Court denied the State's ap-

[1] Louisiana's Code of Criminal Procedure does not authorize trial judges to enter judgments of acquittal in jury trials. La Code Crim Proc. Ann., Art. 778 (West Supp. 1980); *State* v. *Henderson*, 362 So. 2d 1358, 1367 (La. 1978). Accordingly, a criminal defendant's only means of challenging the sufficiency of evidence presented against him to a jury is a motion for new trial under La. Code Crim. Proc. Ann., Art. 851 (West 1967 and Supp. 1980), which provides in pertinent part:

"The Court, on motion of the defendant, shall grant a new trial whenever:

"(1) The verdict is contrary to the law and the evidence;

"(2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;

"(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;

"(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or

"(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

We think it clear that the trial judge in this case acted under paragraph (1) in granting a new trial. See *infra*, at 43.

plication for a writ of certiorari. *State* v. *Hudson,* 344 So. 2d 1 (1977).

At petitioner's second trial, the State presented an eyewitness whose testimony it had not presented at the first trial. The second jury also found petitioner guilty. The Louisiana Supreme Court affirmed the conviction. *State* v. *Hudson,* 361 So. 2d 858 (1978).

Petitioner then sought a writ of habeas corpus in a Louisiana state court, contending that the Double Jeopardy Clause barred the State from trying him the second time. Petitioner relied on our decision in *Burks* [2] that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support the guilty verdict. 437 U. S., at 18.[3] The trial court denied a writ, and the Louisiana Supreme Court affirmed. 373 So. 2d 1294 (1979). The Supreme Court read *Burks* to bar a second trial only if the court reviewing the evidence—whether an appellate court or a trial court—determines that there was *no* evidence to support the verdict. Because it believed that the trial judge at petitioner's first trial had granted petitioner's motion for new trial on the ground that there was *insufficient* evidence to support the verdict, although some evidence, the Louisiana Supreme Court concluded that petitioner's second trial was not precluded by the Double Jeopardy Clause.

We granted a writ of certiorari, 445 U. S. 960 (1980), and we now reverse.

II

We considered in *Burks* the question "whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of suffi-

[2] We decided *Burks* before the Louisiana Supreme Court entered its judgment affirming petitioner's conviction.

[3] *Burks* involved a federal prosecution, but the Court held in *Greene* v. *Massey,* 437 U. S. 19, 24 (1978), that the double jeopardy principle in *Burks* fully applies to the States. See *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Crist* v. *Bretz,* 437 U. S. 28 (1978).

cient evidence to sustain the jury's verdict." 437 U. S., at 2. We held that a reversal "due to a failure of proof at trial," where the State received a "fair opportunity to offer whatever proof it could assemble," bars retrial on the same charge. *Id.*, at 16. We also held that it makes "no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient," *id.*, at 11 (emphasis in original), or that "a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Id.*, at 17.

Our decision in *Burks* controls this case, for it is clear that petitioner moved for a new trial on the ground that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground. In the hearing on the motion, petitioner's counsel argued to the trial judge that "the verdict of the jury is contrary to the law and the evidence." After reviewing the evidence put to the jurors, the trial judge agreed with petitioner "that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict"; and he commented: "[H]ow they concluded that this defendant committed the act from that evidence when no weapon was produced, no proof of anyone who saw a blow struck, is beyond the Court's comprehension." The Louisiana Supreme Court recognized that the trial judge granted the new trial on the ground that the evidence was legally insufficient. The Supreme Court described the trial judge's decision in these words: "[T]he trial judge herein ordered a new trial pursuant to LSA–C. Cr. P. art. 851 (1) solely for lack of *sufficient evidence* to sustain the jury's verdict . . . ." 373 So. 2d, at 1298 (emphasis in original). This is precisely the circumstance in which *Burks* precludes retrials. 437 U. S., at 18. See *Greene* v. *Massey*, 437 U. S. 19, 24–26 (1978); *id.*, at 27 (POWELL, J., concurring). Nothing in *Burks* suggests, as the Louisiana Supreme Court seemed to believe, that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof.

The State contends that *Burks* does not control this case. As the State reads the record, the trial judge granted a new trial only because he entertained personal doubts about the verdict. According to the State, the trial judge decided that he, as a "13th juror," would not have found petitioner guilty and he therefore granted a new trial even though the evidence was not insufficient as a matter of law to support the verdict.[4] The State therefore reasons that *Burks* does not preclude a new trial in such a case, for the new trial was not granted "due to a failure of proof at trial." 437 U. S., at 16.

This is not such a case, as the opinion of the Louisiana Supreme Court and the statements of the trial judge make clear. The trial judge granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a "13th juror," would have decided it differently from the other 12 jurors.[5] Accordingly, there are no signifi-

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[4] The State's contention here adopts the reasoning of Justice Tate's concurring opinion in the Louisiana Supreme Court. Justice Tate wrote: "[The trial judge] did *not* grant a new trial for a reason that he did not think the state had produced *sufficient* evidence to prove guilt, but rather because he himself (to satisfy *his* doubts—not the jury's, which had concluded otherwise) had personal doubts that the evidence was sufficient to prove guilt beyond a reasonable doubt. Commendably and conscientiously, he therefore ordered a new trial . . . .

"The present is not an instance where the state did not prove its case at the first trial, so that granting a new trial gave the state a *second* chance to produce enough evidence to convict the accused. If so, as the majority notes, re-trial offends constitutional double jeopardy." 373 So. 2d, at 1298 (emphasis in original).

[5] Whether a state trial judge in a jury trial may assess evidence as a "13th juror" is a question of state law. Compare *People* v. *Noga*, 196 Colo. 478, 480, 586 P. 2d 1002, 1003 (1978); *State* v. *Bowle*, 318 So. 2d 407, 408 (Fla. App. 1975), with *Veitch* v *Superior Court*, 89 Cal. App. 3d 722, 730–731, 152 Cal. Rptr 822, 827 (1979); *People* v. *Ramos*, 33 App. Div. 2d 344, 347, 308 N. Y. S. 2d 195, 197–198 (1970). Justice Tate's concurring opinion for the Louisiana Supreme Court suggests that Louisiana law allows trial judges to act as "13th jurors." We do not decide whether the Double Jeopardy Clause would have barred Louisiana from retrying

cant facts which distinguish this case from *Burks*,[6] and the Double Jeopardy Clause barred the State from prosecuting petitioner a second time.

III

The judgment of the Louisiana Supreme Court is reversed.

It is so ordered.

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petitioner if the trial judge had granted a new trial in that capacity, for that is not the case before us. We note, however, that *Burks* precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so. *Supra*, at 43. By definition, a new trial ordered by a trial judge acting as a "13th juror" is not such a case. Thus, nothing in *Burks* precludes retrial in such a case.

[6] The Louisiana Supreme Court did not find it significant that the trial judge, rather than an appellate court, held the State's evidence to be insufficient to sustain the jury's verdict: "While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both." 373 So. 2d, at 1297. The State does not contest this conclusion.

BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM *v.* INVESTMENT COMPANY INSTITUTE

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

No. 79–927. Argued October 15, 1980—Decided February 24, 1981

Section 4 (c) (8) of the Bank Holding Company Act authorizes the Federal Reserve Board (Board) to allow bank holding companies to acquire or retain ownership in companies whose activities are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." In 1972, the Board amended its Regulation Y, and issued an interpretive ruling in connection therewith, enlarging the category of activities that it would regard as "closely related to banking" under § 4 (c) (8) by permitting bank holding companies and their nonbanking subsidiaries to act as an investment adviser to a closed-end investment company. Section 16 of the Banking Act of 1933 (Glass-Steagall Act) prohibits a bank from "underwriting" any issue of a security or purchasing any security for its own account, and § 21 of that Act prohibits any organization "engaged in the business of issuing, underwriting, selling, or distributing" securities from engaging in banking. Respondent trade association of open-end investment companies, in proceedings before the Board and on direct review in the Court of Appeals, challenged, on the basis of the Glass-Steagall Act, the Board's authority to determine that investment adviser services are "closely related" to banking. While rejecting respondent's argument that Regulation Y, as amended, violated the Glass-Steagall Act, the Court of Appeals nevertheless held that § 4 (c) (8) of the Bank Holding Company Act did not authorize the regulation because the activities that it permitted were not consistent with the congressional intent in both of these Acts to effect as complete a separation as possible between the securities and commercial banking businesses.

Held: The amendment to Regulation Y does not exceed the Board's statutory authority. Pp. 55–78.

(a) The Board's determination that services performed by an investment adviser for a closed-end investment company are "so closely related to banking . . . as to be a proper incident thereto" is supported not only by the normal practice of banks in performing fiduciary functions in various capacities but also by a normal reading of the language of § 4 (c) (8). And the Board's determination of what activities are

"closely related" to banking is entitled to the greatest deference. Pp. 55–58.

(b) Investment adviser services by a bank do not necessarily violate either § 16 or § 21 of the Glass-Steagall Act. The Board's interpretive ruling here prohibits a bank holding company or its subsidiaries from participating in the "sale or distribution" of, or from purchasing, securities of any investment company for which it acts as an investment adviser. Thus, if such restrictions are followed, investment advisory services—even if performed by a bank—would not violate § 16's requirements. And the management of a customer's investment portfolio is not the kind of selling activity contemplated in the prohibition in § 21, which was intended to require securities firms, such as underwriters or brokerage houses, to sever their banking connections. In any event, even if the Glass-Steagall Act did prohibit banks from acting as investment advisers, that prohibition would not necessarily preclude the Board from determining that such adviser services would be permissible under § 4 (c)(8). Pp. 58–64.

(c) Since the interpretive ruling issued with the amendment to Regulation Y prohibits a bank holding company acting as an investment adviser from issuing, underwriting, selling, or redeeming securities, Regulation Y, as amended, avoids the potential hazards involved in any association between a bank affiliate and a closed-end investment company. Cf *Investment Company Institute* v. *Camp*, 401 U. S. 617. Pp. 64–68.

(d) Regulation Y, as amended, is consistent with the legislative history of both the Bank Holding Company Act and the Glass-Steagall Act. More specifically, such legislative history indicates that Congress did not intend the Bank Holding Company Act to limit the Board's discretion to approve securities-related activity as closely related to banking beyond the prohibitions already contained in the Glass-Steagall Act. Pp. 68–78.

196 U. S. App. D. C. 97, 606 F. 2d 1004, reversed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except STEWART and REHNQUIST, JJ., who took no part in the consideration or decision of the case, and POWELL, J., who took no part in the decision of the case.

Stephen M. Shapiro argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Daniel, Anthony J. Steinmeyer,* and *Neal L. Petersen.*

G. Duane Vieth argued the cause for respondent. With him on the briefs was *Leonard H. Becker.**

JUSTICE STEVENS delivered the opinion of the Court.

In 1956 Congress enacted the Bank Holding Company Act to control the future expansion of bank holding companies and to require divestment of their nonbanking interests.[1] The Act, however, authorizes the Federal Reserve Board (Board) to allow holding companies to acquire or retain ownership in companies whose activities are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." [2] In 1972 the Board amended its

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**William H. Smith, Keith A. Jones, Alan B. Levenson, Daniel F. Kolb, Geoffrey S. Stewart, Arnold M. Lerman, Michael L. Burack,* and *Edward T. Hand* filed a brief for the American Bankers Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Roger A. Clark, John M. Liftin,* and *Donald J. Crawford* for the Securities Industry Association; and by *Harvey L. Pitt, James H. Schropp,* and *Randy A. Harris* for A. G. Becker Inc.

[1] The stated purpose of the Bank Holding Company Act of 1956 was "[t]o define bank holding companies, control their future expansion, and require divestment of their nonbanking interests." 70 Stat. 133.

[2] Section 4 of the statute, as originally enacted, provided in pertinent part:

"(a) Except as otherwise provided in this Act, no bank holding company shall—

"(1) after the date of enactment of this Act acquire direct or indirect ownership or control of any voting shares of any company which is not a bank. . . .

. . . . . .

"(c) The prohibitions in this section shall not apply—

. . . . . .

"(6) to shares of any company all the activities of which are of a financial, fiduciary, or insurance nature and which the Board after due notice and hearing, and on the basis of the record made at such hearing, by order has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto and as

regulations to enlarge the category of activities that it would regard as "closely related to banking" and therefore permissible for bank holding companies and their nonbanking subsidiaries. Specifically, the Board determined that the services of an investment adviser to a closed-end investment company may be such a permissible activity. The question presented by this case is whether the Board had the statutory authority to make that determination.

The Board's determination, which was implemented by an amendment to its "Regulation Y," permits bank holding companies and their nonbanking subsidiaries to act as an investment adviser as that term is defined by the Investment Company Act of 1940.[3] Although the statutory definition

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to make it unnecessary for the prohibitions of this section to apply in order to carry out the purposes of this Act . . . ." 70 Stat. 135–137.

The relevant exemption is now found in § 4 (c) (8) which allows holding company ownership of:

"(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern." 12 U. S. C. § 1843 (c) (8).

[3] See 36 Fed. Reg. 16695, 17514 (1971); 37 Fed. Reg. 1463 (1972); 12 CFR § 225.4 (a) (5) (ii) (1980). The 1972 amendment to Regulation Y made the following addition to the list of permissible activities:

"(ii) serving as investment adviser, as defined in section 2 (a) (20) of the Investment Company Act of 1940, to an investment company registered under that Act."

is a detailed one,[4] the typical relationship between an investment adviser and an investment company can be briefly described. Investment companies, by pooling the resources of small investors under the guidance of one manager, provide those investors with diversification and expert management.[5] Investment advisers generally organize and manage investment companies pursuant to a contractual arrangement with the company.[6] In return for a management fee, the adviser

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[4] The definition of an investment adviser in § (2)(a)(20) of the Investment Company Act of 1940 reads as follows:

"(20) 'Investment adviser' of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) of this paragraph regularly performs substantially all of the duties undertaken by such person described in said clause (A); but does not include (i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies, or other financial institutions, (iv) any person the character and amount of whose compensation for such services must be approved by a court, or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition." 15 U. S. C. § 80a–2 (20).

[5] 1 T. Frankel, The Regulation of Money Managers, I-A, § 2, p. 6 (1978).

[6] *Id.*, at I-B, § 4, pp. 9–10; see Wharton School Study of Mutual Funds, H. R. Rep. No. 2274, 87th Cong., 2d Sess., 467–477 (1962) (hereinafter Wharton School Study); *Burks* v. *Lasker*, 441 U. S. 471, 480–481 (1979).

selects the company's investment portfolio and supervises most aspects of its business.[7]

The Board issued an interpretive ruling in connection with its amendment to Regulation Y. That ruling distinguished "open-end" investment companies (commonly referred to as "mutual funds") from "closed-end" investment companies. The ruling explained that "a mutual fund is an investment company, which, typically, is continuously engaged in the issuance of its shares and stands ready at any time to redeem the securities as to which it is the issuer; a closed-end investment company typically does not issue shares after its initial organization except at infrequent intervals and does not stand ready to redeem its shares." [8] Because open-end investment companies will redeem their shares, they must constantly issue securities to prevent shrinkage of assets.[9] In contrast, the capital structure of a closed-end company is similar to that of other corporations; if its shareholders wish to sell, they must do so in the marketplace. Without any obligation to redeem, closed-end companies need not continuously seek new capital.[10]

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[7] Securities and Exchange Commission Report on the Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess, 8 (1966).

[8] 12 CFR § 225.125 (c) (1980).

[9] Hearings on S. 3580 before a Senate Subcommittee on Banking and Currency, 76th Cong., 3d Sess., 43 (1940) (hereinafter 1940 Senate Hearings) (statement of Robert E. Healy). As the SEC Report on the Public Policy Implications of Investment Company Growth recognized with respect to open-end funds:

"Since there will always be some shareholders who want to sell, an open-end company must comply with continuous demands for cash from selling stockholders. To offset the resulting cash outflow and because of the strong incentives for growth created by the structure of the industry, the managers of virtually all open-end companies vigorously promote sales of new shares at all times." H. R. Rep. No. 2337, *supra,* at 42–43.

[10] *Id.,* at 42.

The Board's interpretive ruling expressed the opinion that a bank holding company may not lawfully sponsor, organize, or control an open-end investment company,[11] but the Board perceived no objection to sponsorship of a closed-end investment company provided that certain restrictions are observed.[12] Among those restrictions is a requirement that the investment company may not primarily or frequently engage in the issuance, sale, and distribution of securities; a requirement that the investment adviser may not have any ownership interest in the investment company, or extend credit to it; and a requirement that the adviser may not underwrite or otherwise participate in the sale or distribution of the investment company's securities.[13]

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[11] The ruling would apparently permit a bank holding company to provide investment advice to an open-end investment company if the holding company does not have the authority to make investment decisions or otherwise to control investments of such an advisee. Respondent has not specifically challenged the legality of a relationship that is purely advisory in character.

[12] "(f) In the Board's opinion, the Glass-Steagall Act provisions, as interpreted by the U. S. Supreme Court, forbid a bank holding company to sponsor, organize or control a mutual fund. However, the Board does not believe that such restrictions apply to closed-end investment companies as long as such companies are not primarily or frequently engaged in the issuance, sale and distribution of securities." 12 CFR § 225.125 (f) (1980).

[13] Pertinent parts of the interpretive ruling read as follows:

"In no case, however, should a bank holding company act as investment adviser to an investment company which has a name that is similar to, or a variation of, the name of the holding company or any of its subsidiary banks.

"(g) In view of the potential conflicts of interests that may exist, a bank holding company and its bank and nonbank subsidiaries should not (1) purchase for their own account securities of any investment company for which the bank holding company acts as investment adviser; (2) purchase in their sole discretion, any such securities in a fiduciary capacity (including as managing agent); (3) extend credit to any such investment company; or (4) accept the securities of any such investment company as

Respondent Investment Company Institute, a trade association of open-end investment companies, commenced this litigation challenging as in excess of the Board's statutory authority the determination that investment adviser services are "closely related" to banking. Both in proceedings before the Board and in a direct review proceeding in the United States Court of Appeals for the District of Columbia Circuit, respondent based this challenge on the Banking Act of 1933, commonly known as the Glass-Steagall Act, in which Congress placed restrictions on the securities-related business of banks in order to protect their depositors.[14]

The Court of Appeals rejected respondent's argument that Regulation Y, as amended, violated the Glass-Steagall Act, relying on the fact that the prohibitions of §§ 16 and 21 of

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collateral for a loan which is for the purpose of purchasing securities of the investment company.

"(h) A bank holding company should not engage, directly or indirectly, in the sale or distribution of securities of any investment company for which it acts as investment adviser. Prospectuses or sales literature should not be distributed by the holding company, nor should any literature be made available to the public at any offices of the holding company. In addition, officers and employees of bank subsidiaries should be instructed not to express any opinion with respect to advisability of purchase of securities of any investment company for which the bank holding company acts as investment adviser. Customers of banks in a bank holding company system who request information on an unsolicited basis regarding any investment company for which the bank holding company acts as investment adviser may be furnished the name and address of the fund and its underwriter or distributing company, but the names of bank customers should not be furnished by the bank holding company to the fund or its distributor. Further, a bank holding company should not act as investment adviser to a mutual fund which has offices in any building which is likely to be identified in the public's mind with the bank holding company." 12 CFR §§ 225.125 (f), (g), (h) (1980).

[14] The stated purpose of the 1933 Act was "[t]o provide for the safer and more effective use of the assets of banks, to regulate interbank control, to prevent the undue diversion of funds into speculative operations, and for other purposes." 48 Stat. 162.

that Act [15] apply only to banks rather than to bank holding companies or their nonbanking subsidiaries. 196 U. S. App. D. C. 97, 606 F. 2d 1004. The court nevertheless concluded that § 4 (c)(8) of the Bank Holding Company Act did not authorize the regulation. The court reasoned that the legislative history of the Act demonstrates that Congress did not intend the Bank Holding Company Act to restrict the scope of the Glass-Steagall Act. Because the court read the legislative history to indicate that Congress perceived the Glass-Steagall Act as an effort to effect as complete a separation as possible between the securities business and the commercial banking business, the court read a similar intent into the Bank Holding Company Act. The Court of Appeals believed that activities permitted by the challenged regulation were not consistent with the congressional intent to effect this separation.

We granted certiorari because of the importance of the Court of Appeals holding. 444 U. S. 1070. We are persuaded

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[15] Section 16, as originally enacted, provided in pertinent part:

"The business of dealing in investment securities by [a national bank] shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and [a national bank] shall not underwrite any issue of securities: *Provided,* That [a national bank] may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe . . . ." 48 Stat. 184.

Section 16, as amended, is now codified at 12 U. S. C. § 24 (Seventh).

Section 21, provides, in pertinent part, that it is unlawful

"[f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor . . . ." 48 Stat. 189, 12 U. S. C. § 378.

that the language of both the Bank Holding Company Act and the Glass-Steagall Act, as well as our interpretation of the Glass-Steagall Act in *Investment Company Institute* v. *Camp,* 401 U. S. 617 (1971), supports the Board. Moreover, contrary to the view of the Court of Appeals, we are persuaded that the regulation is consistent with the legislative history of both statutes.

I

The services of an investment adviser are not significantly different from the traditional fiduciary functions of banks. The principal activity of an investment adviser is to manage the investment portfolio of its advisee—to invest and reinvest the funds of the client. Banks have engaged in that sort of activity for decades.[16] As executor, trustee, or managing agent of funds committed to its custody, a bank regularly buys and sells securities for its customers. Bank trust departments manage employee benefits trusts, institutional and corporate agency accounts, and personal trust and agency accounts.[17] Moreover, for over 50 years banks have performed these tasks for trust funds consisting of commingled funds of customers.[18] These common trust funds adminis-

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[16] A memorandum submitted to the Board on behalf of the American Bankers Association states, in part: "For well over a century, banks and trust companies in every state have managed and administered customers' investment funds in the form of trusts, estates and agency accounts." App. 20. The accuracy of that statement is not challenged.

[17] See Securities Exchange Commission Institutional Investor Study Report Summary, H. R. Doc. No. 92–64, pt. 8, pp. 34–35 (1971).

[18] As we recognized in *Investment Company Institute* v. *Camp,* 401 U. S. 617 (1971):

"National banks were granted trust powers in 1913. Federal Reserve Act, § 11, 38 Stat. 261. The first common trust fund was organized in 1927, and such funds were expressly authorized by the Federal Reserve Board by Regulation F promulgated in 1937. Report on Commingled or Common Trust Funds Administered by Banks and Trust Companies, H. R. Doc. No. 476, 76th Cong., 2d Sess., 4–5 (1939). For at least a generation,

tered by banks would be regulated as investment companies by the Investment Company Act of 1940 were they not exempted from the Act's coverage.[19] The Board's conclusion that the services performed by an investment adviser are "so closely related to banking . . . as to be a proper incident thereto" is therefore supported by banking practice and by a normal reading of the language of § 4 (c)(8).[20]

The Board's determination of what activities are "closely related" to banking is entitled to the greatest deference.[21]

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therefore, there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds on the one hand, and act as a managing agent on the other. No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers." *Id.*, at 624–625.

See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 307–308 (1950).

[19] See 15 U. S. C. § 80a–3 (c)(3). As David Schenker, an attorney for the SEC, explained at the 1940 Senate Hearings: "We have exempted any common trust fund . . . . Those common trust funds are a sort of investment trust in which trustees can participate, and they are managed by banks and trust companies." 1940 Senate Hearings, at 181.

[20] The normal reading of the language of § 4 (c)(8) takes on additional significance in light of the fact, recognized by the Court of Appeals, that the legislative history of the section provides no real guidance as to the scope of the exception contained therein. 196 U. S. App. D C. 97, 110, 606 F. 2d 1004, 1017

[21] Commenting on an interpretation of the Glass-Steagall Act by the Board in *Board of Governors* v. *Agnew*, 329 U. S. 441 (1947), Justice Rutledge observed:

"Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly

Such deference is particularly appropriate in this case because the regulation under attack is merely a general determination that investment advisory services which otherwise satisfy the restrictions imposed by the Board's interpretive ruling constitute an activity that is so closely related to banking as to be a proper incident thereto.[22] Because the authority for any specific investment advisory relationship must be preceded by a further determination by the Board that the relationship can be expected to provide benefits for the public, the Board will have the opportunity to ensure that no bank holding company exceeds the bounds of a bank's traditional fiduciary function of managing customers' accounts.[23] Thus

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their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority." *Id.*, at 450.

See also *Board of Governors* v. *First Lincolnwood Corp*, 439 U. S. 234, 248 (1978).

[22] A determination by the Board that a particular service is closely related to banking does not end the Board's role. A bank holding company must submit a specific application with respect to each service it wishes to perform. The Board then determines on the basis of the circumstances of each applicant whether the proposed activity would serve the public interest See 12 CFR § 225 4 (a) (1980); H. R. Conf. Rep No. 91–1747, p. 22 (1970); *NCNB Corp.* v. *Board of Governors*, 599 F. 2d 609, 610–611 (CA4 1979). If a bank holding company wishes to acquire or retain shares of a company engaged in an activity already approved as "closely related," the Board publishes notice of the application in the Federal Register for public comment on the "public benefits" issue. 12 CFR § 225 4 (b)(2) (1980).

[23] The Senate Report on the Bank Holding Company Act indicated the importance of the role of the Board in determining what activities would be permitted under § 4 (c)(8):

"[T]here are many other activities of a financial, fiduciary, or insurance nature which cannot be determined to be closely related to banking without a careful examination of the particular type of business carried on under such activity. For this reason your committee deems it advisable to provide a forum before an appropriate Federal authority in which decisions concerning the relationship of such activities to banking can be determined

unless the Glass-Steagall Act requires a contrary conclusion, the Board's interpretation of the plain language of the Bank Company Holding Act must be upheld.

II

Respondent's principal attack on the Board's general determination that investment adviser services are so closely related as to be a proper incident to banking proceeds from the premise that if such services were performed by a bank, the bank would violate §§ 16 and 21 of the Glass-Steagall Act.[24] Respondent therefore argues that such services may

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in each case on its merits." S Rep No. 1095, 84th Cong., 1st Sess., pt. 1, p. 13 (1955) (hereinafter 1955 Senate Report).

The legislative history of the Bank Holding Company Act Amendments of 1970 indicated that the Amendments were not intended to cut back on the discretion afforded the Board. As Senator Bennett, a member of the Conference Committee, indicated, the 1970 Amendments maintained "maximum flexibility for the Federal Reserve Board to determine the activities in which a bank holding company and its subsidiaries may engage . . . ." 116 Cong. Rec. 42432 (1970). See n. 58, *infra*.

[24] See n. 15, *supra*. We agree with the Court of Appeals that §§ 16 and 21 apply only to banks and not to bank holding companies. Section 21 prohibits firms engaged in the securities business from also receiving deposits. Bank holding companies do not receive deposits, and the language of § 21 cannot be read to include within its prohibition separate organizations related by ownership with a bank, which does receive deposits. As the following colloquy, cited by the Court of Appeals, between Senator Glass, cosponsor of the bill, and Senator Robinson indicates, the drafters of the bill agreed with this construction:

"Mr. GLASS. . . . Here [§ 21] we prohibit the large private banks, whose chief business is investment business, from receiving deposits. We separate them from the deposit banking business.

. . . . . .

"Mr. ROBINSON of Arkansas. That means if they wish to receive deposits they must have separate institutions for that purpose?

"Mr. GLASS. Yes" 77 Cong. Rec. 3730 (1933).

Section 16, which prohibits a national bank from "underwriting" any issue of a security, by its terms applies only to banks. Although respondent contended here and in the Court of Appeals that the bank and its hold-

never be regarded as a "proper incident" that could be performed by a bank affiliate.[25] We reject both the premise and the conclusion of this argument. The performance of

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ing company should be treated as a single entity for purposes of applying §§ 16 and 21, the structure of the Glass-Steagall Act indicates to the contrary. Sections 16 and 21 flatly prohibit banks from engaging in the underwriting business Organizations affiliated with banks, however, are dealt with by other sections of the Act. Section 19 (e), 48 Stat. 188, repealed in pertinent part, 80 Stat. 242, prohibited bank holding companies from voting the shares of a bank subsidiary unless the holding company divested itself of any interest in a subsidiary formed for the purpose of or "engaged principally" in the issuance or underwriting of securities. More importantly, § 20 of the Act, 48 Stat. 188, prohibits national banks or state bank members of the Federal Reserve System from owning securities affiliates, defined in § 2 (b), 48 Stat. 162, that are "engaged principally" in the issuance or underwriting of securities. Thus the structure of the Act reveals a congressional intent to treat banks separately from their affiliates. The reading of the Act urged by respondent would render § 20 meaningless

[25] Respondent also argues that the regulation authorizes banks as well as bank holding companies and nonbank subsidiaries to act as investment advisers. The operative definition of "bank holding company" in the Board's interpretive ruling includes "their bank and nonbank subsidiaries." 12 CFR § 225.125 (c) (1980). Respondent contends that banks have relied on the interpretive ruling as authorization for them to sponsor investment companies. Brief for Respondent 13–18. The simple answer to this argument is that not only does the interpretive ruling confer no authorization to undertake any activities, but also the Board does not have the power to confer such authorization on banks. As the Board's opinion in this case stated:

"[T]he Board's regulation was adopted pursuant to section 4 (c) (8) of the Bank Holding Company Act and authorizes investment advisory activity to be conducted by a nonbanking subsidiary of the holding company. The authority of national banks or state member banks to furnish investment advisory services does not derive from the Board's regulation; such authority would exist independently of the Board's regulation and its scope is to be determined by a particular bank's primary supervisory agency." App. to Pet. for Cert 61a.

Thus the regulation applies only to bank holding companies. Although the interpretive ruling applies to banks, that ruling contains only restric-

investment advisory services by a bank would not necessarily violate § 16 or § 21 of the Glass-Steagall Act. Moreover, bank affiliates may be authorized to engage in certain activities that are prohibited to banks themselves.[26]

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tions on the activity permitted by the regulation. The Board's opinion explained that the restrictions contained in the interpretive ruling were intended to apply to banks when the investment advisory function was performed by a holding company or its nonbanking subsidiaries. *Ibid.* This imposition of restrictions on banks prevented bank holding companies and their nonbanking subsidiaries from evading the restrictions by allowing subsidiary banks to perform the restricted activities. Whether banks are mistakenly relying on the Board's interpretive ruling to derive permission to act as investment advisers is not relevant to the determination of the Board's power to enact the challenged regulation We do note that at the time of the Court of Appeals decision, the Board represented that no bank had sought the Board's approval for an investment adviser service that is a prerequisite to acting pursuant to Board authority. See 196 U. S App. D C., at 107, n. 26, 606 F 2d, at 1014, n. 26. Thus although in the discussion to follow we refer to bank affiliation with investment companies, this reference is only for purposes of addressing respondent's argument that banks would violate the Glass-Steagall Act by serving as investment advisers to closed-end investment companies.

[26] Respondent also contends that the Board's regulation violates § 20 of the Glass-Steagall Act The Court of Appeals did not consider the § 20 argument, but the respondent has submitted this contention to answer the Board's argument that § 20 is the only relevant section of the Glass-Steagall Act for purposes of determining what services bank holding companies may provide. Section 20 provides in pertinent part:

"[N]o [national bank] shall be affiliated . . . with any corporation, association, business trust or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities." 48 Stat. 188, 12 U. S. C. § 377.

Although "affiliate" as originally defined in § 2 (b) of the Glass-Steagall Act did not include holding companies, see 48 Stat. 162, Congress in 1966 amended the statute to bring holding companies within the definition of "affiliate" and thereby within the reach of § 20. 80 Stat. 242, 12 U. S. C. § 221a (b)(4). In *Board of Governors* v. *Agnew,* 329 U. S. 441 (1947), the Court recognized the difference in the extent of prohibition of securities-related activities reflected in the use of the word "engaged"

It is familiar history that the Glass-Steagall Act was enacted in 1933 to protect bank depositors from any repetition of the widespread bank closings that occurred during the Great Depression.[27] Congress was persuaded that speculative activities, partially attributable to the connection between commercial banking and investment banking, had contributed to the rash of bank failures.[28] The legislative history reveals that securities firms affiliated with banks had

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in § 21 as opposed to the use of the words "engaged principally" in § 20. Thus a less stringent standard should apply to determine whether a holding company has violated § 20 than is applied to a determination of whether a bank has violated §§ 16 and 21. Nevertheless, the Board's regulation goes beyond the less stringent standard by prohibiting *any* involvement by the bank holding company or its subsidiaries in the underwriting or selling of the securities of the investment company. Moreover, the distinction here between closed-end and open-end investment companies is crucial. If, as respondent contends, the closed-end company's initial issuance of stock were sufficient to render the company "principally engaged" in the issuance of securities, then all corporations, including banks, would at some point be engaged principally in the issuance of securities. We cannot accept this premise. Moreover, given our rejection of this premise, it follows that the investment adviser to such a company is clearly not engaged principally in the issuance of securities. To a certain extent, our conclusions *infra* with respect to §§ 16 and 21 subsume the argument that the regulation is inconsistent with § 20.

[27] Representative Steagall, cosponsor of the bill, stated in debate:

"[T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of a system of banks in the United States where citizens may place their hard earnings with reasonable expectation of being able to get them out again upon demand." 77 Cong. Rec. 3837 (1933).

This purpose is also reflected by the fact that a major portion of the Act, around which most of the debate by both Houses centered, was the creation of the Federal Deposit Insurance Corporation. See 48 Stat. 168–180.

[28] S. Rep. No. 77, 73d Cong., 1st Sess., 6, 10 (1933) (hereinafter 1933 Senate Report). Representative Koppleman stated in debate: "One of the chief causes of this depression has been the diversion of depositors' moneys into the speculative markets of Wall Street." 77 Cong. Rec. 3907 (1933). See also *id.*, at 3835 (remarks of Rep. Steagall).

engaged in perilous underwriting operations, stock speculation, and maintaining a market for the bank's own stock, often with the bank's resources.[29] Congress sought to separate national banks, as completely as possible, from affiliates engaged in such activities.[30]

Sections 16 and 21 of the Glass-Steagall Act approach the legislative goal of separating the securities business from the banking business from different directions. The former places a limit on the power of a bank to engage in securities transactions; the latter prohibits a securities firm from engaging in the banking business. Section 16 expressly prohibits a bank from "underwriting" any issue of a security or purchasing any security for its own account. The Board's interpretive ruling here expressly prohibits a bank holding company or its subsidiaries from participating in the "sale or distribution" of securities of any investment company for which it acts as investment adviser. 12 CFR § 225.125 (h) (1980). The ruling also prohibits bank holding companies and their subsidiaries from purchasing securities of the investment company for which it acts as investment adviser. § 225.125 (g).[31] Therefore, if the restrictions imposed by the Board's interpretive ruling are followed, investment advisory services—even if performed by a bank—would not violate the requirements of § 16.

We are also satisfied that a bank's performance of such services would not necessarily violate § 21. In contrast to § 16, § 21 prohibits certain kinds of securities firms from engaging in banking. The § 21 prohibition applies to any organization "engaged in the business of issuing, underwriting, selling, or distributing" securities. Such a securities firm may not engage at the same time "to any extent whatever in

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[29] 1933 Senate Report, at 10. See also 77 Cong. Rec. 3835 (1933) (remarks of Rep. Steagall); *id*, at 4179, 4180 (remarks of Sen. Bulkley).

[30] 1933 Senate Report, at 10 See also 77 Cong. Rec. 3835 (1933) (remarks of Rep. Steagall); *id*, at 4179, 4180 (remarks of Sen. Bulkley).

[31] See n. 13, *supra*.

the business of receiving deposits." The management of a customer's investment portfolio—even when the manager has the power to sell securities owned by the customer—is not the kind of selling activity that Congress contemplated when it enacted § 21. If it were, the statute would prohibit banks from continuing to manage investment accounts in a fiduciary capacity or as an agent for an individual. We do not believe Congress intended that such a reading be given § 21.[32] Rather, § 21 presented the converse situation of § 16 and was intended to require securities firms such as underwriters or brokerage houses to sever their banking connections. It surely was not intended to require banks to abandon an accepted banking practice that was subjected to regulation under § 16.[33]

Even if we were to assume that a bank would violate the Glass-Steagall Act by engaging in certain investment advisory

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[32] The statutory prohibition in § 21 applies to firms "engaged in the business of issuing, underwriting, selling, or distributing at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities . . ."; that is hardly the sort of language that would be used to describe an investment adviser. Compare the statutory definition of an investment adviser quoted in n. 4, *supra*.

[33] Section 21 originally prohibited firms "engaged principally" in the business of issuing securities from receiving deposits. Senator Bulkley introduced an amendment striking the word "principally" because "[i]t has become apparent that at least some of the great investment houses are engaged in so many forms of business that there is some doubt as to whether the investment business is the principal one" 77 Cong Rec. 4180 (1933). This amendment indicates the type of institution which Congress focused upon in § 21. Senator Glass, in discussing the effect that § 21 would have upon the credit supply, indicated that "[i]f we confine to their proper business activities these large private concerns whose principal business is that of dealing in investment securities, . . and many of which unloaded millions of dollars of worthless investment securities upon the banks of this country, and deny them the right to conduct the deposit bank business at the same time, there will be no difficulty on the face of the globe in financing any business enterprise that needs to be financed at a profit in this country." 77 Cong. Rec. 4179 (1933).

services, it would not follow that a bank holding company could never perform such services. In both the Glass-Steagall Act itself and in the Bank Holding Company Act, Congress indicated that a bank affiliate may engage in activities that would be impermissible for the bank itself. Thus, § 21 of Glass-Steagall entirely prohibits the same firm from engaging in banking and in the underwriting business, whereas § 20 does not prohibit bank affiliation with a securities firm unless that firm is "engaged principally" in activities such as underwriting.[34] Further, § 4 (c) (7) of the Bank Holding Company Act, which authorizes holding companies to purchase and own shares of investment companies, permits investment activity by a holding company that is impermissible for a bank itself.[35] Finally, inasmuch as the Bank Holding Company Act requires divestment only of nonbanking interests, the § 4 (c) (8) exception would be unnecessary if it applied only to services that a bank could legally perform. Thus even if the Glass-Steagall Act did prohibit banks from acting as investment advisers, that prohibition would not necessarily preclude the Board from determining that such adviser services would be permissible under § 4 (c) (8).

In all events, because all that is presently at issue is the Board's preliminary authorization of such services, rather than approval of any specific advisory relationship, speculation about possible conflicts with the Glass-Steagall Act is plainly not a sufficient basis for totally rejecting the Board's carefully considered determination.

III

Our conclusions with respect to the Glass-Steagall Act are in no way altered by consideration of our decision in *Invest-*

[34] See nn. 15, 26, *supra*.

[35] See 12 U. S. C. § 1843 (c) (7). Section 4 (c) (7) even permits a bank holding company to own a controlling interest in an investment company, and § 4 (a) (2) permits a holding company to provide management services to companies in which it has a controlling interest. See 12 U. S. C. § 1843 (a) (2).

ment Company Institute v. *Camp*, 401 U. S. 617 (1971). The Court there held that a regulation issued by the Comptroller of the Currency purporting to authorize banks to operate mutual funds violated §§ 16 and 21 of the Glass-Steagall Act. The mutual fund under review in that case was the functional equivalent of an open-end investment company.[36] Because the authorization at issue in this case is expressly limited to closed-end investment companies, the holding in *Camp* is clearly not dispositive. Respondent argues, however, that both the Court's reasoning in *Camp* and its description of the "more subtle hazards" created by the performance of investment advisory services by a bank are inconsistent with the Board's action. We disagree.

In *Camp* the Court relied squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act. After noting that § 16 prohibited the underwriting by a national bank of any issue of securities and the purchase for its own account of shares of stock of any corporation, and that § 21 prohibited corporations from both receiving deposits and engaging in issuing, underwriting, selling, or distributing securities, the Court recognized that the statutory language plainly applied to a bank's sale of redeemable and transferable "units of participation" in a common investment fund operated by the bank. 401 U. S., at 634. Because the Court held that the bank was the underwriter of the fund's units of participation within the meaning of the Investment Company Act of 1940,

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[36] It was described as follows:

"Under the plan the bank customer tenders between $10,000 and $500,000 to the bank, together with an authorization making the bank the customer's managing agent. The customer's investment is added to the fund, and a written evidence of participation is issued which expresses in 'units of participation' the customer's proportionate interest in fund assets. Units of participation are freely redeemable, and transferable to anyone who has executed a managing agency agreement with the bank. The fund is registered as an investment company under the Investment Company Act of 1940. The bank is the underwriter of the fund's units of participation within the meaning of that Act." 401 U. S., at 622–623.

id., at 622–623, the Comptroller attempted to avoid the reach of § 16 by arguing that the units of participation were not "securities" within the meaning of the Glass-Steagall Act. The Court's contrary determination led inexorably to the conclusion that § 16 had been violated.

This case presents an entirely different issue. No one could dispute the fact that the shares in a closed-end investment company are securities. But as we have indicated, such securities are not issued, sold, or underwritten by the investment adviser. In contrast to the bank's activities in issuing, underwriting, selling, and redeeming the units of participation in the *Camp* case, in this case the Board's interpretive ruling expressly prohibits such activity.[37]

The Court in *Camp* recognized that in enacting the Glass-Steagall Act, Congress contemplated other hazards in addition to the danger of banks using bank assets in imprudent securities investments.[38] But none of these "more subtle haz-

[37] Moreover, the decision by an investment adviser to purchase or sell securities on behalf of a closed-end investment company is critically different from the comparable decision by the operator of the mutual fund reviewed in *Camp* When an adviser makes a change in the securities portfolio of a closed-end company, the adviser is acting for the account of its customer—not for its own account. In *Camp,* however, the securities in the portfolio of the mutual fund were at least arguably the property of the bank itself and therefore the bank was arguably acting for its own account within the meaning of § 16.

[38] The Court recognized that because the bank and its affiliate would be closely associated in the public mind, public confidence in the bank might be impaired if the affiliate performed poorly. Further, depositors of the bank might lose money on investments purchased in reliance on the relationship between the bank and its affiliate. The pressure on banks to prevent this loss of public confidence could induce the bank to make unsound loans to the affiliate or to companies in whose stock the affiliate has invested. Moreover, the association between the commercial and investment bank could result in the commercial bank's reputation for prudence and restraint being attributed, without justification, to an enterprise selling stocks and securities. Furthermore, promotional considerations might induce banks to make loans to customers to be used

ards" would be present were a bank to act as an investment adviser to a closed-end investment company subject to the restrictions imposed by the Board. Those restrictions would prevent the bank from extending credit to the investment company and would also preclude the promotional pressures that are inherent in the investment banking business.[39] In addition to the fact that the bank could not underwrite or sell the stock of the closed-end investment company, that company, unlike a mutual fund, would not be constantly involved in the search for new capital to cover the redemption of other stock. The advisory fee earned by the bank would provide little incentive to the bank or its holding company to engage in promotional activities.[40]

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for the purchase of stocks and might impair the ability of the commercial banker to render disinterested advice. 401 U. S., at 630–634.

[39] The bank could not stray from its obligation to render impartial advice to its customers by promoting the fund, because the interpretive ruling prohibits a bank from giving the names of its depositors to the investment company. 12 CFR § 225.125 (h) (1980); see n. 13, *supra*. Further, the bank could not act as investment adviser to any investment company having a similar name; prospectuses and sales literature of the investment company could not be distributed by the bank; officers and employees of the bank could not express an opinion with respect to the advisability of the purchase of securities of the investment company, and the investment company could not locate its offices in the same building as the bank. *Ibid.* These restrictions would prevent to a large extent the association in the public mind between the bank and the investment company, as well as the resulting connection between public confidence in the bank and the fortunes of the investment company. Although this association cannot be completely obliterated, we do note that the performance of the large trust funds operated by banks is routinely published. See American Banker, Sept. 2, 1980, pp. 1, 10, 16. The Securities Exchange Act of 1934 requires disclosure of information about the securities portfolios of common trust funds that have a portfolio with an aggregate value of at least $100 million. 15 U. S. C. § 78m (f); 17 CFR § 240.13f–1 (1980).

[40] The advisory fee is the adviser's consideration for managing the investment company. In 1962 the Wharton School Study of Mutual Funds indicated that the advisory fee charged by advisers to open-end funds

Our obligation to accord deference to the Board's interpretive ruling provides added support to our conclusion that the Board's regulation avoids the potential hazards involved in any association between a bank affiliate and a closed-end investment company. In *Camp* the Court emphasized that the Comptroller of the Currency had provided no guidance as to the effect of the Glass-Steagall Act on the proposed activity.[41] Whereas in *Camp* the Court was deprived of administrative "expertise that can enlighten and rationalize the search for the meaning and intent of Congress," 401 U. S., at 628, in this case the regulatory action by the Board recognized and addressed the concerns that led to the enactment of the Glass-Steagall Act. Contrary to respondent's argument, the *Camp* decision therefore affirmatively supports the Board's action in this case.

IV

The Court of Appeals rested its conclusion that the Board had exceeded its statutory authority on a review of the legislative history of § 4 (c)(8). As originally enacted in 1956 the section referred to activities "closely related to the business of banking." In 1970, when the Act was amended to

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was typically one-half of one percent of the value of the fund's assets. Wharton School Study, at 484. The amount of the advisory fee earned by the adviser to a closed-end company increases only if the value of the investment portfolio increases. In contrast, the fee of the adviser to a mutual fund increases both with the increase in value of the investment portfolio and through the sale of the company's shares. SEC Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 4, pp. 204–205, 96–99 (1963). The fee paid by the closed-end company would provide scant incentive to a bank to risk its assets by making unwise loans to companies whose stock is held by the investment company.

[41] The Court stated:

"The difficulty here is that the Comptroller adopted no expressly articulated position at the administrative level as to the meaning and impact of the provisions of §§ 16 and 21 as they affect bank investment funds." 401 U. S., at 627.

extend its coverage to holding companies controlling just one bank, the words "business of" were deleted from § 4 (c)(8), thereby making the section refer merely to activities "closely related to banking." The conclusion of the Court of Appeals did not, however, place special reliance on this modest change. Rather, the Court of Appeals was persuaded that in 1956 Congress believed that the Glass-Steagall Act had been enacted in 1933 to "divorc[e] investment from commercial banking" and that the 1970 amendment to § 4 (c)(8) did not alter the intent expressed by the 1956 Congress. 196 U. S. App. D. C., at 110, 606 F. 2d, at 1017.

Congress did intend the Bank Holding Company Act to maintain and even to strengthen Glass-Steagall's restrictions on the relationship between commercial and investment banking. Part of the motivation underlying the requirement that bank holding companies divest themselves of nonbanking interests was the desire to provide a measure of regulation missing from the Glass-Steagall Act.[42] In 1956, the only provision of the Glass-Steagall Act which regulated bank holding companies was § 19 (e) of the Act, which provided that a bank holding company could not obtain a permit from the Federal Reserve Board entitling it to vote the shares of a bank subsidiary unless it agreed to divest itself within five years of any interest in a company formed for the purpose of, or "engaged principally" in, the issuance or underwriting of securities.[43] This provision was largely ineffectual, because

[42] 1955 Senate Report, at 2. See also H. R. Rep. No. 609, 84th Cong., 1st Sess, 16 (1955) (hereinafter 1955 House Report).

[43] Section 19 (e) provided in pertinent part:

"Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that

bank holding companies were not subject to the divestiture requirement as long as they did not vote their bank subsidiary shares.[44] Thus bank holding companies were able to avoid Glass-Steagall's general purpose of separating as completely as possible commercial from investment banking in a way not available to other bank affiliates or banks themselves. The inadequacy of § 19 (e) therefore lay not in the type of affiliation with securities-related firms permitted to bank holding companies but in the ability of holding companies to avoid any restrictions on affiliation by simply not voting their shares. To the extent that Congress strengthened the Glass-Steagall Act, it did so by closing this loophole rather than by imposing further restrictions on the permissible securities-related business of bank affiliates.[45] The clear evidence of a

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during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participation in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest, in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof . . . ." 48 Stat. 188.

The "engaged principally" standard is the same standard as is contained in § 20 of the Glass-Steagall Act. Section 19 (e) also required bank holding companies to divest themselves of shares of companies "formed for the purpose of" the issuance or underwriting of securities. We do not view this language as prohibiting securities-related activities that would not also be prohibited by the "engaged principally" standard. All companies formed for the purpose of issuing or underwriting securities would surely meet the "engaged principally" test.

[44] 1955 Senate Report, at 2; see S. Rep. No. 1179, 89th Cong., 2d Sess., 12 (1966) (hereinafter 1966 Senate Report).

[45] The Senate Report to the Bank Holding Company Act indicated that as of December 31, 1954, only 18 holding companies had obtained voting permits for bank shares from the Board. The Board estimated that 46

congressional purpose in 1956 to remedy the inadequacy of § 19 (e) of the 1933 Act does not support the conclusion that Congress also intended § 4 (c)(8) to be read as totally prohibiting bank holding companies from being "engaged" in any securities-related activities; on the contrary it is more accurately read as merely completing the job of severing the connection between bank holding companies and affiliates "principally engaged" in the securities business.[46]

To invalidate the Board's regulation, the Court of Appeals had to assume that the activity of managing investments for a customer had been regarded by Congress as an aspect of investment banking rather than an aspect of commercial banking. But the Congress that enacted the Glass-Steagall Act did not take such an expansive view of investment banking.[47] Investment advisers and closed-end investment companies are not "principally engaged" in the issuance or the underwriting of securities within the meaning of the Glass-Steagall Act, even if they are so engaged within the meaning of §§ 16 and 21.[48] Nothing in the legislative history of the Bank Holding Company Act persuades us that Congress in 1956 intended to effect a more complete separation between commercial and investment banking than the separation that the Glass-Steagall Act had achieved with respect to banks in §§ 16 and 21 and had sought unsuccessfully to achieve with respect to bank holding companies in § 19 (e).[49]

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bank holding companies would be subjected to regulation by the Bank Holding Company Act. 1955 Senate Report, at 2.

[46] As we have indicated previously, see n. 26, *supra,* the words "principally engaged," contained in both §§ 19 (e) and 20 of the Glass-Steagall Act, the sections applicable to bank affiliates, indicate a significantly less stringent test for determining the permissibility of securities-related activity than does the word "engaged," contained in §§ 16 and 21, the sections applicable to banks.

[47] See nn. 32, 33, *supra,* and accompanying text.

[48] See n. 26, *supra.*

[49] The 1966 Senate Report on the 1966 Amendments to the Bank Holding Company Act states that the purpose of the 1956 Act was in part to

A review of the 1970 Amendments to the Bank Holding Company Act only strengthens this conclusion.[50] On its face the 1970 amendment to § 4 (c)(8) would appear to have

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serve the "general purposes of the Glass-Steagall Act of 1933—to prevent unduly extensive connections between banking and other businesses." 1966 Senate Report, at 2 The legislative history identified by the Court of Appeals merely indicates that Congress recognized the deficiency of § 19 (e), 1955 Senate Report, at 2, or that Congress intended the Bank Holding Company Act to serve some of the same policies that we have identified as motivating the Glass-Steagall Congress:

"Whenever a holding company thus controls both banks and nonbanking businesses, it is apparent that the holding company's nonbanking businesses may thereby occupy a preferred position over that of their competitors in obtaining bank credit. It is also apparent that in critical times the holding company which operates nonbanking businesses may be subjected to strong temptation to cause the banks which it controls to make loans to its nonbanking affiliates even though such loans may not at that time be entirely justified in the light of current banking standards. In either situation the public interest becomes directly involved." 1955 House Report, at 16.

The Court of Appeals also cited legislative history indicating that the Board was to have a "limited" authority to administer the § 4 (c)(8) exception. See Control and Regulation of Bank Holding Companies: Hearings on H. R. 2674 before the House Committee on Banking and Currency, 84th Cong., 1st Sess., 14 (1955); Control of Bank Holding Companies: Hearings on S. 880, S. 2350, and H. R. 6277 before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., 76 (1955). The fact that the scope of the Board's discretion was to be limited sheds no light on the question of Congress' view of the Glass-Steagall Act. Moreover, although the Court of Appeals relied, as indicative of congressional intent regarding the scope of § 4 (c)(8), on the Senate Report's omission of any securities-related activities from the listing of activities clearly falling within the § 4 (c)(8) exception, 196 U. S. App. D. C., at 110, 606 F. 2d, at 1017, the Senate Report, after listing those obviously related activities, goes on to indicate the importance of the Board's role in approving other such activities. See 1955 Senate Report, at 13; n. 23, *supra*. Finally, the Court of Appeals found significance in the repeal of § 19 (e) of Glass-Steagall in 1966 and the Senate Report's indication that § 19 (e) "serve[d] no substantial purpose" after passage of the 1956 Act. 1966 Senate Report, at 12. At the same time as Congress repealed

[*Footnote 50 is on p. 73*]

broadened the Board's authority to determine when an activity is sufficiently related to banking to be permissible for a nonbanking subsidiary of a bank holding company.[51] The initial versions of both the House and the Senate bills changed the "closely related" test of § 4 (c)(8) to a "functionally related" test.[52] The Conference Committee's final version of the bill, however, retained the "closely related" language of the 1956 Act.[53] Whether this indicated that § 4 (c)(8) was to have the same scope as it did under the 1956 Act is difficult to discern.[54] For purposes of this case, however, we need

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§ 19 (e), however, it amended the definition of "affiliate" in § 2 (b) of the Glass-Steagall Act to include bank holding companies, so that the restrictions applying to affiliates contained in § 20 of the Act then applied to bank holding companies as well. 80 Stat. 242. Furthermore, the fact that § 19 (e) served no purpose after the passage of the 1956 Act merely indicates that Congress was successful in its attempt to close the loophole left by Congress in the Glass-Steagall Act. It does not indicate that the 1956 Congress sought to impose more substantial restrictions than those contained in § 19 (e) or that the 1956 Congress misperceived the scope of those restrictions.

[50] See S. Rep. No. 91–1084, p. 4 (1970) (hereinafter 1970 Senate Report): "[T]he primary purpose of the pending legislation is to modify the Bank Holding Company Act of 1956 to bring under its provisions those companies controlling one bank . . . ." See also H. R. Rep. No. 91–387, p. 2 (1969) (hereinafter 1969 House Report).

[51] The 1956 version had required a close connection to the "business of banking." The 1970 Amendments required only a close connection to "banking." This change eliminated the requirement that bank holding companies show a close connection between a proposed activity and an activity in which the holding company or its subsidiary already actually engaged. Thus the 1970 amendment to § 4 (c)(8) permitted bank holding companies to engage in any activities closely related to activities generally engaged in by banks. H. R. Conf. Rep. No. 91–1747, p. 16 (1970) (hereinafter 1970 Conference Report); 116 Cong. Rec. 42436 (1970) (remarks of Sen. Bennett).

[52] 1969 House Report, at 1; 1970 Senate Report, at 25.

[53] 1970 Conference Report, at 5.

[54] The Conference Committee Report, signed by only four of the seven House conference managers, indicated that the "functionally related" test

not reconcile the conflicting views as to whether the 1970 amendment expanded the scope of § 4 (c)(8), because no one disputes that the Board's discretion is at least as broad under the 1970 Amendments as it was under the 1956 Act. Therefore, our conclusion that nothing in the 1956 Act or its legislative history indicates that Congress intended to prohibit bank holding companies from acting as investment advisers to closed-end investment companies should also apply to the 1970 Amendments unless Congress specifically indicated that such services should not be authorized by the Board. Not only is there no such specific evidence, there is affirmative evidence to the contrary.

The legislative history of the 1970 Amendments indicates that Congress did not intend the 1970 Amendments to have any effect on the prohibitions of the Glass-Steagall Act. The Senate chairman of the Conference Committee assured his fellow Senators that the conference bill was intended neither to enlarge nor to restrict the prohibitions contained

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represented a "more liberal and expansive approach by the Federal Reserve Board in authorizing nonbank activities for bank holding companies" and that the retention of the "closely related" language indicated that "Congress was not convinced that such expansion and liberalization was justified." *Id.*, at 21. This view was not shared by all of the Senate Members of the Conference Committee, however. Senator Bennett criticized the Conference Report as an inaccurate indication of the conference's intent and expressed his belief that the conference intended to broaden the power of the Board to determine what activities are closely related to banking. 116 Cong Rec. 42432–42437 (1970). Senator Bennett indicated that the proposed term "functionally related" was no broader than the retained term "closely related," and that the removal of the phrase "of a financial, fiduciary, or insurance nature" was intended to reflect an expansion of the Board's discretion. *Id.*, at 42432–42433. See also *id.*, at 42422 (remarks of Sen. Sparkman). See n. 2, *supra*. All of the Senators on the Conference Committee, however, did not so perceive the final version of § 4 (c)(8). Senator Proxmire indicated that "the conference committee agreed essentially to retain the standards of the existing 1956 Bank Holding Company Act." 116 Cong. Rec. 42427 (1970).

in the Glass-Steagall Act.[55] Moreover, the Senate Report refers to investment services but declines to state that the Board could not approve under § 4 (c)(8) "bank sponsored mutual funds." [56] The House's version of the bill rigidly

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[55] During debate on the conference bill, Senator Williams expressed concern about the effect of the 1970 Amendments on the prohibitions of the Glass-Steagall Act:

"Mr. WILLIAMS of New Jersey. I have one question I should like to ask the chairman of the committee.

"Both the Senate and House bills contained, in section 4 (c) (8), substantially similar language reiterating the existing law embodied in the Glass-Steagall Act which provides, essentially, for separation of commercial banking and the securities business. This language does not appear in the bill agreed to by the conferees. I wonder whether there was any intention to imply that the very securities-related activities forbidden to banks directly may nevertheless be engaged in by bank-holding companies or their nonbanking affiliates.

"Mr. SPARKMAN. The answer to the Senator's question is that there clearly was not. As it now stands, the Glass-Steagall Act broadly prohibits both banks and their affiliates from engaging in what we commonly understand to be the securities business. There are some specific exceptions, of course, but I can assure you that we did not mean to enlarge or contract them here. We regarded that general prohibition as being so clearly applicable to the subjects of this bill as to make a restatement of it unnecessary. The provision to which you referred is already complicated enough In short, we did not intend to amend or modify, directly or indirectly, any limitations on the activities of banks, bank holding companies or any of their affiliates, now contained in the Glass-Steagall Act. If Congress is to change that longstanding, fundamental statement of public policy, we will have to do so in other legislation. I hope there is no longer any misconception on that point.

"Mr. WILLIAMS of New Jersey. It is reassuring, indeed, to know that the Glass-Steagall Act has not been disturbed in any way and that there is no intention at all here to do so." *Id.*, at 42430.

See also 1970 Senate Report, at 15. By the time Congress was considering the 1970 Amendments, the definition of "affiliate" contained in § 2 (b) of the Glass-Steagall Act had been amended to include bank holding companies, so that the prohibitions contained in § 20 of Glass-Steagall had become applicable to bank holding companies.

[56] 1970 Senate Report, at 15. The Report notes that the Senate version of the bill prohibited bank holding companies from holding shares in com-

confined the Board's discretion in certain areas by including a "laundry list" of activities which the Board could not approve. Included in this list was a prohibition of bank holding company acquisition of shares of any company engaged in "the issue, flotation, underwriting, public sale, or distribution," of securities, "whether or not any such interests are redeemable." [57] The Conference Committee deleted this list. This deletion indicates a rejection of the House's restrictive approach in favor of the Senate's more flexible attitude toward the Board's exercise of its discretion.[58] Thus

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panies "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or securities." The Report recognized that this provision was a restatement of the prohibition already contained in the Glass-Steagall Act. The Report goes on to state:

"The inclusion of this provision is not intended to prejudice the rights of banks or bank holding companies or their affiliates to engage in such of these activities as may be permitted under existing law or which may become permissible under this legislation or under any future legislation. In particular, the language is not intended to inhibit the underwriting of revenue bonds nor operating commingled or managing agency accounts (bank sponsored mutual funds) which activities have already been specifically approved in legislation previously reported by this committee and passed by the Senate, if such legislation is finally enacted, if these activities are allowed under the amendments being made by this legislation, or if the activities are permitted by the courts." *Ibid.*

When the 1970 Amendments were passed, the status of bank-sponsored mutual funds under the Glass-Steagall Act was unsettled The District of Columbia Circuit's decision in *National Association of Securities Dealers* v. *SEC*, 136 U. S. App D. C. 241, 420 F. 2d 83 (1969), approving bank operation of mutual funds, had not yet been reversed by our decision in *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971).

[57] 115 Cong. Rec. 33133 (1969).

[58] Senator Goodell stated that "[t]he Senate-passed bill . . . provided the banking industry with a great deal of flexibility regarding expansion into bank-related activities." 116 Cong. Rec. 42429 (1970). See n. 23, *supra*. As Senator Sparkman stated of the conference: "We reached a decision that the whole thing ought to be flexible, that it ought to be lodged in the hands of the Federal Reserve Board to carry out the guidelines we set." 116 Cong. Rec. 42429 (1970).

as we read the legislative history of the 1970 Amendments, Congress did not intend the Bank Holding Company Act to limit the Board's discretion to approve securities-related activity as closely related to banking beyond the prohibitions already contained in the Glass-Steagall Act.[59] This case is

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[59] The Court of Appeals read the colloquy between Senators Williams and Sparkman, see n. 55, *supra,* as an indication that Congress was under the impression—admittedly incorrect—that the Glass-Steagall Act prohibited the services authorized by the Board here. 196 U. S. App. D. C., at 115, 606 F. 2d, at 1022. In light of the indications in the Senate Report that the Senate did not intend § 4 (c) (8) to foreclose the Board from approving bank-sponsored mutual funds, see n. 56, *supra,* and accompanying text, the Senate colloquy cited by the Court of Appeals lends scant support to the theory that Congress misunderstood the scope of the Glass-Steagall Act. Moreover, the language deleted from the Senate bill's version of § 4 (c) (8) to which Senators Sparkman and Williams were referring contained the "principally engaged" standard contained in § 20 of the Glass-Steagall Act, and not the more complete prohibition contained in §§ 16 and 21. See nn. 54, 55, *supra.* Furthermore, if Congress was confused about the scope of the Glass-Steagall Act, it may have believed that the statute permitted more than is actually the case. See n. 55, *supra.* Finally, given the flexible approach to § 4 (c) (8) which prevailed in the 1970 Amendments, we must presume that Congress did not intend to adopt a rigid and fixed construction of the Glass-Steagall Act but rather intended that the prevailing view of Glass-Steagall should guide the Board's discretion.

We also disagree with the Court of Appeals' conclusion that the policies underlying the 1970 Amendments would be frustrated by permitting bank holding companies to act as investment advisers to closed-end investment companies. See 196 U. S. App. D. C., at 116, 606 F. 2d, at 1023. The first policy, the fear that bank holding companies would improperly further the interests of the nonbanking subsidiary, is adequately protected by the Board's interpretive ruling. See nn. 38–44, *supra,* and accompanying text. Furthermore, given our conclusion that the 1970 Amendments at the very least did not cut back on the discretion granted the Board under the 1956 Act, we believe that to the extent that Congress addressed in the 1970 Amendments the second policy, the prevention of centralization of economic power, it did so by eliminating the one bank holding company loophole and not by limiting Board discretion to determine what activities are closely related to banking. 1970 Senate Report at 2–4; 1969 House Report, at 2.

therefore one that is best resolved by deferring to the Board's expertise in determining what activities are encompassed within the plain language of the statute.

Because we have concluded that the Board's decision to permit bank holding companies to act as investment advisers for closed-end investment companies is consistent with the language of the Bank Holding Company Act, and because such services are not prohibited by the Glass-Steagall Act, we hold that the amendment to Regulation Y does not exceed the Board's statutory authority. The judgment of the Court of Appeals is

Reversed.

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

Syllabus

CARSON ET AL. v. AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL.

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

No 79–1236. Argued December 10, 1980—Decided February 25, 1981

Petitioners, representing a class of present and former black employees and job applicants, sought injunctive and declaratory relief and damages in an action under 42 U. S. C § 1981 and Title VII of the Civil Rights Act of 1964, alleging that respondent employer and unions had engaged in racially discriminatory employment practices. The parties negotiated a settlement and jointly moved the District Court to enter a proposed consent decree which would permanently enjoin respondents from discriminating against black employees and would require them to give hiring and seniority preferences to black employees and to fill one-third of certain supervisory positions with qualified blacks. The court denied the motion, holding that since there was no showing of present or past discrimination, the proposed decree illegally granted racial preferences to the petitioner class, and that in any event the decree would be illegal as extending relief to all present and future black employees, not just to actual victims of the alleged discrimination. The Court of Appeals dismissed petitioners' appeal for want of jurisdiction, holding that the District Court's order was not appealable under 28 U. S. C. § 1292 (a) (1), which permits appeals as of right to the courts of appeals from interlocutory orders of district courts "refusing . . . injunctions."

Held: The District Court's interlocutory order refusing to enter the consent decree was an order "refusing" an "injunction" and was therefore appealable under § 1292 (a) (1). Pp. 83–90.

(a) The order, although not in terms refusing an injunction, had the practical effect of doing so. However, for such an interlocutory order to be immediately appealable under § 1292 (a) (1), a litigant must also show that the order might have "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal. *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176, 181. Pp. 83–86.

(b) Here, petitioners meet such test. First, they might lose their opportunity to settle their case on the negotiated terms, because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment en-

tered. And a second "serious, perhaps irreparable, consequence" of the District Court's order justifying an immediate appeal is that, because petitioners cannot obtain the injunctive relief of an immediate restructuring of respondents' transfer and promotional policies until the proposed consent decree is entered, any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm. Pp. 86–89.

606 F. 2d 420, reversed.

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

Napoleon B. Williams, Jr., argued the cause for petitioners. With him on the briefs were *Henry L. Marsh III*, *Jack Greenberg*, *James M. Nabrit III*, and *Barry L. Goldstein*.

Henry T. Wickham argued the cause for respondent American Brands, Inc. With him on the brief were *Paul G. Pennoyer, Jr.*, *Bernard W. McCarthy*, and *D. Eugene Webb, Jr.* *Jay J. Levit* argued the cause for respondent unions. With him on the brief was *James F. Carroll*.

Harlon L. Dalton argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Days*, *Deputy Solicitor General Wallace*, *Brian K. Landsberg*, *Marie E. Klimesz*, and *Leroy D. Clark*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this Title VII class action is whether an interlocutory order of the District Court denying a joint motion of the parties to enter a consent decree containing injunctive relief is an appealable order.

I

Petitioners, representing a class of present and former black seasonal employees and applicants for employment at the

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Richmond Leaf Department of the American Tobacco Co., brought this suit in the United States District Court for the Eastern District of Virginia under 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* Alleging that respondents [1] had discriminated against them in hiring, promotion, transfer, and training opportunities, petitioners sought a declaratory judgment, preliminary and permanent injunctive relief, and money damages.

After extensive discovery had been conducted and the plaintiff class had been certified,[2] the parties negotiated a settlement and jointly moved the District Court to approve and enter their proposed consent decree. See Fed. Rule Civ. Proc. 23 (e).[3] The decree would have required respondents to give hiring and seniority preferences to black employees and to fill one-third of all supervisory positions in the Richmond Leaf Department with qualified blacks. While agreeing to the terms of the decree, respondents "expressly den[ied] any violation of . . . any . . . equal employment law, regulation, or order." App. 25a.

The District Court denied the motion to enter the proposed decree. 446 F. Supp. 780 (1977). Concluding that preferential treatment on the basis of race violated Title VII and

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[1] Respondents in this case are: American Brands, Inc.. which operates the Richmond Leaf Department of the American Tobacco Co.; Local 182 of the Tobacco Workers International Union, the exclusive bargaining agent for all hourly paid production unit employees of the Richmond Leaf Department; and the International Union.

[2] The class was certified pursuant to Federal Rule of Civil Procedure 23 (b)(2). It consisted of black persons who were employed as seasonal employees at the Richmond Leaf Department on or after September 9, 1972, and black persons who applied for seasonal employment at the Department on or after that date.

[3] Rule 23 (e) provides:

"A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

the Constitution absent a showing of past or present discrimination, and that the facts submitted in support of the decree demonstrated no "vestiges of racial discrimination," *id.*, at 790, the court held that the proposed decree illegally granted racial preferences to the petitioner class. It further declared that even if present or past discrimination had been shown, the decree would be illegal in that it would extend relief to *all* present and future black employees of the Richmond Leaf Department, not just to *actual* victims of the alleged discrimination. *Id.*, at 789.

The United States Court of Appeals for the Fourth Circuit, sitting en banc, dismissed petitioners' appeal for want of jurisdiction. 606 F. 2d 420 (1979). It held that the District Court's refusal to enter the consent decree was neither a "collateral order" under 28 U. S. C. § 1291,[4] nor an interlocutory order "refusing" an "injunctio[n]" under 28 U. S. C. § 1292 (a)(1).[5] Three judges dissented, concluding that the order refusing to approve the consent decree was appealable under 28 U. S. C. § 1292 (a)(1).

Noting a conflict in the Circuits,[6] we granted certiorari.

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[4] Although the Court of Appeals did not expressly mention the collateral-order doctrine, petitioners argued that the District Court order was appealable under that doctrine, and the Court of Appeals cited cases decided under that doctrine. 606 F. 2d, at 423–424, citing *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U S. 541 (1949); and *Seigal* v. *Merrick*, 590 F. 2d 35 (CA2 1978).

[5] Title 28 U. S. C. § 1292 (a)(1) provides:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . ."

[6] Compare *Norman* v. *McKee*, 431 F. 2d 769 (CA9 1970) (refusal to enter consent decree appealable under § 1291), cert. denied *sub nom. Security Pacific National Bank* v. *Myers*, 401 U. S. 912 (1971), and *United States* v. *City of Alexandria*, 614 F. 2d 1358 (CA5 1980) (refusal to enter consent decree appealable under § 1292 (a)(1)), with *Seigal* v. *Merrick*, *supra* (not appealable under § 1291), and 606 F. 2d 420 (CA4 1979) (case below) (not

447 U. S. 920 (1980). We hold that the order is appealable under 28 U. S. C. § 1292 (a)(1), and accordingly reverse the Court of Appeals.[7]

II

The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only *final* decisions of the federal district courts would be reviewable on appeal. 28 U. S. C. § 1291. See *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176, 178–179 (1955); *Cobbledick* v. *United States,* 309 U. S. 323, 324–325 (1940). Because rigid application of this principle was found to create undue hardship in some cases, however, Congress created certain exceptions to it. See *Baltimore Contractors, Inc.* v. *Bodinger, supra,* at 180–181. One of these exceptions, 28 U. S. C. § 1292 (a)(1), permits appeal as of right from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, *refusing* or dissolving *injunctions* . . . ." (Emphasis added.)[8]

Although the District Court's order declining to enter the proposed consent decree did not in terms "refus[e]" an "injunctio[n]," it nonetheless had the practical effect of doing so. Cf. *General Electric Co.* v. *Marvel Rare Metals Co.,* 287 U. S. 430, 433 (1932). This is because the proposed decree

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appealable under § 1291 or § 1292 (a)(1)). See also *In re International House of Pancakes Franchise Litigation,* 487 F. 2d 303 (CA8 1973) (refusal to enter proposed settlement agreement appealable; no discussion of jurisdictional question).

[7] We therefore need not decide whether the order is also appealable under 28 U. S. C. § 1291.

[8] This statutory exception was first established by the Evarts Act of 1891, § 7, 26 Stat. 828, which authorized interlocutory appeals "where . . . an injunction shall be granted or continued by interlocutory order or decree." In 1895, that Act was amended to extend the right of appeal to orders of the district courts refusing requests for injunctions. 28 Stat. 666. Although the reference to orders refusing injunctions was dropped from the statute in 1900 for reasons not relevant here, 31 Stat. 660, the reference was reinstated in § 129 of the Judicial Code of 1911, 36 Stat. 1134, and has since remained part of the statute.

would have permanently enjoined respondents from discriminating against black employees at the Richmond Leaf Department, and would have directed changes in seniority and benefit systems, established hiring goals for qualified blacks in certain supervisory positions, and granted job-bidding preferences for seasonal employees. Indeed, prospective relief was at the very core of the disapproved settlement.[9]

For an interlocutory order to be immediately appealable under § 1292 (a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because § 1292 (a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292 (a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.* v. *Bodinger, supra,* at 181. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

In *Switzerland Cheese Assn., Inc.* v. *E. Horne's Market, Inc.,* 385 U. S. 23 (1966), for example, petitioners contended that the District Court's denial of their motion for summary judgment was appealable under § 1292 (a)(1) simply because

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[9] Neither the parties nor the Court of Appeals dispute that the predominant effect of the proposed decree would have been injunctive. The parties entitled the major part of the decree, "Injunctive Relief for the Class," and expressly agreed that respondents would be *"permanently enjoined* from discriminating against black employees at the facilities of the Richmond Leaf Department." App. 26a, 27a (emphasis added). The Court of Appeals, in construing the effect of the District Court's action, similarly characterized the relief contained in the proposed decree as "injunctive." 606 F. 2d., at 423.

its practical effect was to deny them the permanent injunction sought in their summary-judgment motion. Although the District Court order seemed to fit within the statutory language of § 1292 (a)(1), petitioners' contention was rejected because they did not show that the order might cause them irreparable consequences if not immediately reviewed. The motion for summary judgment sought permanent and not preliminary injunctive relief and petitioners did not argue that a denial of summary judgment would cause them irreparable harm *pendente lite.* Since permanent injunctive relief might have been obtained after trial,[10] the interlocutory order lacked the "serious, perhaps irreparable, consequence" that is a prerequisite to appealability under § 1292 (a)(1).

Similarly, in *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U. S. 478 (1978), petitioner in a Title VII sex discrimination suit sought a permanent injunction against her prospective employer on behalf of herself and her putative class. After the District Court denied petitioner's motion for class certification, petitioner filed an appeal under § 1292 (a)(1). She contended that since her complaint had requested injunctive relief, the court's order denying class certification had the effect of limiting the breadth of the available relief, and therefore of "refus[ing] a substantial portion of the injunctive relief requested in the complaint." 437 U. S., at 480.

As in *Switzerland Cheese,* petitioner in *Gardner* had not filed a motion for a preliminary injunction and had not alleged that a denial of her motion would cause irreparable harm. The District Court order thus had "no direct or irreparable impact on the merits of the controversy." 437 U. S., at 482.

[10] The District Court denied petitioners' motion for summary judgment because it found disputed issues of material fact, not because it disagreed with petitioners' legal arguments. Thus, not only was the court free to grant the requested injunctive relief in full after conducting a trial on the merits, but it was also not precluded from granting a motion for preliminary injunction during the pendency of the litigation if petitioners were to allege that further delay would cause them irreparable harm.

Because the denial of class certification was conditional, Fed. Rule Civ. Proc. 23 (c)(1), and because it could be effectively reviewed on appeal from final judgment, petitioner could still obtain the full permanent injunctive relief she requested and a delayed review of the District Court order would therefore cause no serious or irreparable harm. As *Gardner* stated:

> "The order denying class certification in this case did not have any such 'irreparable' effect. It could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did not pass on the legal sufficiency of any claims for injunctive relief." 437 U. S., at 480–481 (footnotes omitted).[11]

III

In the instant case, unless the District Court order denying the motion to enter the consent decree is immediately appealable, petitioners will lose their opportunity to "effectually challenge" an interlocutory order that denies them injunctive relief and that plainly has a "serious, perhaps irreparable, consequence." First, petitioners might lose their opportunity to settle their case on the negotiated terms. As *United States* v. *Armour & Co.*, 402 U. S. 673, 681 (1971), stated:

> "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

[11] By contrast, *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430 (1932), a case in which respondents sought to appeal the District Court's dismissal of their counterclaim for injunctive relief on jurisdictional grounds, concluded that the District Court's order *did* have a serious, perhaps irreparable, consequence and that it could not be effectually challenged unless an appeal were immediately taken. The Court noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction," *id.*, at 433, and that this decision resolved "the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." *Ibid.*

> 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."

Settlement agreements may thus be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation. In this case, that condition of settlement has been radically affected by the District Court. By refusing to enter the proposed consent decree, the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court.[12] Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered,[13]

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[12] By refusing to enter the proposed consent decree, the District Court made clear that it would not enter any decree containing remedial relief provisions that did not rest solidly on evidence of discrimination and that were not expressly limited to actual victims of discrimination. 446 F. Supp., at 788–790. In ruling so broadly, the court did more than postpone consideration of the merits of petitioners' injunctive claim. It effectively foreclosed such consideration. Having stated that it could perceive no "vestiges of racial discrimination" on the facts presented, *id.*, at 790, and that even if it could, no relief could be granted to future employees and others who were not "actual victims" of discrimination, *id.*, at 789, the court made clear that nothing short of an admission of discrimination by respondents plus a complete restructuring of the class relief would induce it to approve remedial injunctive provisions.

[13] Indeed, although there has yet been no trial, respondents are even now claiming a right to withdraw their consent to the settlement agreement. After the Court of Appeals dismissed petitioners' appeal and returned jurisdiction to the District Court, respondents filed a motion for a pretrial conference in which they stated: "In support of this motion the defendants assert that they do not now consent to the entry of the proposed Decree . . . ." App. 67a. Neither the District Court nor the Court of Appeals has yet considered whether respondents' statement constitutes a formal motion to withdraw consent or whether such a with-

the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their right to compromise their dispute on mutually agreeable terms.[14]

There is a second "serious, perhaps irreparable, consequence" of the District Court order that justifies our conclusion that the order is immediately appealable under § 1292

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drawal would be legally permissible at this point in the litigation, and we therefore do not decide those issues.

[14] Furthermore, such an order would also undermine one of the policies underlying Title VII. In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims. As explained in *Alexander* v *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974):

"Congress enacted Title VII . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."

Moreover, postjudgment review of a district court's refusal to enter a proposed consent decree raises additional problems. Not only might review come after the prevailing party has sought to withdraw its consent to the agreement, but even if the parties continued to support their decree, the court of appeals might be placed in the difficult position of having to choose between ordering the agreed-upon relief or affirming the relief granted by the trial court even when such relief rested on different facts or different judgments with respect to the parties' ultimate liability.

In addition, delaying appellate review until after final judgment would adversely affect the court of appeals' ability fairly to evaluate the propriety of the district court's order. Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. See *Protective Comm. for Independent Stockholders* v. *Anderson*, 390 U. S. 414, 424–425 (1968). They do not decide the merits of the case or resolve unsettled legal questions. Since the likely outcome of a trial is best evaluated in light of the state of facts and perceptions that existed when the proposed consent decree was considered, appellate review would be more effective if held prior to the trial court's factfinding rather than after final judgment when the rights and liabilities of the parties have been established.

(a)(1). In seeking entry of the proposed consent decree, petitioners sought an immediate restructuring of respondents' transfer and promotional policies. They asserted in their complaint that they would suffer irreparable injury unless they obtained that injunctive relief at the earliest opportunity.[15] Because petitioners cannot obtain that relief until the proposed consent decree is entered, any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm.[16]

In sum, in refusing to approve the parties' negotiated consent decree, the District Court denied petitioners the opportunity to compromise their claim and to obtain the injunctive benefits of the settlement agreement they negotiated.

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[15] In the "Relief" section of their complaint, petitioners alleged:

"Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by the policies, practices, customs and usages of the defendants complained of herein until the same are enjoined by this Court. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction and declaratory judgment is their only means of securing adequate relief.

"WHEREFORE, plaintiffs pray that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing, to:

"1. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants and their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing to maintain policies, practices, customs or usages of limiting plaintiffs and members of their class to the lower-paying and less desirable jobs, denying them on-the-job training opportunities, denying them the opportunity to advance to supervisory positions, denying them fringe benefits afforded other employees of the Company, and denying them adequate and effective union representation because of their race and color." App. 9a–10a.

This is essentially the relief that petitioners would have obtained under the proposed consent decree.

[16] For example, petitioners might be denied specific job opportunities and the training and competitive advantages that would come with those opportunities.

These constitute "serious, perhaps irreparable, consequences" that petitioners can "effectually challenge" only by an immediate appeal. It follows that the order is an order "refusing" an "injunctio[n]" and is therefore appealable under § 1292 (a)(1).

Reversed.

STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION

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

No 79–1266. Argued December 3, 1980—Decided February 25, 1981

After an on-the-record hearing before an Administrative Law Judge and review by the Securities and Exchange Commission (SEC) in which the preponderance-of-the-evidence standard of proof was employed, the SEC held that petitioner had violated various antifraud provisions of the federal securities laws, and sanctions were imposed. Petitioner sought review in the Court of Appeals on the alleged ground, *inter alia,* that the SEC's use of the preponderance-of-the-evidence, rather than the clear-and-convincing, standard of proof in determining whether he had violated the securities laws, was improper. The Court of Appeals rejected the argument.

Held:

1. In adjudicatory proceedings before the SEC, § 7 (c) of the Administrative Procedure Act applies. It provides in pertinent part that a sanction may not be imposed by an administrative agency except on consideration of the whole record or parts thereof cited by a party and supported by and "in accordance with the reliable, probative, and substantial evidence." Pp. 95–97.

2. The SEC properly used the preponderance-of-the-evidence standard of proof in determining whether the antifraud provisions of the federal securities laws had been violated. Pp. 97–104.

(a) Section 7 (c)'s language implies the enactment of a standard of proof. By allowing sanctions to be imposed only when they are "in accordance with . . . *substantial* evidence," Congress implied that a sanction must rest on a *minimum quantity* of evidence. And the phrase "in accordance with" lends further support to a construction of § 7 (c) as establishing a standard of proof, suggesting that the adjudicatory agency must weigh the evidence and decide, based on the weight of the evidence, whether a disciplinary order should be issued. Pp 98–100.

(b) While § 7 (c)'s language is somewhat opaque as to the precise standard of proof to be used, the legislative history clearly reveals that Congress intended to adopt a preponderance-of-the-evidence standard. Pp. 100–102.

(c) Such intent is buttressed by the SEC's longstanding practice of imposing sanctions according to the preponderance of the evidence. Pp. 103–104.

603 F. 2d 1126, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 104.

Peter J. Nickles argued the cause for petitioner. With him on the briefs was *Alex Kozinski.*

Ralph C. Ferrara argued the cause for respondent. With him on the brief were *Solicitor General McCree, Stephen M. Shapiro, Paul Gonson, Jacob H. Stillman,* and *Rosalind C. Cohen.**

JUSTICE BRENNAN delivered the opinion of the Court.

In administrative proceedings, the Securities and Exchange Commission applies a preponderance-of-the-evidence standard of proof in determining whether the antifraud provisions of the federal securities laws have been violated. The question presented is whether such violations must be proved by clear and convincing evidence rather than by a preponderance of the evidence.

I

In June 1971, the Commission initiated a disciplinary proceeding against petitioner and certain of his wholly owned companies. The proceeding against petitioner was brought pursuant to § 9 (b) of the Investment Company Act of 1940 [1]

*Briefs of *amici curiae* urging reversal were filed by *Carl L. Shipley* for the National Committee of Discount Securities Brokers; and by *Arthur F. Mathews, Robert B. McCaw, David M Becker,* and *William J. Fitzpatrick* for the Securities Industry Association.

[1] Section 9 (b) of the Investment Company Act of 1940, 15 U. S. C. § 80a–9 (b), empowers the Commission, in specified circumstances, "after notice and opportunity for hearing . . . [to] prohibit, conditionally or

and § 203 (f) of the Investment Advisers Act of 1940.[2] The Commission alleged that petitioner had violated numerous provisions of the federal securities laws in his management of several mutual funds registered under the Investment Company Act.

After a lengthy evidentiary hearing before an Administrative Law Judge and review by the Commission in which the preponderance-of-the-evidence standard was employed,[3] the

unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter . . . ."

[2] Section 203 (f) of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–3 (f), empowers the Commission, in specified circumstances, after notice and opportunity for hearing "on the record" to "censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser . . . ."

[3] Disciplinary proceedings before the Securities and Exchange Commission are governed by the Commission's Rules of Practice, 17 CFR § 201.1 *et seq.* (1980), which enlarge, in certain respects, protections afforded by the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.* Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc*, 435 U. S. 519, 524 (1978) (as to 5 U. S. C. § 553, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them"). A respondent in a disciplinary proceeding is entitled to receive timely notice of the charges against him and the questions of fact and law to be determined. 17 CFR § 201.6 (a) (1980). He may retain counsel to represent him in connection with the proceeding, § 201.2 (b), file an answer to the charges against him and move for a more definite statement of those charges, §§ 201.7 (a) and (d), and have a trial-type hearing presided over by an impartial administrative law judge, other duly-appointed officer, or a Commission member, §§ 201.11 (b)–(c). The respondent may present oral or documentary evidence, cross-examine adverse witnesses, and object to the admission or exclusion of evidence. § 201.14 (a). A respondent may compel pro-

Commission held that between December 1965 and June 1972, petitioner had violated antifraud,[4] reporting,[5] conflict of interest,[6] and proxy[7] provisions of the federal securities laws. Accordingly, it entered an order permanently barring petitioner from associating with any investment adviser or affiliating with any registered investment company, and suspending him for one year from associating with any broker or dealer in securities.[8]

Petitioner sought review of the Commission's order in the

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duction of evidence by subpoena, § 201.14 (b), and may obtain witness statements in the possession of the Commission's staff for cross-examination purposes, § 201.11.1. At the conclusion of the hearing, the respondent has the right to submit briefs and proposed findings of fact and conclusions of law. § 201 16 (d) The initial decision of the administrative law judge must include findings of fact and conclusions of law, with supporting reasons, on all material issues of fact, law, or discretion presented on the record. § 201 16 (a). A respondent may seek review by the Commission, which may affirm, reverse, or modify the initial decision based on its independent review of the record. §§ 201.17 (g) (2), 201.21.

[4] Section 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a); § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and Rule 10b–5 thereunder, 17 CFR § 240 10b–5 (1980); §§ 206 (1)–(2) of the Investment Advisers Act of 1940, 15 U. S C. §§ 80b–6 (1)–(2).

[5] Section 17 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78q (a), and Rule 17a–5 thereunder, 17 CFR § 240.17a–5 (1980); §§ 30 (a) and 34 (b) of the Investment Company Act of 1940, 15 U. S. C. §§ 80a–29 (a) and 80a–33 (b).

[6] Sections 15 (a) (1), 17 (a), and 17 (e) of the Investment Company Act of 1940, 15 U. S. C. §§ 80a–15 (a) (1), 80a–17 (a), and 80a–17 (e).

[7] Section 20 (a) of the Investment Company Act of 1940, 15 U. S. C. § 80a–20 (a).

[8] Petitioner was allowed 90 days in which to sell his stock in Steadman Securities Corp. Compliance with the Commission's order has been stayed pending completion of judicial review.

Because the Commission imposed severe sanctions on petitioner, the Court of Appeals remanded to the Commission "to articulate carefully the grounds for its decision, including an explanation of why lesser sanctions will not suffice." 603 F. 2d 1126, 1143 (CA5 1979).

United States Court of Appeals for the Fifth Circuit on a number of grounds, only one of which is relevant for our purposes. Petitioner challenged the Commission's use of the preponderance-of-the-evidence standard of proof in determining whether he had violated antifraud provisions of the securities laws. He contended that, because of the potentially severe sanctions that the Commission was empowered to impose and because of the circumstantial and inferential nature of the evidence that might be used to prove intent to defraud, the Commission was required to weigh the evidence against a clear-and-convincing standard of proof. The Court of Appeals rejected petitioner's argument, holding that in a disciplinary proceeding before the Commission violations of the antifraud provisions of the securities laws may be established by a preponderance of the evidence. 603 F. 2d 1126, 1143 (1979). See n. 8, *supra*. Because this was contrary to the position taken by the United States Court of Appeals for the District of Columbia Circuit, see *Whitney* v. *SEC*, 196 U. S. App. D. C. 12, 604 F. 2d 676 (1979); *Collins Securities Corp.* v. *SEC*, 183 U. S. App. D. C. 301, 562 F. 2d 820 (1977), we granted certiorari to resolve the conflict. 446 U. S. 917 (1980). We affirm.

II

Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for "[i]t is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby* v. *INS*, 385 U. S. 276, 284 (1966). However, where Congress has spoken, we have deferred to "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts" [9] absent countervailing constitutional constraints.

[9] There is no reason to accord less deference to congressionally prescribed standards of proof and rules of evidence in administrative proceedings than

Vance v. *Terrazas*, 444 U. S. 252, 265 (1980). For Commission disciplinary proceedings initiated pursuant to 15 U. S. C. § 80a–9 (b) and § 80b–3 (f), we conclude that Congress has spoken, and has said that the preponderance-of-the-evidence standard should be applied.[10]

The securities laws provide for judicial review of Commission disciplinary proceedings in the federal courts of appeals [11] and specify the scope of such review.[12] Because they do not indicate which standard of proof governs Commission adjudications, however, we turn to § 5 of the Administrative Procedure Act (APA), 5 U. S. C. § 554, which "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," except in instances not relevant here.[13] Section 5 (b), 5

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in federal courts. See *Woodby* v *INS*, 385 U. S , at 284 (ascertaining first that Congress had not legislated a standard of proof for administrative deportation proceedings before determining appropriate standard).

[10] Because the task of determining the appropriate standard of proof in the instant case is one of discerning congressional intent, many of petitioner's arguments are simply inapposite He contends, for example, that as a matter of policy, the potentially severe consequences to a respondent in a Commission proceeding involving allegations of fraud demand that his burden of risk of erroneous factfinding should be reduced by requiring the Commission to prove violations of the antifraud provisions of the securities laws by clear and convincing evidence. This argument overlooks, however, Congress' "traditional powers . . . to prescribe . . . standards of proof . . . ." *Vance* v. *Terrazas*, 444 U. S. 252, 265 (1980). It is not for this Court to determine the wisdom of Congress' prescription.

[11] Title 15 U. S. C. §§ 77i, 78y, 80a–42, and 80b–13 provide for judicial review of Commission orders in the courts of appeals.

[12] Commission findings of fact are conclusive for a reviewing court "if supported by substantial evidence" 15 U. S. C. §§ 78y, 80a–42, and 80b–13; cf. § 77i (Commission findings conclusive "if supported by evidence").

[13] This disciplinary proceeding, brought by the Commission pursuant to 15 U. S. C. § 80a–9 (b) and § 80b–3 (f), is clearly a "case of adjudication" within 5 U. S. C. § 554. See *International Telephone & Telegraph Corp.* v. *Electrical Workers*, 419 U. S. 428, 445 (1975). Both § 80a–9 (b)

U. S. C. § 554 (c)(2), makes the provisions of § 7, 5 U. S. C. § 566, applicable to adjudicatory proceedings.[14] The answer to the question presented in this case turns therefore on the proper construction of § 7.[15]

The search for congressional intent begins with the language of the statute. *Andrus* v. *Allard,* 444 U. S. 51, 56 (1979); *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 337 (1979);

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and § 80b–3 (f) also explicitly require an "opportunity for [an agency] hearing." Moreover, the disciplinary proceeding must be conducted "on the record." The phrase "on the record" appears in § 80b–3 (f), and while it does not appear in § 80a–9 (b), see n. 1, *supra,* the absence of the specific phrase from § 80a–9 (b) does not make the instant proceeding not subject to § 554 See *United States* v. *Florida East Coast R. Co.,* 410 U. S. 224, 238 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U. S 742, 757 (1972), *Seacoast Anti-Pollution League* v. *Costle,* 572 F. 2d 872, 876 (CA1), cert. denied, 439 U. S. 824 (1978). Rather, the "on the record" requirement for § 80a–9 (b) is satisfied by the substantive content of the adjudication. Title 15 U. S C. § 80a–42 provides for judicial review of Commission orders issued pursuant to § 80a–9 (b). Substantial-evidence review by the Court of Appeals here required a hearing on the record. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 415 (1971); *Seacoast Anti-Pollution League* v. *Costle,* 572 F. 2d, at 877. Otherwise effective review by the Court of Appeals would have been frustrated. *Ibid.* In addition, the substantive violations to be proved pursuant to §§ 80a–9 (b)(1)–(3) are virtually identical to the substantive violations stated in §§ 80b–3 (e) (1), (4), and (5), which are incorporated by reference into § 80b–3 (f). The only substantive difference between § 80b–3 (f) and § 80a–9 (b) is that the former permits the Commission to impose sanctions on persons affiliated with an investment adviser and the latter on persons affiliated with an investment company. In both statutes, the Commission is required to prove violations of the securities law provisions enumerated, precisely the type of proceeding for which the APA's adjudicatory procedures were intended. See generally 410 U. S., at 246.

[14] Section 5 (b), 5 U. S. C. § 554 (c)(2), provides that "[t]he agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with sections 556 and 557 of this title."

[15] Petitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing-evidence standard. See Tr. of Oral Arg. 10.

62 Cases of Jam v. *United States,* 340 U. S. 593, 596 (1951). Section 7 (c), 5 U. S. C. § 556 (d), states in pertinent part:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and *in accordance with* the reliable, probative, and *substantial evidence.*" (Emphasis added.)

The language of the statute itself implies the enactment of a standard of proof. By allowing sanctions to be imposed only when they are "in accordance with . . . *substantial* evidence," Congress implied that a sanction must rest on a *minimum quantity* of evidence. The word "substantial" denotes quantity.[16] The phrase "in accordance with . . . substantial evidence" thus requires that a decision be based on a certain quantity of evidence. Petitioner's contention that the phrase "reliable, probative, and substantial evidence" sets merely a standard of *quality* of evidence is, therefore, unpersuasive.[17]

The phrase "in accordance with" lends further support to a construction of § 7 (c) as establishing a standard of proof. Unlike § 10 (e), the APA's explicit "Scope of review" provision that declares that agency action shall be held unlawful

[16] Webster's Third New International Dictionary (1976) defines "substantial" to mean "considerable in amount."

[17] Section 7 (c), of course, also sets minimum quality-of-evidence standards. For example, the provision directing agency exclusion of "irrelevant, immaterial, or unduly repetitious evidence" and the further requirement that an agency sanction rest on "reliable" and "probative" evidence mandate that agency decisionmaking be premised on evidence of a certain level of quality. Thus, while the words "reliable" and "probative" may imply quality-of-evidence concerns, the word "substantial" implies quantity of evidence.

if "unsupported by substantial evidence," [18] § 7 (c) provides that an agency may issue an order only if that order is "supported by and *in accordance with* . . . substantial evidence" (emphasis added). The additional words "in accordance with" [19] suggest that the adjudicating agency must weigh the evidence and decide, based on the weight of the evidence, whether a disciplinary order should be issued. The language of § 7 (c), therefore, requires that the agency decision must be "in accordance with" the weight of the evidence, not simply supported by enough evidence " 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Consolo* v. *FMC,* 383 U. S. 607, 620 (1966), quoting *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300 (1939). Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of error. See *Addington* v. *Texas,* 441 U. S. 418, 423 (1979). Section 10 (e), by contrast, does not permit the reviewing court to weigh the evidence, but only to determine that there is in the record " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " *Consolo* v. *FMC, supra,* at 620, quoting *Consolidated Edison Co.* v. *NLRB,* 305 U. S.

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[18] Section 10 (e) of the APA, 5 U. S. C § 706, is entitled "Scope of review" and provides, in pertinent part, that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." § 706 (2) (E).

[19] Section 10(e) expressly refers to § 7. Addition of the words "in accordance with" could not have been inadvertent. See n. 18, *supra.* This is especially true in light of the House Report's discussion of the relationship between § 7 (c) and § 10 (e): " 'Substantial evidence' [in § 10 (e)] means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7 (c), and material to the issues." H. R Rep No. 1980, 79th Cong, 2d Sess., 45 (1946).

197, 229 (1938). It is not surprising, therefore, in view of the entirely different purposes of § 7 (c) and § 10 (e), that Congress intended the words "substantial evidence" to have different meanings in context. Thus, petitioner's argument that § 7 (c) merely establishes the scope of judicial review of agency orders is unavailing.[20]

While the language of § 7 (c) suggests, therefore, that Congress intended the statute to establish a standard of proof, the language of the statute is somewhat opaque concerning the precise standard of proof to be used. The legislative history, however, clearly reveals the Congress' intent. The original Senate version of § 7 (c) provided that "no sanction shall be imposed . . . except as supported by relevant, reliable, and probative evidence." S. 7, 79th Cong., 1st Sess. (1945). After the Senate passed this version, the House passed the language of the statute as it reads today, and the Senate accepted the

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[20] It is true that the phrase "substantial evidence" is often used to denote the scope of judicial review. See n. 12, *supra*. But to conclude that the phrase "substantial evidence" in § 7 (c) defines the scope of judicial review would make the "substantial evidence" language of § 10 (e) redundant. Moreover, it is implausible to think that the drafters of the APA would place a scope-of-review standard in the middle of a statutory provision designed to govern evidentiary issues in adjudicatory proceedings. Section 7 is entitled "Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision." It "is made up almost entirely of a specification of the various elements of trial procedure." 2 K. Davis, Administrative Law Treatise § 10:07, p. 332 (2d ed. 1979). More specifically, § 7 (c) allocates the burden of proof (placing it on the proponent of a rule or order), provides for a broad rule governing admissibility of evidence, directs an agency to exclude "irrelevant, immaterial, or unduly repetitious evidence," and delineates the evidentiary basis on which a "sanction may . . . be imposed."

Petitioner's argument overlooks the different functions of initial decisionmaking and judicial review of it. See *Charlton* v. *FTC*, 177 U. S. App. D. C. 418, 422, 543 F. 2d 903, 907 (1976); see generally 4 K. Davis, Administrative Law Treatise §§ 29.01–29.11 (1958). As we recognized in *Consolo* v. *FMC*, 383 U. S. 607 (1966), the reviewing court is not to weigh the evidence, which *Consolo* assumed had already been done.

amendment. Any doubt as to the intent of Congress is removed by the House Report, which expressly adopted a preponderance-of-the-evidence standard:

> "[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide 'in accordance with the evidence.' Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.* In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 37 (1946) (emphasis added).[21]

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[21] Representative Walter of Pennsylvania, author of the House Report and a principal drafter of the legislation, speaking during the floor debate on the day the bill was passed by the House, stated as to the meaning of the phrase "in accordance with . . . substantial evidence" that "the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity." S Doc. No. 248, 79th Cong., 2d Sess., 365 (1946). This statement suggests that the usual preponderance standard was contemplated. See *Sea Island Broadcasting Corp.* v. *FCC,* 200 U. S. App. D. C. 187, 190, 627 F. 2d 240, 243 (1980) ("The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U. S. C. § 556 (d)"), cert denied, 449 U. S. 834 (1980); *Collins Securities Corp.* v. *SEC,* 183 U. S. App. D. C. 301, 304, 562 F. 2d 820, 823 (1977) ("The traditional standard of proof in a civil or administrative proceeding is the preponderance standard . . ."); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940); cf. *Woodby* v. *INS,* 385 U. S., at 288 (Clark, J., dissenting).

Moreover, during the floor debate, in the context of a discussion of § 10 (e), it was noted that the substantial-evidence test became the scope-of-review standard because of a desire to have courts review agency decisionmaking more carefully than under the then-prevalent scintilla-of-evidence test. It is clear from the debate that Congress intended agency decisionmaking to be done according to the preponderance of the evidence:

"MR. SPRINGER. . . . The gentleman from Iowa . . . has gone rather

Nor is there any suggestion in the legislative history that a standard of proof higher than a preponderance of the evidence was ever contemplated, much less intended. Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality—irrelevant, immaterial, unreliable, and nonprobative—and of insufficient quantity—less than a preponderance. See *id.*, at 36–37 and 45; S. Doc. No. 248, 79th Cong., 2d Sess., 320–322 and 376–378 (1946); n. 21, *supra.*

The language and legislative history of § 7 (c) lead us to conclude, therefore, that § 7 (c) was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard.[22]

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carefully over the provisions of the bill. I desire to call attention to only one . . . relating to the question of reviewable acts, the review of the proceedings by the judiciary, and the scope of the review. Under the present procedure, in many cases where there is any evidence, even a scintilla of evidence, decisions have been rendered and predicated on that character of evidence before the hearing tribunal.

"MR. HANCOCK. Even though contrary to the preponderance of the evidence.

"MR. SPRINGER Yes, . . . that has been done in many cases even though it is contrary to the preponderance of the evidence introduced at the hearing." S. Doc. No. 248, *supra,* at 376.

[22] Petitioner's reliance on *Woodby* v. *INS, supra,* is misplaced. There the Court required the Immigration and Naturalization Service to establish facts in deportation proceedings by clear, unequivocal, and convincing evidence. The Court adopted this standard of proof because deportation proceedings were not subject to the APA, and the Immigration and Nationality Act (INA) did not prescribe a standard of proof, only the scope of judicial review. The Court reached this conclusion after examining the language, legislative history, and purpose of § 106 (a) (4) and § 242 (b) (4) of the INA. That both sections contained the words "reasonable, substantial, and probative evidence" has little bearing on the construction of somewhat different language in an entirely different statute. The language, purpose, and legislative history of these sections of the INA differ in material respects from the language, purpose, and legislative history of § 7 (c). Section 106 (a) (4) was explicitly labeled a judicial review provision. Section 242 (b) (4) was also construed by the Court

III

Our view of congressional intent is buttressed by the Commission's longstanding practice of imposing sanctions according to the preponderance of the evidence. As early as 1938, the Commission rejected the argument that in a proceeding to determine whether to suspend, expel, or otherwise sanction a brokerage firm and its principals for, *inter alia*, manipulation of security prices in violation of § 9 of the Securities Exchange Act of 1934, 15 U. S. C. § 78i, a standard of proof greater than the preponderance-of-the-evidence standard was required. *In re White*, 3 S. E. C. 466, 539–540 (1938). Use of the preponderance standard continued after passage of the APA, and persists today. *E. g., In re Cea*, 44 S. E. C. 8, 25

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to be "addressed to reviewing courts," 385 U. S., at 283, in part because at the time that the provision was adopted, there was no other scope-of-judicial-review provision in the INA, *id.*, at 284 The APA, by contrast, was passed with an explicit judicial review provision, § 10 (e), and with a provision explicitly governing evidentiary matters before the agency, § 7 (c). To the extent § 242 (b) (4) was viewed by the Court as representing a "yardstick for the administrative factfinder," the Court concluded that the provision was directed at the quality of evidence upon which an order could be based. *Id.*, at 283. The language of § 242 (b) (4) differs from the language of § 7 (c), which includes the additional phrase "in accordance with." Moreover, as explained above, the legislative history and purpose of § 7 (c) make clear that it was not limited to quality-of-evidence concerns or directed at all at judicial review.

We thus accept Justice Clark's statement in dissent, with which the Court in *Woodby* did not disagree, that §§ 7 (c) and 10 (e) of the APA have "traditionally been held satisfied when the agency decides on the preponderance of the evidence." *Id.*, at 289, n. 1. Justice Clark's understanding of § 7 (c), as expressed in *Woodby*, is entitled to particular respect. We have previously noted that the Attorney General's Manual on the Administrative Procedure Act (1947) has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S., at 546, and Justice Clark was Attorney General both when the APA was passed and when the Manual was published.

(1969); *In re Pollisky*, 43 S. E. C. 458, 459–460 (1967). The Commission's consistent practice, which is in harmony with § 7 (c) and its legislative history, is persuasive authority that Congress intended that Commission disciplinary proceedings, subject to § 7 of the APA, be governed by a preponderance-of-the-evidence standard. See *Andrus* v. *Sierra Club*, 442 U. S. 347, 358 (1979); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U. S. 694, 719 (1975); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978), we stated that § 4 of the APA, 5 U. S. C. § 553, established the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." In § 7 (c), Congress has similarly expressed its intent that adjudicatory proceedings subject to the APA satisfy the statute where determinations are made according to the preponderance of the evidence. Congress was free to make that choice, *Vance* v. *Terrazas*, 444 U. S., at 265–266, and, in the absence of countervailing constitutional considerations, the courts are not free to disturb it.

Affirmed.

JUSTICE POWELL, with whom JUSTICE STEWART joins, dissenting.

The Securities and Exchange Commission (SEC), acting under the antifraud provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940, has imposed severe sanctions on petitioner. He has been barred permanently from practicing his profession and also forced to divest himself of an investment at a substantial loss. In making its findings of fraud and imposing these penalties, the SEC applied the "preponderance of the evidence" standard of proof.

The Court today sustains the action of the SEC, holding

that § 7 (c) of the Administrative Procedure Act (APA), 5 U. S. C. § 556 (d), commands the use of this standard in disciplinary proceedings brought under the securities laws. The Court recognizes, however, *ante,* at 95–96, that the general provisions of the APA are applicable only when Congress has not intended that a different standard be used in the administration of a specific statute. The critical inquiry thus is the identification of the standard of proof desired by Congress.

The SEC acted in this case under § 9 (b) of the Investment Company Act of 1940, 15 U. S. C. § 80a–9 (b), and § 203 (f) of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–3 (f). Sanctions imposed under these sections are the functional equivalent of penalties for fraud. At common law, it was plain that allegations of fraud had to be proved by clear and convincing evidence. *E. g., Addington* v. *Texas,* 441 U. S. 418, 424 (1979); *Woodby* v. *INS,* 385 U. S. 276, 285, n. 18 (1966); *Weininger* v. *Metropolitan Fire Insurance Co.,* 359 Ill. 584, 598, 195 N. E. 420, 426 (1935); *Bank of Pocahontas* v. *Ferimer,* 161 Va. 37, 40–41, 170 S. E. 591, 592 (1933); *Bowe* v. *Gage,* 127 Wis. 245, 251, 106 N. W. 1074, 1076 (1906). Congress enacted the Investment Company and Investment Advisers Acts against this common-law background. There is no evidence that Congress, when it adopted these Acts, intended to authorize the SEC to abandon the then-applicable standard of proof in fraud adjudications. See *Whitney* v. *SEC,* 196 U. S. App. D. C. 12, 604 F. 2d 676 (1979); *Collins Securities Corp.* v. *SEC,* 183 U. S. App. D. C. 301, 562 F. 2d 820 (1977).

The APA, upon which the Court relies, did not become law for some seven years after the enactment of the two statutes under which the SEC imposed these penalties. Again, the Court points to no specific evidence that Congress intended the APA to supplant the burden-of-proof rule generally applicable when the securities laws were enacted. Thus, the APA—the *general* statute applicable only where a *specific*

statute is not—should have no bearing on the proof burden in this case.

I imply no opinion on the question whether the evidence supports the SEC's allegations against petitioner. It is clear, however, that the SEC's finding of fraud and its imposition of harsh penalties have resulted in serious stigma and deprivation. Cf. *Addington* v. *Texas, supra.** In the absence of any specific demonstration of Congress' purpose, we should not assume that Congress intended the SEC to apply a lower standard of proof than the prevailing common-law standard for similar allegations. With all respect, it seems to me that the Court's decision today lacks the sensitivity that traditionally has marked our review of the Government's imposition upon citizens of severe penalties and permanent stigma.

*Petitioner has practiced the profession of investment adviser for many years. He has been forever barred from resuming that profession. Many penalties imposed under our criminal laws—such as monetary fines and probation—are far less severe, and yet these can be imposed only under the "beyond a reasonable doubt" standard of the criminal law.

Syllabus

DEMOCRATIC PARTY OF UNITED STATES ET AL. *v.* WISCONSIN EX REL. LA FOLLETTE ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 79–1631. Argued December 8, 1980—Decided February 25, 1981

Rules of the Democratic Party of the United States (National Party) provide that only those who are willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party's National Convention. Wisconsin election laws allow voters to participate in its Democratic Presidential candidate preference primary without regard to party affiliation and without requiring a public declaration of party preference. While the Wisconsin delegates to the National Convention are chosen separately, after the primary, at caucuses of persons who have stated their affiliation with the Democratic Party, those delegates are bound to vote at the Convention in accord with the results of the open primary election. Thus, while Wisconsin's open Presidential preference primary does not itself violate the National Party's rules, the State's mandate that primary results shall determine the allocation of votes cast by the State's delegates at the National Convention does. When the National Party indicated that Wisconsin delegates would not be seated at the 1980 National Convention because the Wisconsin delegate selection system violated the National Party's rules, an original action was brought in the Wisconsin Supreme Court on behalf of the State, seeking a declaration that such system was constitutional as applied to appellants (the National Party and Democratic National Committee) and that they could not lawfully refuse to seat the Wisconsin delegation. Concluding, *inter alia*, that the State had not impermissibly impaired the National Party's freedom of political association protected by the First and Fourteenth Amendments, the Wisconsin Supreme Court held that the State's delegate selection system was constitutional and binding upon appellants and that they could not refuse to seat delegates chosen in accord with Wisconsin law.

Held: Wisconsin cannot constitutionally compel the National Party to seat a delegation chosen in a way that violates the Party's rules. *Cousins* v. *Wigoda*, 419 U. S. 477, controlling. Pp. 120–126.

(a) The National Party and its adherents enjoy a constitutionally protected right of political association under the First Amendment, and

this freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State, and necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only. Here, the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in any binding process leading to the selection of delegates to their National Convention. Pp. 120–122.

(b) Wisconsin's asserted compelling interests in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters, go to the conduct of the open Presidential preference primary, not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates. Therefore, such asserted interests do not justify the State's substantial intrusion into the associational freedom of members of the National Party. Pp. 124–126.

93 Wis. 2d 473, 287 N. W. 2d 519, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 126.

Ronald D. Eastman argued the cause for appellants. With him on the briefs was *Lynda S. Mounts.*

Bronson C. La Follette, Attorney General, argued the cause for appellee State of Wisconsin. With him on the brief were *Charles Hoornstra, F. Joseph Sensenbrenner, Jr.*, and *Nancy L. Arnold,* Assistant Attorneys General. *Robert H. Friebert* argued the cause for appellee Democratic Party of Wisconsin. With him on the brief was *Carol Skornicka.**

**Thomas F. Nealon III* filed a brief for The Democratic Conference as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Slade Gorton,* Attorney General of Washington, *Thomas R. Bjorgen,* Assistant Attorney General, *Mike Greely,* Attorney General of Montana, and *Mike McGrath,* Assistant Attorney General, for the State of Washington et al.; and by *David C. Vladeck* and *Alan B. Morrison* for James MacDonald et al.

JUSTICE STEWART delivered the opinion of the Court.

The charter of the appellant Democratic Party of the United States (National Party) provides that delegates to its National Convention shall be chosen through procedures in which only Democrats can participate. Consistently with the charter, the National Party's Delegate Selection Rules provide that only those who are willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party's National Convention. The question on this appeal is whether Wisconsin may successfully insist that its delegates to the Convention be seated, even though those delegates are chosen through a process that includes a binding state preference primary election in which voters do not declare their party affiliation. The Wisconsin Supreme Court held that the National Convention is bound by the Wisconsin primary election results, and cannot refuse to seat the delegates chosen in accord with Wisconsin law. 93 Wis. 2d 473, 287 N. W. 2d 519.

I

Rule 2A of the Democratic Selection Rules for the 1980 National Convention states: "Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded." [1] Under

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[1] Rule 2A provides in full:

"Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate."

National Party rules, the "delegate selection process" includes any procedure by which delegates to the Convention are bound to vote for the nomination of particular candidates.[2]

The election laws of Wisconsin [3] allow non-Democrats—

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[2] Rule 12B of the Delegate Selection Rules for the 1980 Democratic National Convention provides in part:

"At all stages of the delegates selection process, delegates shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters or if there is no binding primary, the convention and caucus participants except that preferences securing less than the applicable percentage of votes cast for the delegates to the National Convention shall not be awarded any delegates."

Rule 12D provides in full:

"For the purpose of fairly reflecting the division of preferences, the *nonbinding advisory* presidential preference portion of primaries shall *not* be considered a step in the delegate selection process." (Emphasis added.)

[3] Wisconsin's election laws are contained in Wis. Stat., Tit. II, chs. 5–12 (1977). The laws in issue in this case relate to the Presidential preference vote at the spring election, held on the first Tuesday in April in each year in which the Electors for President and Vice President are to be chosen. The relevant provisions are as follows:

"5.37 Voting machine requirements.

. . . . . .

"(4) Voting machines may be used at primary elections when they comply with . . . the following provisions: All candidates' names entitled to appear on the ballots at the primary shall appear on the machines; the elector cannot vote for candidates of more than one party, whenever the restriction applies, and an elector who votes for candidates of any party may not vote for independent candidates at the September primary; the elector may secretly select the party for which he or she wishes to vote, or the independent candidates in the case of the September primary; the elector may vote for as many candidates for each office as he or she is lawfully entitled to vote for, but no more.

. . . . . .

"5.60 Spring election ballots. At spring elections the following ballots, when necessary, shall be provided for each ward.

. . . . . .

"(8) Ballots for Presidential Vote. There shall be a separate ballot for each party . . . listing the names of all potential candidates of that party . . . and affording, in addition, an opportunity to the voter to

including members of other parties and independents—to vote in the Democratic primary without regard to party affiliation and without requiring a public declaration of party preference. The voters in Wisconsin's "open" [4] primary express their

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nominate another potential candidate by write-in vote or to vote against the choices offered on the ballot . Each voter shall be given the ballots of all the parties participating in the presidential preference vote, but may vote on one ballot only.

. . . . .

"8.12 Presidential preference vote.

. . . . .

"(3) DELEGATES TO NATIONAL CONVENTION. (a) In canvassing the presidential preference vote, the specific candidate for president receiving a plurality in any district or in the state at large is entitled to control all the delegates representing such area . . . As an alternative to this procedure, the state chairperson of any political party having a presidential preference ballot may inform the board . . . that the delegates from such party are to be certified on the basis of proportional representation. In such case, each presidential candidate shall be apportioned delegates committed to support him or her as nearly as possible in accordance with the percentage of the vote in a district or in the state at large which such candidate receives. . . .

. . . . .

[8.12 (3)(b) and 8.12 (3)(c) 5 are described in n. 6, *infra*]

. . . . .

"(am) No later than the last Monday in April following the presidential preference vote, the board shall notify each state party organization chairperson . . . of the results of the presidential preference vote cast within his or her party, and the number of delegates from each congressional district and from the state at large which are to be pledged to each presidential candidate and the number which are to be uninstructed."

[4] What characterizes the Wisconsin primary as "open" is that the "voter is not required to declare publicly a party preference or to have that preference publicly recorded." 93 Wis. 2d 473, 485, 287 N. W. 2d 519, 523. See Wis Stat. §§ 5.60 (8), 10.02 (3) (1977). "The major characteristic of open primaries is that any registered voter can vote in the primary of either party." R. Blank, Political Parties, An Introduction 316 (1980). "The states with open primaries [including Wisconsin] allow any qualified voter to participate in a party primary without designating

choice among Presidential candidates for the Democratic Party's nomination; they do not vote for delegates to the National Convention. Delegates to the National Convention are chosen separately, after the primary, at caucuses of persons who have stated their affiliation with the Party.[5] But these delegates, under Wisconsin law, are bound to vote at the National Convention in accord with the results of the open primary election.[6] Accordingly, while Wisconsin's open Presidential preference primary does not itself violate National Party rules,[7] the State's mandate that the results of the primary shall determine the allocation of votes cast by the State's delegates at the National Convention does.

In May 1979, the Democratic Party of Wisconsin (State Party) submitted to the Compliance Review Commission of the National Party its plan for selecting delegates to the 1980 National Convention. The plan incorporated the provisions of the State's open primary laws, and, as a result, the Commission disapproved it as violating Rule 2A.[8] Since compliance with Rule 2A was a condition of participation at

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party affiliation or preference." D Ippolito & T. Walker, Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics 175 (1980).

[5] The State Party limits participation in the selection of delegates to the National Convention to "persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect." 93 Wis. 2d, at 486, 287 N W. 2d, at 524

[6] The Convention delegates are bound for a limited period by the outcome of the Presidential preference vote in their respective districts or by the outcome of the total Presidential vote in the State at large. Wis. Stat. § 8.12 (3)(b) (1977). Each delegate must pledge to support the candidate to whom the delegate is bound and to vote for that candidate on the first ballot and on any additional ballot, unless the candidate dies or releases the delegate or until the candidate fails to receive at least one-third of the votes authorized to be cast. Thereafter the delegate's vote at the Convention is based on personal preference. § 8.12 (3)(c) 5.

[7] Cf. Rule 12D, at n. 2, *supra.*

[8] See n. 1, *supra.*

the Convention, for which no exception could be made,[9] the National Party indicated that Wisconsin delegates who were bound to vote according to the results of the open primary would not be seated.

The State Attorney General then brought an original action in the Wisconsin Supreme Court on behalf of the State. Named as respondents in the suit were the National Party and the Democratic National Committee, who are the appellants in this Court, and the State Party, an appellee here. The State sought a declaration that the Wisconsin delegate selection system was constitutional as applied to the appellants and that the appellants could not lawfully refuse to seat the Wisconsin delegation at the Convention. The State Party responded by agreeing that state law may validly be applied against it and the National Party, and cross-claimed against the National Party, asking the court to order the National Party to recognize the delegates selected in accord with Wisconsin law. The National Party argued that under the First and Fourteenth Amendments it could not be compelled to seat the Wisconsin delegation in violation of Party rules.

The Wisconsin Supreme Court entered a judgment declaring that the State's system of selecting delegates to the Democratic National Convention is constitutional and binding on the appellants. 93 Wis. 2d 473, 287 N. W. 2d 519. The court assumed that the National Party's freedom of political association, protected by the First and Fourteenth Amendments, gave it the right to restrict participation in the process of choosing Presidential and Vice Presidential candidates to Democrats. *Id.*, at 511–512, 287 N. W. 2d, at 536. It concluded, however, that the State had not impermissibly impaired that right. The court said that the State's primary election laws were themselves intended to permit persons to vote only for the candidates of the party they preferred, and

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[9] Rule 2B precludes any exemption from Rule 2A requirements. See n. 20 and accompanying text, *infra*.

that, as a practical matter, requiring a public declaration of party affiliation would not prevent persons who are not Democrats from voting in the primary.[10] Moreover, the court reasoned that to whatever extent appellants' constitutional freedom of political association might be burdened by the Wisconsin election laws, the burden was justified by the State's "compelling . . . interest in maintaining the special feature of its primary . . . which permits private declaration of party preference." *Id.*, at 521, 287 N. W. 2d, at 541.

The court declared that the votes of the state delegation at the National Convention for Presidential and Vice Presidential candidates must be apportioned and cast as prescribed by Wisconsin law, and that the State's delegates could not for that reason be disqualified from being seated at the Convention.[11] The National Party and the Democratic National Committee then brought this appeal under 28 U. S. C. § 1257 (2).

Wisconsin held its primary on April 1, 1980, in accord with its election laws. Subsequently, the State Party chose delegates to the 1980 Democratic National Convention, in compliance with the order of the Wisconsin Supreme Court and Wis. Stat. §§ 8.12 (3)(b), (3)(c) 5 (1977). This Court noted probable jurisdiction of the appeal on July 2, 1980. 448 U. S. 909. On the same day, the Court stayed the judgment of

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[10] The court reasoned that because a primary voter must vote on only one party's ballot, he effectively declares his affiliation, albeit privately.

[11] The order of the Wisconsin Supreme Court was as follows:

"It is adjudged and declared that the Wisconsin electoral statutes involved in this controversy are constitutional, in full force and effect and binding on the petitioner and respondents; that the presidential preference primary shall be conducted in accordance with the Wisconsin statutes; and that Wisconsin delegates to the Democratic Party national convention shall be apportioned as required by statute in accordance with the results of the presidential preference vote and are not disqualified as delegates solely by reason of the apportionment being determined as required by the Wisconsin statutes." 93 Wis. 2d, at 525–526, 287 N. W. 2d, at 543.

the Wisconsin Supreme Court. On July 20, 1980, the Credentials Committee of the National Convention decided to seat the delegates from Wisconsin, despite this Court's stay,[12] and despite the delegates' selection in a manner that violated Rule 2A.[13]

II

Rule 2A can be traced to efforts of the National Party to study and reform its nominating procedures and internal structure after the 1968 Democratic National Convention.[14]

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[12] In oral argument, counsel for the National Party asserted that the Party did not have the time or resources, at that late date, to establish a procedure to select an alternative slate of delegates.

[13] This case is not moot. The Wisconsin Supreme Court's order is not explicitly limited to the 1980 Convention. The effect of the order "remains and controls future elections." *Moore* v. *Ogilvie,* 394 U. S. 814, 816. In any event, even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one "capable of repetition, yet evading review" *Rosario* v. *Rockefeller,* 410 U. S. 752, 756, n. 5; *Dunn* v. *Blumstein,* 405 U. S. 330, 333, n. 2.

[14] Wisconsin's open primary system has a history far longer than that of Rule 2A of the National Party. The open primary was adopted in 1903, and in the words of the Wisconsin Supreme Court, it has "functioned well" ever since. 93 Wis 2d, at 514, 287 N. W. 2d, at 537. The open primary is employed in Wisconsin not only to express preference for Presidential candidates, but to choose "partisan . . . state and local candidates . . . and an extensive array of nonpartisan officers" as well. *Ibid.* For a history of Wisconsin's open primary, see Part II of the Wisconsin Supreme Court opinion. *Id.*, at 491–495, 287 N. W. 2d, at 526–528. See also Berdahl, Party Membership in the United States, 36 Am. Pol. Sci. Rev. 16, 39–41 (1942).

Wisconsin's open primary apparently is still very popular. On September 5, 1979, by a unanimous vote of its Senate and a 92–1 vote of its Assembly, the Wisconsin Legislature reaffirmed by joint resolution the "firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." And on September 14, 1979, a bill to create a modified closed primary was defeated in committee. 93 Wis. 2d, at 490, n. 14, 287 N. W. 2d, at 526, n. 14.

The Convention, the Party's highest governing authority, directed the Democratic National Committee (DNC) to establish a Commission on Party Structure and Delegate Selection (McGovern/Fraser Commission). This Commission concluded that a major problem faced by the Party was that rank-and-file Party members had been underrepresented at its Convention, and that the Party should "find methods which would guarantee every American *who claims a stake in the Democratic Party* the opportunity to make his judgment felt in the presidential nominating process." Commission on Party Structure and Delegate Selection, Mandate for Reform: A Report of the Commission on Party Structure and Delegate Selection to the Democratic National Committee 8 (Apr. 1970) (emphasis added) (hereafter Mandate for Reform). The Commission stressed that Party nominating procedures should be as open and accessible as possible to all persons who wished to join the Party,[15] but expressed the concern that "a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate

[15] The McGovern/Fraser Commission adopted guidelines to eliminate state party practices that limited the access of rank-and-file Democrats to the candidate selection procedures, as well as those that tended to dilute the influence of each Democrat who took advantage of expanded opportunities to participate. Mandate for Reform, at 12. For example, the guidelines required that the delegates ultimately chosen, and their apportionment to particular candidates, had to reflect the candidate preferences of Democrats participating at all levels of the selection process. *Id.*, at 44. Among other measures recommended by the Commission were (1) the abolition of the unit rule at any stage of the delegate selection process so that majorities could not bind dissenting minorities to vote in accordance with majority wishes; (2) adequate public notice of times and places of meetings related to the delegate selection process; (3) the requirement that ballots indicate the Presidential preference of candidates, or of slates of delegates; and (4) the prohibition of discrimination against racial minorities, women, and young people *Id.*, at 44–46. See also Segal, Delegate Selection Standards: The Democratic Party's Experience, 38 Geo. Wash. L. Rev. 873, 880–881 (1970).

in the selection of delegates to the Democratic National Convention." *Id.*, at 47.[16]

The 1972 Democratic National Convention also established a Commission on Delegate Selection and Party Structure (Mikulski Commission). This Commission reiterated many of the principles announced by the McGovern/Fraser Commission, but went further to propose binding rules directing state parties to restrict participation in the delegate selection process to Democratic voters. Commission on Delegate Selection and Party Structure, Democrats All: A Report of the Commission on Delegate Selection and Party Structure 2, 15 (Dec. 6, 1973) (hereafter Democrats All). The DNC incorporated these recommendations into the Delegate Selection Rules for the 1976 Convention. In 1974, the National Party adopted its charter and by-laws. The charter set the following qualifications for delegates to the Party's national conventions:

> "The National Convention shall be composed of delegates who are chosen through processes which (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirmative action programs toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the presidential nominating process, . . . [and] (v) *restrict participation to Democrats only* . . . ." Democratic National Committee, Charter of the Democratic Party of the United States, Art. Two, § 4 (emphasis added).

[16] The recommendations of the McGovern/Fraser Commission were subsequently incorporated into the Call to the 1972 Convention, which set forth the formal requirements of the delegate selection and nominating processes for the Convention. They were also favorably received by at least one group monitoring their implementation at the 1972 Democratic National Convention. See Americans for Democratic Action, "Let Us Continue . . .", A Report on the Democratic Party's Delegate Selection Guidelines (1973).

Rule 2A took its present form in 1976. Consistent with the charter, it restricted participation in the delegate selection process in primaries or caucuses to "Democratic voters only who publicly declare their party preference and have that preference publicly recorded." But the 1976 Delegate Selection Rules allowed for an exemption from any rule, including Rule 2A, that was inconsistent with state law if the state party was unable to secure changes in the law.[17]

In 1975, the Party established yet another commission to review its nominating procedures, the Commission on Presidential Nomination and Party Structure (Winograd Commission). This Commission was particularly concerned with what it believed to be the dilution of the voting strength of Party members in States sponsoring open or "crossover" primaries.[18] Indeed, the Commission based its concern in part on a study of voting behavior in Wisconsin's open primary. See Adamany, Cross-Over Voting and the Democratic Party's Reform Rules, 70 Am. Pol. Sci. Rev. 536, 538–539 (1976).

The Adamany study, assessing the Wisconsin Democratic primaries from 1964 to 1972, found that crossover voters comprised 26% to 34% of the primary voters; that the voting patterns of crossover voters differed significantly from those of participants who identified themselves as Democrats; and that crossover voters altered the composition of the delegate slate chosen from Wisconsin.[19] The Winograd Commission

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[17] Under Rule 20 state parties must take "provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules." If a state party takes such provable positive steps but is unable to obtain the necessary legislative changes, the state party may be eligible for a Rule 20 exemption. In 1976, the Wisconsin State Party obtained such an exemption from the 1976 version of Rule 2A.

[18] A crossover primary is one that permits nonadherents of a party to "cross over" and vote in that party's primary.

[19] In 1964, crossovers made up 26% of the participants in the Wisconsin Democratic primary. Seven percent of those identifying themselves

thus recommended that the Party strengthen its rules against crossover voting, Openness, Participation and Party Building: Reforms for a Stronger Democratic Party 68 (Feb. 17, 1978) (hereafter Openness, Participation), predicting that continued crossover voting "could result in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." *Ibid.* And it specifically recommended that "participation in the delegate selection process in primaries or caucuses . . . be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded." *Id.*, at 69. Accordingly, the text of Rule 2A was retained, but a new Rule, 2B, was added, prohibiting any exemptions from

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as Democrats voted for Governor George Wallace, but 62% of the crossovers voted for him. Three-quarters of Governor Wallace's support in the Democratic primary came from crossover voters. Adamany, Cross-Over Voting and the Democratic Party's Reform Rules, 70 Am. Pol. Sci. Rev. 536, 541 (1976).

In 1968, crossovers constituted 28% of the participants in the Wisconsin Democratic primary. Forty-eight percent of those who said they were Democrats voted for Senator Eugene McCarthy, while 39% voted for President Johnson. Of the crossovers, however, 70% voted for Senator McCarthy, while only 14% voted for President Johnson. Participation of crossovers increased Senator McCarthy's margin of victory over President Johnson in Wisconsin by 2½ times. *Id.*, at 539.

In 1972, crossovers amounted to 34% of the participants. Fifty-one percent of the self-identified Democrats voted for Senator George McGovern, while only 7% voted for Governor Wallace. Of the crossovers, however, only 33% voted for Senator McGovern, while 29% voted for Governor Wallace. The study figures indicate that two-thirds of Governor Wallace's support in the Democratic primary came from crossover voters. *Ibid.* The study found that "the participation of crossover voters will . . . alter the composition of national convention delegations." *Id.*, at 540.

These data, of course, are relevant only insofar as they help to explain the derivation of Rule 2A. The application of Rule 2A to the delegate selection procedures of any State is not in any way dependent on the pattern or history of voting behavior in that State.

Rule 2A. Delegate Selection Rules for the 1980 Democratic Convention, Rule 2B.[20]

III

The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats.[21] Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules.

The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law, as such. Concluding that the

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[20] Rule 2A was the only rule applicable to the 1980 Convention that permitted no exemption. Rule 2B reads in full: "A Rule 20 exemption [see n. 17, *supra*] shall not be granted from Rule 2A requirements."

[21] In its answer to the complaint filed by the Wisconsin Attorney General, the National Party stated that it would "recognize only those delegate votes at the 1980 Convention which are the product of delegate selection processes, whether in binding primaries, conventions, or caucuses, which are restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded." The National Party nowhere indicated that the Wisconsin primary cannot be open; it averred only that any process adopted by the State that *binds* the National Party must comply with Party rules. And in the joint stipulation of facts before the Wisconsin Supreme Court, the National Party did not declare that Wisconsin must abandon its open primary. The National Party said only that if Wisconsin does not change its primary laws by requiring public party declaration consistent with Party rules, it would be satisfied with some other, Party-run, delegate selection system that did comply with Party rules. This statement is consistent with Rule 2C of the 1980 Delegate Selection Rules, which provides that "[a] State Party which is precluded by state statute from complying with this rule [2A], shall adopt and implement an alternative Party-run delegate selection system which complies with this rule." Cf. Rule 20, at n. 17, *supra*.

open primary serves compelling state interests by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct. In any event, there is no need to question its conclusion here. For the rules of the National Party do not challenge the authority of a State to conduct an open primary, so long as it is not binding on the National Party Convention. The issue is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in *Cousins* v. *Wigoda,* 419 U. S. 477.

In *Cousins* the Court reviewed the decision of an Illinois court holding that state law exclusively governed the seating of a state delegation at the 1972 Democratic National Convention, and enjoining the National Party from refusing to seat delegates selected in a manner in accord with state law although contrary to National Party rules. Certiorari was granted "to decide the important question . . . whether the [a]ppellate [c]ourt was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention." *Id.,* at 483. The Court reversed the state judgment, holding that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." *Id.,* at 491. That disposition controls here.

The *Cousins* Court relied upon the principle that "[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association." *Id.,* at 487. See also, *id.,* at 491 (REHNQUIST, J., concurring). This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. *Kusper* v. *Pontikes,* 414 U. S. 51, 57; *Williams* v. *Rhodes,* 383 U. S. 23, 30–31. See also *NAACP* v. *Alabama ex rel. Patterson,*

357 U. S. 449, 460. And the freedom to associate for the "common advancement of political beliefs," *Kusper* v. *Pontikes, supra,* at 56, necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.[22] "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250; see *NAACP* v. *Button,* 371 U. S. 415, 431.

Here, the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention. On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves "from intrusion by those with adverse political principles." *Ray* v. *Blair,* 343 U. S. 214, 221–222. In *Rosario* v. *Rockefeller,* 410 U. S. 752, for example, the Court sustained the constitutionality of a requirement—there imposed by a state statute—that a voter enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. The purpose of that statute was "to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Id.,* at 760.[23] See also *Kusper* v. *Pontikes, supra,* at 59–60.

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[22] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, American Constitutional Law 791 (1978).

[23] The extent to which "raiding" is a motivation of Wisconsin voters matters not. As the Winograd Commission acknowledged, "the existence

The Wisconsin Supreme Court recognized these constitutional doctrines in stating that the National Party could exclude persons who are not Democrats from the procedures through which the Party's national candidates are actually chosen. 93 Wis. 2d, at 499, 287 N. W. 2d, at 530. But the court distinguished *Cousins* on the ground that this case "does not arise 'in the context of the selection of delegations to the National Party Convention. . . .'" [24] *Id.*, at 525, 287 N. W. 2d, at 543. The court's order, however, unequivocally obligated the National Party to accept the delegation to the National Convention chosen in accord with Wisconsin law, despite contrary National Party rules.

The State argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial, because it prevents the Party from "screen[ing] out those whose affiliation is . . . slight, tenuous, or fleeting," and that such screening is essential to build a more effective and responsible Party. But it is not for the courts to mediate the merits of this dispute. For even if the State were correct,[25] a State, or a court, may not con-

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of 'raiding' has never been conclusively proven by survey research." Openness, Participation, at 68. The concern of the National Party is, rather, with crossover voters in general, regardless of their motivation.

[24] The appellees similarly argue that *Cousins* is inapposite. They contend that the decision in *Cousins* involved the direct election of individual delegates to the National Convention, while this case does not. But appellees, like the Wisconsin Supreme Court, fail to recognize that the problem presented by this case is not the "openness" of Wisconsin's primary in and of itself, but the binding effect of Wisconsin law on the freedom of the National Party to define its own eligibility standards.

[25] It may be the case, of course, that the public avowal of party affiliation required by Rule 2A provides no more assurance of party loyalty than does Wisconsin's requirement that a person vote in no more than one party's primary. But the stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible.

stitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.[26] And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.[27]

IV

We must consider, finally, whether the State has compelling interests that justify the imposition of its will upon the appellants. See *Cousins*, 419 U. S., at 489.[28] "Neither the right to associate nor the right to participate in political activities is absolute." *CSC* v. *Letter Carriers*, 413 U. S. 548, 567. The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy

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[26] Cf. *Ripon Society, Inc* v. *National Republican Party*, 173 U. S. App. D. C. 350, 368, 525 F. 2d 567, 585 (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution . .") (emphasis of the court), cert. denied, 424 U. S. 933.

[27] The State Party argues at length that empirical data do not support the National Party's need for Rule 2A. That argument should be addressed to the National Party—which has studied the need for something like Rule 2A for 12 years, see Part II, *supra*—and not to the judiciary.

The State also contends that the National Party should not be able to prevent "principled crossovers" from influencing the selection of its candidate, and that the appellants have not presented any evidence that "raiding" has been a problem. These contentions are irrelevant. See n. 23, *supra*. It is for the National Party—and not the Wisconsin Legislature or any court—to determine the appropriate standards for participation in the Party's candidate selection process.

[28] Obviously, States have important interests in regulating primary elections, *United States* v. *Classic*, 313 U. S. 299. A State, for example, "has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter*, 405 U. S. 134, 145.

of the ballot, increasing voter participation in primaries, and preventing harassment of voters.[29] But all those interests go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates.[30] Therefore, the interests advanced by the State [31] do not justify

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[29] The Wisconsin Supreme Court identified the interests of the State as follows:

"The state's interest in maintaining a primary and in not restricting voting in the presidential preference primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner" 93 Wis 2d, at 512, 287 N. W. 2d, at 536.

[30] The State contends repeatedly that the issue whether it can prevent the National Party from determining the qualifications of National Convention delegates is not presented. But this contention utterly ignores the Wisconsin Supreme Court order, and Wis. Stat. §§ 8.12 (3)(b), 3 (c) 5 (1977). The State Party acknowledges near the end of its brief that "[p]erhaps the real issue in this case is not whether Wisconsin can conduct an open primary, but rather whether it can make the results of the open primary binding upon Wisconsin delegates to the National Convention."

[31] The State attempts to add constitutional weight to its claims with the authority conferred on the States by Art. II, § 1, cl. 2, of the United States Constitution: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which a State may be entitled." See *In re Green*, 134 U. S. 377, 379; *McPherson* v. *Blacker*, 146 U. S. 1, 27–28; *Ray* v. *Blair*, 343 U. S. 214; *Oregon* v. *Mitchell*, 400 U. S. 112, 291 (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.); see also *Cousins* v. *Wigoda*, 419 U. S. 477, 495–496 (REHNQUIST, J., concurring in result). Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance. In *Cousins*, despite similar arguments by Illinois, all nine Justices agreed that a State could not constitutionally compel a national political convention to seat

its substantial [32] intrusion into the associational freedom of members of the National Party.

V

The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest in the manner in which the delegates to its National Convention are selected. But these interests are not incompatible, and to the limited extent they clash in this case, both interests can be preserved. The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules. Since the Wisconsin Supreme Court has declared that the National Party cannot disqualify delegates who are bound to vote in accordance with the results of the Wisconsin open primary, its judgment is reversed.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

Under Wisconsin law, the Wisconsin delegations to the Presidential nominating conventions of the two major political parties are required to cast their votes in a way that

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delegates against its will. See *id.*, at 488; *id.*, at 492 (REHNQUIST, J., concurring in result); *id.*, at 496 (POWELL, J., concurring in part and dissenting in part).

[32] Because the actual selection of delegates is within the control of persons who publicly proclaim their allegiance to the Democratic Party, the Wisconsin Supreme Court apparently deduced that the effects of the open primary on the nominating process were minimal. But the court ignored the fact—the critical fact in the case—that under Wisconsin law state delegates are bound to cast their votes at the National Convention in accord with the open primary outcomes.

reflects the outcome of the State's "open" primary election. That election is conducted without advance party registration or any public declaration of party affiliation, thus allowing any registered voter to participate in the process by which the Presidential preferences of the Wisconsin delegation to the Democratic National Convention are determined. The question in this case is whether, in light of the National Party's rule that only publicly declared Democrats may have a voice in the nomination process, Wisconsin's open primary law infringes the National Party's First Amendment rights of association. Because I believe that this law does not impose a substantial burden on the associational freedom of the National Party, and actually promotes the free political activity of the citizens of Wisconsin, I dissent.

I

The Wisconsin open primary law was enacted in 1903. 1903 Wis. Laws, ch. 451. It was amended two years later to apply to Presidential nominations. 1905 Wis. Laws, ch. 369. See 93 Wis. 2d 473, 492, 287 N. W. 2d 519, 527 (1980). As the Wisconsin Supreme Court described in its opinion below:

> "The primary was aimed at stimulating popular participation in politics thereby ending boss rule, corruption, and fraudulent practices which were perceived to be part of the party caucus or convention system. Robert M. La Follette, Sr., supported the primary because he believed that citizens should nominate the party candidates; that the citizens, not the party bosses, could control the party by controlling the candidate selection process; and that the candidates and public officials would be more directly responsible to the citizens." *Ibid.*

As noted in the opinion of the Court, the open primary law only recently has come into conflict with the rules of the National Democratic Party. The new Rule 2A was enacted

as part of a reform effort aimed at opening up the party to greater popular participation. This particular rule, however, has the ironic effect of calling into question a state law that was intended itself to open up participation in the nominating process and minimize the influence of "party bosses."

II

The analysis in this kind of First Amendment case has two stages. If the law can be said to impose a burden on the freedom of association, then the question becomes whether this burden is justified by a compelling state interest. *E. g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960). The Court in this case concludes that the Wisconsin law burdens associational freedoms. It then appears to acknowledge that the interests asserted by Wisconsin are substantial, *ante*, at 120–121, but argues that these interests "go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates," *ante*, at 125. In my view, however, any burden here is not constitutionally significant, and the State has presented at least a formidable argument linking the law to compelling state interests.

A

In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins* v. *Wigoda*, 419 U. S. 477 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights. It is important to recognize, however, that the facts of this case present issues that differ considerably from those we dealt with in *Cousins*.

In *Cousins*, we reversed a determination that a state court could interfere with the Democratic Convention's freedom to

select one delegation from the State of Illinois over another. At issue in the case was the power of the National Party to reject a delegation chosen in accordance with state law because the State's delegate-selection procedures violated party rules regarding participation of minorities, women, and young people, as well as other matters. See *id.*, at 479, n. 1. The state court had ordered the Convention to seat the delegation chosen under state law, rather than the delegation preferred by the Convention itself. In contrast with the direct state regulation of the delegate-selection process at issue in *Cousins,* this case involves a state statutory scheme that regulates delegate *selection* only indirectly. Under Wisconsin law, the "method of selecting the delegates or alternates [is] determined by the state party organization," Wis. Stat. § 8.12 (3)(b) (1977). Wisconsin simply mandates that each delegate selected, by whatever procedure, must be pledged to represent a candidate who has won in the state primary election the right to delegate votes at the Convention.[1]

In sum, Wisconsin merely requires that the delegates "vote in accordance with the results of the Wisconsin open primary." *Ante,* at 126. While this regulation affecting participation in the primary is hardly insignificant, it differs substantially from the direct state interference in delegate selection at issue in *Cousins.* This difference serves to emphasize the importance of close attention to the way in which a state law is said to impose a burden on a party's freedom of association. Cf. *Marchioro* v. *Chaney,* 442 U. S. 191, 199 (1979). All that Wisconsin has done is to require the major parties to allow voters to affiliate with them—for the limited purpose of participation in a primary—*secretly,* in the pri-

[1] The delegates selected must be approved by the candidate they are to represent, Wis. Stat. § 8.12 (3)(b) (1977), and must pledge that they are affiliated with the candidate's party and will support their candidate until he or she fails to receive at least one-third of the votes authorized to be cast at the Convention, § 8.12 (3)(c).

vacy of the voting booth.[2] The Democrats remain free to require public affiliation from anyone wishing any greater degree of participation in party affairs. In Wisconsin, participation in the caucuses where delegates are selected is limited to publicly affiliated Democrats. Brief for Appellee Democratic Party of Wisconsin 19. And, as noted above, the State's law *requires* that delegates themselves affirm their membership in the party publicly.

In evaluating the constitutional significance of this relatively minimal state regulation of party membership requirements, I am unwilling—at least in the context of a claim by one of the two major political parties—to conclude that every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights. Instead, I would look closely at the nature

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[2] It is not fully accurate to say, as the Court does, that the "election laws of Wisconsin allow non-Democrats—including members of other parties and independents—to vote in the Democratic primary." *Ante*, at 110–111. The Wisconsin statute states that "[i]n each year in which electors for president and vice president are to be elected, the voters of this state shall at the spring election be given an opportunity to express their preference for the person to be the presidential candidate *of their party*." Wis. Stat. § 8.12 (1) (1977) (emphasis added). Thus, the act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. The real issue in this case is whether the Party has the right to decide that only *publicly* affiliated voters may participate.

The situation might be different in those States with "blanket" primaries—*i. e.*, those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office. *E. g.*, Wash. Rev. Code § 29.18.200 (1976). Cf. 93 Wis. 2d 473, 504, 287 N. W. 2d 519, 532 (1980) ("[T]he legislature has taken steps to encourage voters to participate in the primary of their party and to discourage a voter of one party from being tempted to vote in the primary of another party. Limiting voters to only one party's ballot discourages voters from voting on a ballot of a party other than their own, because in order to do so they would have to sacrifice their opportunity to participate in their own party's selection process").

of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms.

It goes without saying that nomination of a candidate for President is a principal function performed by a national political party, and Wisconsin has, to an extent, regulated the terms on which a citizen may become a "member" of the group of people permitted to influence that decision. If appellant National Party were an organization with a particullar ideological orientation or political mission, perhaps this regulation would present a different question.[3] In such a case, the state law might well open the organization to participation by persons with incompatible beliefs and interfere with the associational rights of its founders.

The Democratic Party, however, is not organized around the achievement of defined ideological goals. Instead, the major parties in this country "have been characterized by a fluidity and overlap of philosophy and membership." *Rosario* v. *Rockefeller,* 410 U. S. 752, 769 (1973) (POWELL, J., dissenting). It can hardly be denied that this Party generally has been composed of various elements reflecting most of the American political spectrum.[4] The Party does take positions

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[3] Compare *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 462–463 (1958), where the Court was careful to assess the effect of a membership disclosure requirement on associational freedoms in light of the particular nature of the organization involved and the likely responses of those opposed to its aims.

[4] See R. Horn, Groups and the Constitution 103–104 (1956); A. Campbell, P. Converse, W Miller, & D. Stokes, The American Voter 183–187, 543 (1960); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1166 (1975). The Charter of the National Democratic Party states that it is "open to all who desire to support the party and . . be known as Democrats." Art. Ten, § 1.

This perception need not be taken as a criticism of the American party structure. The major parties have played a key role in forming coalitions and creating consensus on national issues. "Broad-based political parties supply an essential coherence and flexibility to the American political

on public issues, but these positions vary from time to time, and there never has been a serious effort to establish for the Party a monolithic ideological identity by excluding all those with differing views. As a result, it is hard to see what the Democratic Party has to fear from an open primary plan. Wisconsin's law may influence to some extent the outcome of a primary contest by allowing participation by voters who are unwilling to affiliate with the Party publicly. It is unlikely, however, that this influence will produce a delegation with preferences that differ from those represented by a substantial number of delegates from other parts of the country. Moreover, it seems reasonable to conclude that, insofar as the major parties do have ideological identities, an open primary merely allows relatively independent voters to cast their lot with the party that speaks to their present concerns.[5]

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scene. They serve as coalitions of different interests that combine to seek national goals." *Branti* v. *Finkel*, 445 U. S. 507, 532 (1980) (POWELL, J., dissenting). As Professor Ranney has written:

"[E]ach party has sought winning coalitions by attempting accommodations among competing interests it hopes will appeal to more contributors and voters than will the rival accommodations offered by the opposition party. This strategy, it is conceded, has resulted in vague, ambiguous, and overlapping party programs and in elections that offer the voters choices between personalities and, at most, general programmatic tendencies, certainly not unequivocal choices between sharply different programs. But this . . . is not a vice but a virtue, for it has enabled Americans through all but one era of their history to manage their differences with relatively little violence and to preserve the world's oldest constitutional democratic regime." A. Ranney, Curing the Mischiefs of Faction 201 (1975).

[5] See Comment, The Constitutionality of Non-Member Voting in Political Party Primary Elections, 14 Willamette L. J. 259, 290 (1978) ("Independents and members of other parties who seek to participate in a party primary will do so precisely because they identify with the community of interest, if indeed one exists. Their very motive for participating in the primary would be to associate with a party presenting 'candidates and issues more responsive to their immediate concerns' "), quoting *Rosario* v. *Rockefeller*, 410 U. S. 752, 769 (1973) (POWELL, J., dissenting).

By attracting participation by relatively independent-minded voters, the Wisconsin plan arguably may enlarge the support for a party at the general election.

It is significant that the Democratic Party of Wisconsin, which represents those citizens of Wisconsin willing to take part publicly in Party affairs, is here *defending* the state law. Moreover, the National Party's apparent concern that the outcome of the Wisconsin Presidential primary will be skewed cannot be taken seriously when one considers the alternative delegate-selection methods that are acceptable to the Party under its rules. Delegates pledged to various candidates may be selected by a caucus procedure involving a small minority of Party members, as long as all participants in the process are publicly affiliated. While such a process would eliminate "crossovers," it would be at least as likely as an open primary to reflect inaccurately the views of a State's Democrats.[6] In addition, the National Party apparently is quite willing to accept public affiliation immediately before primary voting, which some States permit.[7] As Party affiliation becomes this easy for a voter to change in order to participate in a particular primary election, the difference between open and closed primaries loses its practical significance.[8]

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[6] The unrepresentative nature of the delegate selections produced by caucuses is suggested by differences between the results of caucuses and nonbinding primaries held in the same State. See n. 11, *infra*.

[7] *E. g.*, Tenn. Code Ann. § 2–7–115 (b)(2) (1979). See Developments in the Law, *supra* n. 4, at 1164.

[8] As one scholar has stated:

"The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states, which after all do account for 82 percent of the states. Take the case of Illinois. Voters do not register as members of a party; at the polling place they simply state their party preference and are given the ballot of that party, no questions asked. Because Illinois voters must disclose a party preference before entering the voting booth, their primary is generally considered 'closed.' One would be hard put, however, to argue that it is in operation much different from an open

In sum, I would hold that the National Party has failed to make a sufficient showing of a burden on its associational rights.[9]

B

The Court does not dispute that the State serves important interests by its open primary plan. Instead the Court argues that these interests are irrelevant because they do not support a requirement that the outcome of the primary be binding on delegates chosen for the convention. This argument, however, is premised on the unstated assumption that a nonbinding primary would be an adequate mechanism for pursuing the state interests involved. This assumption is unsupportable because the very purpose of a Presidential primary, as enunciated as early as 1903 when Wisconsin passed its first primary law, was to give control over the nomination process to individual voters.[10] Wisconsin cannot do this, and still pursue the interests underlying an open primary, without making the open primary binding.[11]

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primary." F. Sorauf, Party Politics in America 206 (4th ed. 1980) (hereinafter Sorauf).

[9] Of course, the National Party could decide that it no longer wishes to be a relatively nonideological party, but it has not done so Such a change might call into question the institutionalized status achieved by the two major parties in state and federal law. It cannot be denied that these parties play a central role in the electoral process in this country, to a degree that has led this Court on occasion to impose constitutional limitations on party activities. See *Smith* v *Allwright*, 321 U. S. 649 (1944); *Terry* v. *Adams*, 345 U. S. 461 (1953) Arguably, the special status of the major parties is an additional factor favoring state regulation of the electoral process even in the face of a claim by such a party that this regulation has interfered with its First Amendment rights.

[10] See, *e. g.*, Sorauf 204 ("it was an article of faith among [the Progressives] that to cure the ills of democracy one needed only to prescribe larger doses of democracy").

[11] Any argument that a nonbinding primary would be sufficient to allow individual voters a voice in the nomination process is belied by the fact that such a primary often will be ignored in later, nonprimary delegate-selection processes. In 1980, for example, Vermont's nonbinding open pri-

If one turns to the interests asserted, it becomes clear that they are substantial. As explained by the Wisconsin Supreme Court:

> "The state's interest in maintaining a primary and in not restricting voting in the presidential preference primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner.
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> . . . . .
>
> "In guaranteeing a private primary ballot, the open primary serves the state interest of encouraging voters to participate in selecting the candidates of their party which, in turn, fosters democratic government. Historically the primary was initiated in Wisconsin in an effort to enlarge citizen participation in the political process and to remove from the political bosses the process of selecting candidates." 93 Wis. 2d, at 512–513, 287 N. W. 2d, at 536–537 (footnote omitted).

The State's interest in promoting the freedom of voters to affiliate with parties and participate in party primaries has been recognized in the decisions of this Court. In several cases, we have dealt with challenges to state laws restricting voters who wished to change party affiliation in order to participate in a primary. We have recognized that voters have a right of free association that can be impaired unconstitutionally if such state laws become too burdensome. In *Rosario* v. *Rockefeller,* 410 U. S. 752 (1973), the Court upheld a

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mary produced a lopsided victory, 74.3% to 25.7%, for President Carter over Senator Kennedy. 38 Cong. Q. Weekly Rep. 647 (1980). Party caucuses then produced a state delegation to the Democratic Convention that favored Kennedy over Carter by 7 to 5. *Id.,* at 1472.

registration time limit, but emphasized that the law did not absolutely prevent any voter from participating in a primary and was "tied to a particularized legitimate purpose" of preventing "raiding," [12] *id.*, at 762. In *Kusper* v. *Pontikes*, 414 U. S. 51 (1973), we struck down an Illinois law that prevented voters who had participated in one party's primary from switching affiliations to vote in another party's primary during the succeeding 23 months. We concluded that such a law went too far in interfering with the freedom of the individual voter, and could not be justified by the State's interest in preventing raiding.

Here, Wisconsin has attempted to ensure that the prospect of public party affiliation will not inhibit voters from participating in a Democratic primary. Under the cases just discussed, the National Party's rule requiring public affiliation for primary voters is not itself an unconstitutional interference with voters' freedom of association. *Nader* v. *Schaffer*, 417 F. Supp. 837 (Conn.) (three-judge court), summarily aff'd, 429 U. S. 989 (1976). But these cases do support the *State's* interest in promoting free voter participation by allowing private party affiliation. The State of Wisconsin has determined that some voters are deterred from participation by a public affiliation requirement,[13] and the validity of that concern is not something that we should second-guess.[14]

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[12] "Raiding" refers to primary voting by members of another party who are seeking to encourage their opponents to select a less desirable or strong candidate. It does not appear to be a problem in Wisconsin. See 93 Wis. 2d, at 506, 287 N. W. 2d, at 533 ("The petitioner and respondents agree that raiding is not a significant problem and that neither the Wisconsin open primary nor the declaration required by Rule 2A prevents 'raiding' ").

[13] A related concern is the prevention of undue influence by a particular political organization or "machine." The Progressives who promoted the idea of a primary election perceived a need to combat political professionals who controlled access to governmental power. See A. Lovejoy,

[*Footnote 14 is on p. 137*]

III

The history of state regulation of the major political parties suggests a continuing accommodation of the interests of the parties with those of the States and their citizens. In the process, "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer* v.

La Follette and the Establishment of the Direct Primary in Wisconsin 7–8 (1941) ("avowed purpose" was "the elimination of the boss from the American political scene"); *id.*, at 97 ("Because of their faith in the American people, the Progressives sought to cure the ills of democracy with more democracy. . . . For the first time the middleman was eliminated between the people and their representatives"); Sorauf 203–204. The *open* primary carries this process one step further by eliminating some potential pressures from political organizations on voters to affiliate with a particular party. Although one well may question the wisdom of a state law that undermines the influence of party professionals and may tend to weaken parties themselves, the state interests involved are neither illegitimate nor insubstantial. As noted *supra*, at 133, the Democratic Party of Wisconsin has filed a brief in *support* of the validity of the Wisconsin plan

[14] A more difficult question in this case is whether Wisconsin can satisfy the second component of the "compelling interest test"—whether it can show that it has no "less drastic way of satisfying its legitimate interests." *Kusper* v. *Pontikes*, 414 U. S. 51, 59 (1973). The answer to this question depends in many cases on how the state interest is conceived. Here, a state interest in protecting voters from the possible coercive effects of public party affiliation cannot be satisfied by any law except one that allows private party affiliation. On the other hand, if the state interest is described more generally, in terms of increasing voter freedom or participation, there may well be less "drastic" alternatives available to Wisconsin. Because of my conclusion that there is no significant burden on the associational freedoms of appellant National Party in this case, and because the Court's analysis does not reach this question, I express no view on whether the State has shown a sufficient interest in this particular method of regulating the electoral process to satisfy a less-drastic-means inquiry.

Brown, 415 U. S. 724, 730 (1974).[15] Today, the Court departs from this process of accommodation. It does so, it seems to me, by upholding a First Amendment claim by one of the two major parties without any serious inquiry into the extent of the burden on associational freedoms and without due consideration of the countervailing state interests.

[15] The Court concedes that the States have a substantial interest in regulating primary elections. *Ante*, at 124, n. 28, 126. The power of the States in this area derives from the specific constitutional grant of authority to the States to "appoint, in such Manner as the Legislature thereof may direct" Presidential electors, U. S. Const., Art. II, § 1, cl. 2, as well as from the more general regulatory powers of the States. See *Cousins* v. *Wigoda*, 419 U. S. 477, 495–496 (1975) (REHNQUIST, J., concurring in result).

IMMIGRATION AND NATURALIZATION SERVICE v. JONG HA WANG ET UX.

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

No. 80–485. Decided March 2, 1981

Respondents, husband and wife who are citizens of Korea and who had been ordered to be deported after an administrative hearing, subsequently moved to reopen the deportation proceedings, seeking a suspension of deportation for "extreme hardship" under § 244 of the Immigration and Nationality Act and applicable regulations. They alleged that deportation would result in extreme hardship to their two American-born children through loss of "educational opportunities," and to themselves and their children from the forced liquidation, at a possible loss, of their assets, which included a home and a dry cleaning business The Board of Immigration Appeals denied the motion without a hearing, concluding that respondents had failed to establish a prima facie case of extreme hardship. The Court of Appeals reversed, directing that a hearing be held and holding that the extreme hardship requirement of § 244 is satisfied if an alien produces sufficient evidence to suggest that the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported.

Held: The Board did not exceed its authority and the Court of Appeals erred in ordering that the case be reopened. Respondents' allegations of hardship were in the main conclusory and unsupported by affidavit, as required by the applicable regulations. Moreover, the Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates to define "extreme hardship" in the first instance. They may construe the term narrowly should they deem it wise to do so, and their construction and application of the standard should not be overturned simply because the reviewing court may prefer another interpretation of the statute.

Certiorari granted; 622 F. 2d 1341, reversed.

PER CURIAM.

Section 244 of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254 (a)(1), provides that the Attorney General in his discretion may suspend

deportation and adjust the status of an otherwise deportable alien who (1) has been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." [1] The Attorney General is authorized to delegate his powers under the Act, 8 U. S. C. § 1103, and his authority under § 244 has been delegated by regulation to specified authorities in the Immigration and Naturalization Service. 8 CFR § 2.1 (1979).[2]

The § 244 issue usually arises in an alien's deportation hearing. It can arise, however, as it did in this case, on a motion to reopen after deportation has been duly ordered. The Act itself does not expressly provide for a motion to reopen, but regulations promulgated under the Act allow such

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[1] Initially, the Attorney General had no discretion in ordering deportation, and an alien's sole remedy was to obtain a private bill from Congress. See *Foti* v *INS*, 375 U. S. 217, 222 (1963). The first measure of statutory relief was included in the Alien Registration Act of 1940, 54 Stat. 670. Under the statutory predecessor of § 244, suspension of a deportation order could be granted only if the alien demonstrated "exceptional and extremely unusual hardship." Immigration and Nationality Act of 1952, § 244 (a)(1), Pub. L. 414, 66 Stat. 214. This provision was amended to require that the alien show that deportation would result in "extreme hardship," Act of Oct. 24, 1962, Pub. L. 87-885, § 4, 76 Stat. 1248.

[2] Section 2.1 of the regulations delegates the Attorney General's power to the Commissioner of Immigration and Naturalization, and permits the Commissioner to redelegate the authority through appropriate regulations. The power to consider § 244 applications in deportation hearings is delegated to special inquiry officers, whose decisions are subject to review by the Board of Immigration Appeals, 8 CFR §§ 242.8, 242.21 (1979). See *Bastidas* v. *INS*, 609 F. 2d 101, 103, n. 1 (CA3 1979). The Board of Immigration Appeals has the power to consider the question if it is raised on a motion to reopen where the Board has already made a decision in the case. 8 CFR § 3.2 (1979).

a procedure.[3] The regulations also provide that the motion to reopen shall "state the new fact to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." 8 CFR § 3.8 (a) (1979). Motions to reopen are thus permitted in those cases in which the events or circumstances occurring after the order of deportation would satisfy the extreme-hardship standard of § 244. Such motions will not be granted "when a *prima facie* case of eligibility for the relief sought has not been established." *Matter of Lam,* 14 I. & N. Dec. 98 (BIA 1972). See *Matter of Sipus,* 14 I. & N. Dec. 229 (BIA 1972).

Respondents, husband and wife, are natives and citizens of Korea who first entered the United States in January 1970 as nonimmigrant treaty traders. They were authorized to remain until January 10, 1972, but they remained beyond that date without permission and were found deportable after a hearing in November 1974. They were granted the privilege of voluntarily departing by February 1, 1975. They did not do so. Instead, they applied for adjustment of status under § 245 of the Act, 8 U. S. C. § 1255, but were found ineligible for this relief after a hearing on July 15, 1975.[4] Their appeal from this ruling was dismissed by the Board of

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[3] Title 8 CFR § 3.2 (1979) provides in pertinent part:

"Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted . . . unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."

[4] Relief was denied because the immigration judge determined that visa numbers for nonpreference Korean immigrants were not available, thus rendering respondents ineligible for the requested relief. The immigration judge also stated that he would have denied the application given respondents' failure to move to Salt Lake City where Mr. Wang's sponsoring employer was located, thus causing doubt whether his services were in fact needed.

Immigration Appeals in October 1977. Respondents then filed a second motion to reopen their deportation proceedings in December 1977, this time claiming suspension under § 244 of the Act. Respondents by then had satisfied the 7-year-continuous-physical-presence requirement of that section. The motion alleged that deportation would result in extreme hardship to respondents' two American-born children because neither child spoke Korean and would thus lose "educational opportunities" if forced to leave this country. Respondents also claimed economic hardship to themselves and their children resulting from the forced liquidation of their assets at a possible loss. None of the allegations was sworn or otherwise supported by evidentiary materials, but it appeared that all of respondents' close relatives, aside from their children, resided in Korea and that respondents had purchased a dry-cleaning business in August 1977, some three years after they had been found deportable. The business was valued at $75,000 and provided an income of $650 per week. Respondents also owned a home purchased in 1974 and valued at $60,000. They had $24,000 in a savings account and some $20,000 in miscellaneous assets. Liabilities were approximately $81,000.

The Board of Immigration Appeals denied respondents' motion to reopen without a hearing, concluding that they had failed to demonstrate a prima facie case that deportation would result in extreme hardship to either themselves or their children so as to entitle them to discretionary relief under the Act. The Board noted that a mere showing of economic detriment is not sufficient to establish extreme hardship under the Act. See *Pelaez* v. *INS*, 513 F. 2d 303 (CA5), cert. denied, 423 U. S. 892 (1975). This was particularly true since respondents had "significant financial resources and there [was] nothing to suggest that the college-educated male respondent could not find suitable employment in Korea." With respect to the claims involving the children, the Board ruled that the alleged loss of educational opportunities to the

young children of relatively affluent, educated Korean parents did not constitute extreme hardship within the meaning of § 244.

The Court of Appeals for the Ninth Circuit, sitting en banc, reversed. 622 F. 2d 1341 (1980). Contrary to the Board's holding, the Court of Appeals found that respondents had alleged a sufficient prima facie case of extreme hardship to entitle them to a hearing. The court reasoned that the statute should be liberally construed to effectuate its ameliorative purpose. The combined effect of the allegation of harm to the minor children, which the court thought was hard to discern without a hearing, and the impact on respondents' economic interests was sufficient to constitute a prima facie case requiring a hearing where the Board would "consider the total potential effect of deportation on the alien and his family." *Id.*, at 1349.

The Court of Appeals erred in two respects. First, the court ignored the regulation which requires the alien seeking suspension to allege and support by affidavit or other evidentiary material the particular facts claimed to constitute extreme hardship. Here, the allegations of hardship were in the main conclusory and unsupported by affidavit. By requiring a hearing on such a motion, the Court of Appeals circumvented this aspect of the regulation, which was obviously designed to permit the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children.[5]

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[5] Other Courts of Appeals have enforced the evidentiary requirement stated in 8 CFR § 3.8 (1979). See, *e. g.*, *Oum* v. *INS*, 613 F. 2d 51, 54 (CA4 1980); *Acevedo* v. *INS*, 538 F. 2d 918, 920 (CA2 1976). See also *Tupacyupanqui-Marin* v. *INS*, 447 F. 2d 603, 607 (CA7 1971); *Luna-Benalcazar* v. *INS*, 414 F. 2d 254, 256 (CA6 1969).

Prior to the present procedures, the grant or denial of a motion to reopen was solely within the discretion of the Board. See *Arakas* v. *Zimmerman*, 200 F. 2d 322, 323–324, and n. 2 (CA3 1952). The present regu-

Secondly, and more fundamentally, the Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates. The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute. Here, the Board considered the facts alleged and found that neither respondents nor their children would suffer extreme hardship. The Board considered it well settled that a mere showing of economic detriment was insufficient to satisfy the requirements of § 244 and in any event noted that respondents had significant financial resources while finding nothing to suggest that Mr. Wang could not find suitable employment in Korea. It also followed that respondents' two children would not suffer serious economic deprivation if they returned to Korea. Finally, the Board could not believe that the two "young children of

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lation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened. See *Villena* v. *INS*, 622 F. 2d 1352 (CA9 1980) (en banc) (Wallace, J., dissenting). In his dissent, Judge Wallace stated that INS had discretion beyond requiring proof of a prima facie case:

"If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations." *Id.*, at 1362.

affluent, educated parents" would be subject to such educational deprivations in Korea as to amount to extreme hardship. In making these determinations, the Board was acting within its authority. As we see it, nothing in the allegations indicated that this is a particularly unusual case requiring the Board to reopen the deportation proceedings.

The Court of Appeals nevertheless ruled that the hardship requirement of § 244 is satisfied if an alien produces sufficient evidence to suggest that the "hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported." 622 F. 2d, at 1346. Also, as Judge Goodwin observed in dissent, the majority of the Court of Appeals also strongly indicated that respondents should prevail under such an understanding of the statute. *Id.*, at 1352. In taking this course, the Court of Appeals extended its "writ beyond its proper scope and deprived the Attorney General of a substantial portion of the discretion which § 244 (a) vests in him." *Id.*, at 1351 (Sneed, J., dissenting).

The Attorney General and his delegates have the authority to construe "extreme hardship" narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the "extreme hardship" language, which itself indicates the exceptional nature of the suspension remedy. Moreover, the Government has a legitimate interest in creating official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations. Under the standard applied by the court below, many aliens could obtain a hearing based upon quite minimal showings. As stated in dissent below, "by using the majority opinion as a blueprint, any foreign visitor who has fertility, money, and the ability to stay out of trouble with the police for seven years can change his status from that of tourist or student to that of permanent resident without the inconvenience of immigration quotas. This strategy is not fair to those waiting for a quota." *Id.*,

at 1352 (Goodwin, J., dissenting). Judge Goodwin further observed that the relaxed standard of the majority opinion "is likely to shift the administration of hardship deportation cases from the Immigration and Naturalization Service to this court." *Id.*, at 1351.

We are convinced that the Board did not exceed its authority and that the Court of Appeals erred in ordering that the case be reopened. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

So ordered.

JUSTICES BRENNAN, MARSHALL, and BLACKMUN would grant the petition for certiorari and give the case plenary consideration.

Per Curiam

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. *v.* FLORIDA NURSING HOME ASSOCIATION ET AL.

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

No. 80–532. Decided March 2, 1981

Held: In proceedings by respondent nursing homes and nursing home association wherein regulations relating to Medicaid reimbursements to be paid by participating States to nursing homes were held invalid, the Court of Appeals erred in holding that the State of Florida had waived its Eleventh Amendment immunity from liability in federal court for retroactive monetary relief to respondents. The State's general waiver of sovereign immunity for petitioner Department of Health and Rehabilitative Services, under a statute providing that the Department is a body corporate with the capacity to sue and be sued, does not constitute a waiver by the State of its Eleventh Amendment immunity from suit in federal court. Nor is the Department's agreement, upon participating in the Medicaid program, to obey federal law in administering the program sufficient to waive the protection of the Eleventh Amendment. *Edelman* v. *Jordan,* 415 U. S. 651.

Certiorari granted; 616 F. 2d 1355, reversed.

PER CURIAM.

Petitioners, the Florida Department of Health and Rehabilitative Services and its Secretary, seek review of a decision of the United States Court of Appeals for the Fifth Circuit ordering them to make payments to various nursing homes. These payments represent the amount that Florida was found to have underpaid these nursing homes in the course of its Medicaid reimbursements from July 1, 1976, to October 18, 1977. Because we conclude that the court below misapplied the prevailing standard for finding a waiver of the State's immunity under the Eleventh Amendment, we grant a writ of certiorari and reverse.

I

In 1972, Congress amended the Medicaid Program to provide that every "skilled nursing facility and intermediate care facility" must be reimbursed by participating States on a "cost related basis." 86 Stat. 1426, 42 U. S. C. § 1396a (a)(13)(E). This amendment was to take effect on July 1, 1976, *ibid.*, and had the effect of altering some reimbursement arrangements based on "flat rates" established by the States. Regulations implementing this change were not promulgated by the Department of Health, Education, and Welfare (HEW) until 1976. As a result, the regulations provided that HEW would not enforce the new "cost related" reimbursement requirement until January 1, 1978. 45 CFR § 250.30 (a)(3)(iv) (1976).[1]

In March 1977, respondents, an association of Florida nursing homes and various individual nursing homes in southern Florida, brought suit in federal court against the Secretary of HEW and petitioners. They argued that the delay in enforcement created by the implementing regulations was inconsistent with the statutory directive that cost-related reimbursements begin on July 1, 1976. In addition to prospective relief, they sought retroactive relief in the form of payments by the State of the difference between the reimbursement they had received since July 1, 1976, and the amounts they would have received under a cost-related system. The United States District Court for the Southern District of Florida held the regulations invalid, relying on its previous decision in *Golden Isles Convalescent Center, Inc.* v. *Califano,* 442 F. Supp. 201 (1977), aff'd, 616 F. 2d 1355 (CA5), cert. denied *sub nom. Taylor* v. *Golden Isles Con-*

[1] In a commentary accompanying the new regulations, the Secretary noted that no States would be able to accumulate needed data in time to meet the statutory deadline of July 1, 1976. For this reason, cost-related reimbursement was not required under the regulations until January 1, 1978, but the States were "encouraged to meet each requirement of the regulations as soon as possible." 41 Fed. Reg. 27305 (1976).

valescent Center, Inc., 449 U. S. 872 (1980). These two cases were consolidated for consideration of the availability of retroactive relief, and the District Court held that such relief was barred by the Eleventh Amendment.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the ruling that the regulations were invalid, but reversed the District Court's determination that retroactive relief was barred by the Eleventh Amendment. 616 F. 2d 1355 (1980).[2] The court acknowledged that retroactive monetary relief against a State in federal court is forbidden by the Eleventh Amendment "if not consented to by the state." *Id.,* at 1362. It found the requisite consent, however, based on two acts of the State. First, Florida law provides that the Department of Health and Rehabilitative Services is a "body corporate" with the capacity to "sue and be sued," Fla. Stat. § 402.34 (1979). 616 F. 2d, at 1363. In addition to this general waiver of sovereign immunity, the court found a specific waiver of the Eleventh Amendment's immunity from suit in federal court in an agreement under the Medicaid Program in which the Department agreed to "recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program." *Ibid.* "By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws." *Ibid.*

II

The analysis in this case is controlled by our decision in *Edelman* v. *Jordan,* 415 U. S. 651 (1974). There we applied

[2] The *Golden Isles* case and this case remained consolidated on appeal. The decision below, however, produced two separate petitions for certiorari The first, *Taylor* v. *Golden Isles Convalescent Center, Inc.,* cert. denied, 449 U. S. 872 (1980), involved jurisdictional and venue issues. The present petition relates only to the availability of retroactive relief.

the Eleventh Amendment to retroactive grants of welfare benefits and discussed the proper standard for a waiver of this immunity by a State. On the latter issue we stated that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Id.*, at 673, quoting *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). We added that the "mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." 415 U. S., at 673.

The holding below, finding a waiver in this case, cannot be reconciled with the principles set out in *Edelman*. As the Court of Appeals recognized, the State's general waiver of sovereign immunity for the Department of Health and Rehabilitative Services "does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court." 616 F. 2d, at 1363. See *Smith* v. *Reeves*, 178 U. S. 436, 441 (1900). And the fact that the Department agreed explicitly to obey federal law in administering the program can hardly be deemed an express waiver of Eleventh Amendment immunity. This agreement merely stated a customary condition for any participation in a federal program by the State, and *Edelman* already established that neither such participation in itself, nor a concomitant agreement to obey federal law, is sufficient to waive the protection of the Eleventh Amendment.[8] 415 U. S., at 673–674.

We therefore reverse the decision below.

It is so ordered.

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[8] Petitioners argue that under Florida law a waiver of immunity can only be accomplished by a state statute. See Fla. Const., Art. 10, § 13. No such waiver is present here.

In addition, it is worth noting that in October 1976 Congress repealed

JUSTICE MARSHALL dissents and would affirm the judgment of the Court of Appeals, substantially for the reasons stated in his dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 688 (1974).

JUSTICE BLACKMUN also dissents and would affirm the judgment of the Court of Appeals substantially for the reasons stated in JUSTICE MARSHALL'S dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 688 (1974).

JUSTICE STEVENS, concurring.

The decision of the Court of Appeals is in square conflict with this Court's holding in *Edelman* v. *Jordan,* 415 U. S. 651. Apparently recognizing this fact, respondents urge the Court to grant certiorari and hear argument on the question whether *Edelman* should be overruled.[1] I find this question less easily answered than do my Brothers, all of whom were Members of the Court when *Edelman* was decided. Each has voted today consistently with his vote in *Edelman* itself.

The arguments in favor of overruling *Edelman* are appealing, particularly because I share the opinion of JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN that *Edelman* was incorrectly decided.[2] I have previously relied

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a provision requiring States participating in Medicaid to waive their Eleventh Amendment immunity. Pub. L. 94–552, 90 Stat. 2540. This repeal was made retroactive to January 1, 1976.

[1] Respondents initially argued that the Court of Appeals' decision was distinguishable from *Edelman* and that certiorari therefore should be denied. However, after the Solicitor General, on behalf of the Secretary of Health and Human Services, recommended that the Court grant certiorari and summarily reverse the lower court's decision, respondents requested that the Court instead grant certiorari and consider overruling *Edelman.* See Supplemental Brief for Respondent Nursing Homes 4–13.

[2] In 1972, I sat as a member of a three-judge District Court that rejected essentially the same Eleventh Amendment argument that the Court accepted in *Edelman.* See *Mothers and Childrens Rights Organization* v. *Sterrett,* No. 70 F. 138 (ND Ind., Apr. 14, 1972), summarily aff'd, 409

on rather slender grounds for distinguishing *Edelman*,[3] when wiser judges might have forthrightly urged rejection of the precedent.[4] And I joined the Court's decision to overrule *Monroe* v. *Pape*, 365 U. S. 167, insofar as it concerned the financial responsibility of municipal corporations. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 714 (STEVENS, J., concurring in part). Moreover, the reflections of some former Members of the Court on the doctrine of *stare decisis* suggest that they would not have hesitated to overrule a decision that stands as an impediment to providing an adequate remedy for citizens injured by their government.[5] Nevertheless, I find greater force in the countervailing arguments.

First, I would note that *Edelman* did not announce a rule of law fundamentally at odds with our current understanding of the scope of constitutionally protected civil rights,[6]

U. S. 809; cited in *Edelman*, 415 U. S., at 670, n. 13. I am therefore quite certain that I would have joined JUSTICE MARSHALL's dissent if I had been a Member of the Court when *Edelman* was decided.

[3] See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 458–460 (STEVENS, J., concurring).

[4] In his 1949 Cardozo lecture, Justice Douglas stated:

"The idea that any body of law, particularly public law, should appear to stay put and not be in flux is an interesting phenomenon that Frank has explored in *Law and the Modern Mind*. He points out how it is—in law and in other fields too—that men continue to chant of the immutability of a rule in order to 'cover up the transformation, to deny the reality of change, to conceal the truth of adaptation behind a verbal disguise of fixity and universality.' But the more blunt, open, and direct course is truer to democratic traditions. It reflects the candor of Cardozo. The principle of full disclosure has as much place in government as it does in the market place. A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe." W. Douglas, Stare Decisis 30–31 (1949) (footnote omitted).

[5] See W. Douglas, *supra*; A. Goldberg, Equal Justice: The Warren Era of the Supreme Court 67–97 (1971).

[6] Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 489–495, overruling *Plessy* v. *Ferguson*, 163 U. S. 537.

nor did it rest upon a discredited interpretation of the relevant historical documents.[7] Rather, the rule of the *Edelman* case is of only limited significance and has been a part of our law for only a few years. Its limiting effect on the jurisdiction of federal courts is not so restrictive that Congress may not mitigate its impact by unambiguously conditioning state participation in federal programs on a waiver of the Eleventh Amendment defense. The *Edelman* rule represents an interpretation of the Eleventh Amendment that had previously been endorsed by some of our finest Circuit Judges; [8] it therefore cannot be characterized as unreasonable or egregiously incorrect.[9]

Of even greater importance, however, is my concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel.[10] Granting that a zigzag is sometimes the best course,[11] I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity. That

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[7] Cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 71–73, overruling *Swift* v. *Tyson,* 16 Pet. 1.

[8] The opinion in *Rothstein* v. *Wyman,* 467 F. 2d 226, 228 (CA2 1972), which adopted the interpretation of the Eleventh Amendment subsequently approved by this Court in *Edelman,* was written by Judge McGowan (sitting by designation) and was joined by Chief Judge Friendly and Judge Timbers. See 415 U. S., at 664–665, 666, n. 11.

[9] The principal justifications for refusing to apply the doctrine of *stare decisis* in *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658; see *id.,* at 695–701, are therefore not available in this case.

[10] Scholars have suggested that the identity of the Court's personnel was a factor underlying the decision in *National League of Cities* v. *Usery,* 426 U. S. 833, 853–855, to overrule *Maryland* v. *Wirtz,* 392 U. S. 183. See, *e. g.,* J. Nowak, J. Young, & R. Rotunda, Constitutional Law 159–163 (1978).

[11] See, *e. g., West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, overruling *Minersville School District* v. *Gobitis,* 310 U. S. 586.

presumption is supported by much more than the desire to foster an appearance of certainty and impartiality in the administration of justice, or the interest in facilitating the labors of judges.[12] The presumption is an essential thread in the mantle of protection that the law affords the individual. Citizens must have confidence that the rules on which they rely in ordering their affairs—particularly when they are prepared to take issue with those in power in doing so—are rules of law and not merely the opinions of a small group of men who temporarily occupy high office.[13] It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.[14]

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[12] These concerns are not, however, insubstantial:

"[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921).

[13] This, of course, is not a novel suggestion. As the first Justice White noted in his dissent in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652:

"The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

[14] THE CHIEF JUSTICE recently reminded us of this fact by quoting a statement ascribed to Sir Thomas More:

"This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." See *TVA* v. *Hill*, 437 U. S. 153, 195, quoting R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

For me, the adverse consequences of adhering to an arguably erroneous precedent in this case are far less serious than the consequences of further unravelling the doctrine of *stare decisis*. I therefore join the Court's disposition.

JUSTICE BRENNAN, dissenting.

I dissent and would affirm the judgment of the Court of Appeals. This suit is brought by Florida citizens against Florida officials. In that circumstance I am of the view, expressed in dissent in *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974), that Florida "may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States."

COMMISSIONER OF INTERNAL REVENUE *v.* PORTLAND CEMENT COMPANY OF UTAH

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

No. 79–1907. Argued January 13, 1981—Decided March 3, 1981

Respondent mines cement rock and manufactures it into Portland cement. Section 611 (a) of the Internal Revenue Code of 1954 allows respondent, as a miner, to deduct from its taxable income a percentage of its gross income from mining as a recoupment of capital investment in the depleting mineral. Because respondent, as an integrated miner-manufacturer, has no actual gross income from mining, it must base its depletion deduction upon a constructive gross income from mining. For each of the tax years at issue in this case, respondent used the proportionate profits method prescribed by the Treasury Regulations to compute such constructive gross income. This method uses the costs of and proceeds from the taxpayer's "first marketable product" to derive the constructive gross income. The regulations define "first marketable product" as "the product (or group of essentially the same products) produced by the taxpayer as a result of the application of nonmining processes, in the form or condition in which such product or products are first marketed in significant quantities by the taxpayer." The regulations provide that bulk and packaged products are considered to be essentially the same product for this purpose. The method required respondent to derive the portion of total proceeds that reflects the ratio between its mining costs and its total costs. Under the regulations, respondent must include in the total-costs figure "all the mining and nonmining costs paid or incurred to produce, sell, and transport the first marketable product." Respondent took the position that its "first marketable product" was cement sold in bulk, rather than all cement sold, whether in bulk or in bags. The costs of bags and bagging exceeded respondent's bagging premium (the increase in proceeds for selling cement in bags). Hence, respondent did not include proceeds from the sale of cement in bags in the total-proceeds figure of the proportionate profits method. Nor did respondent include in the total-costs figure of the method the costs incurred for bags, bagging, storage, distribution, and sales. The result was that the proportionate profits method yielded a greater constructive gross income from mining, and respondent reported a correspondingly greater depletion deduction, than

it would have if it had included those proceeds in costs in its computation by such method. Petitioner Commissioner of Internal Revenue determined that respondent's reported tax liabilities were deficient, taking the position that respondent's "first marketable product" is cement, whether sold in bulk or in bags, and that respondent should have included proceeds from its sale of bagged cement in its calculation by the method, and also the costs incurred for bags, bagging, storage, distribution, and sales. Respondent then filed suit in the Tax Court for a redetermination. That court accepted respondent's position, and the Court of Appeals affirmed.

Held: The Treasury Regulations defining "first marketable product" and prescribing the treatment of the costs of bags, bagging, storage, distribution, and sales support the Commissioner's position Pp. 165–174.

(a) This Court customarily defers to Treasury Regulations that "implement the congressional mandate in some reasonable manner." *United States* v *Correll,* 389 U. S. 299, 307. P. 169.

(b) Respondent's contention that the Commissioner's position will yield a distorted constructive gross income from mining if it is applied without regard to the particular circumstances in this case, *i. e.,* that respondent's bagging costs exceed its bagging premium, misperceives both the meaning of "gross income from mining" and the holding in *United States* v. *Cannelton Sewer Pipe Co.,* 364 U. S 76. Under the Code and regulations, gross income from mining means income received, whether actually or constructively, without regard to value. In *Cannelton,* in interpreting an earlier statutory definition of "mining," the Court said that "Congress intended integrated mining-manufacturing operations to be treated as if the operator were selling the mineral mined to himself for fabrication." *Id.,* at 89. This statement, in the context in which it occurs, does not support respondent's contention that the method used to determine constructive gross income must take into account forces that might cause income to differ from value. Nor does the difference between bagging costs and the bagging premium warrant a deviation from the regulation's definition of "first marketable product." Pp. 170–173.

(c) The statutory definition of "mining" to include all processes up to the introduction of the kiln feed into the kiln, "but not . . . any subsequent processes," forecloses respondent's further contention that the costs it incurred in the storage, distribution, and sales of its first marketable product, if they must be included in the proportionate profits method, should be treated as indirect costs which benefit the entire mining-manufacturing operation, and hence should be allocated between mining and manufacturing. The regulations recognizing that

storage, distribution, and sales are "subsequent processes" are reasonable. Pp. 173–174.

614 F. 2d 724 reversed.

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

Stuart A. Smith argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Murray, Jonathan S. Cohen,* and *David English Carmack.*

Dennis P. Bedell argued the cause for respondent. With him on the brief were *Mark L. Evans, John J. Martin,* and *Glen E. Fuller.**

JUSTICE POWELL delivered the opinion of the Court.

This case concerns the depletion deduction taken under § 611 of the Internal Revenue Code of 1954, 26 U. S. C. § 611, by a company that mines and manufactures Portland cement. The question presented is whether the company's "first marketable product," for the purpose of determining gross income from mining by the proportionate profits method, is cement, whether sold in bulk or in bags, or only cement sold in bulk.

I

Respondent, Portland Cement Co. of Utah, is an integrated miner-manufacturer. It mines argillaceous limestone rock, known in the trade as cement rock, and it manufactures the rock into Portland cement.[1] As a miner, respondent is al-

**Richard A. Freling* and *David G. Glickman* filed a brief for Centex Corp. as *amicus curiae* urging affirmance.

[1] As suggested by the term "integrated miner-manufacturer," respondent's operation has two phases: mining and manufacturing. The mining phase begins with the blasting of cement rock from the face of respondent's quarry. After crushing the rock into pieces about one cubic inch in size, respondent transports the rock to its processing plant, which is about 12 miles from its quarry in Utah. Respondent then grinds the

lowed by § 611 (a) [2] to deduct from its taxable income an amount that permits it a recoupment of capital investment in the depleting mineral. Section 611 (a) provides:

> "In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary. . . ."

The amount which respondent may deduct is a percentage of its "gross income from the property." 26 U. S. C.

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rock finely and adds water, producing a mud known as "slurry." Respondent feeds the slurry from tanks into fired kilns that heat it into a hard glass-like substance known as a "clinker." Once the clinker is cooled, respondent grinds it with gypsum to produce finished Portland cement. The finished cement is placed in storage silos to await sales to customers.

There is no dispute as to when respondent's mining phase ends and its manufacturing phase begins. Section 613 (c) (2) of the Code, 26 U. S. C. § 613 (c) (2), defines "mining" to include "not merely the extraction of the ores or minerals from the ground but also the treatment process considered as mining described in paragraph (4) (and the treatment processes necessary or incidental thereto), and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which such treatment processes are applied thereto as is not in excess of 50 miles . . . ." Paragraph (4) (F) of § 613 (c) describes the treatment processes considered as mining to be—"in the case of calcium carbonates and other minerals when used in making cement—all processes (other than preheating of the kiln feed) applied prior to the introduction of the kiln feed into the kiln, but not including any subsequent process."

When these definitions are applied, respondent's mining phase ends when the slurry has been produced and is stored in tanks to await introduction into the kilns. The Tax Court so found, 36 TCM 578, 579 (1977), ¶ 77.137, p. 582, P–H Memo TC, and the parties agree.

[2] All citations to the Internal Revenue Code are to the Code of 1954, unless stated otherwise.

§ 613 (a).[3] In respondent's case, gross income from property means "gross income from mining." [4] Thus, respondent may deduct from its taxable income a percentage of the gross income it receives from mining.

If respondent were only a miner and therefore sold the product of its mining, respondent's gross income from mining would be the receipts from its sales. But as an integrated miner-manufacturer, respondent itself uses the product of its mining.[5] Respondent therefore has no actual gross income from mining and must base its depletion deduction upon a constructive gross income from mining. See *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S. 76, 86 (1960).

The Commissioner of Internal Revenue, petitioner here, has prescribed in Treasury Regulations two methods of determining constructive gross income from mining. If other miners in the industry sell the product of their mining on an open market, then miners who do not sell their product must use "the representative market or field price" to compute their constructive gross income from mining. Treas. Reg. § 1.613–4 (c), 26 CFR § 1.613–4 (c) (1980). If other miners do not sell their mining product and a representative market

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[3] Section 613 (a) reads in pertinent part:

"In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property . . . ."

For tax years beginning on or prior to October 9, 1969, the percentage specified by subsection (b) of § 613 for the depletion of calcium carbonates, the chemical name for cement rock, was 15%. 26 U. S. C. § 613 (b)(7) (1964 ed.). For tax years beginning after October 9, 1969, the percentage was 14%. 26 U. S. C. § 613 (b)(7).

[4] Title 26 U. S. C. § 613 (c)(1) (1976 ed., Supp. III) provides: "The term 'gross income from the property' means, in the case of a property other than an oil or gas well and other than a geothermal deposit, the gross income from mining."

[5] See n. 1, *supra*.

or field price cannot be determined, as is the case in the integrated cement industry, then constructive gross income from mining must be determined by the "proportionate profits method." § 1.613–4 (d). In addition to providing these two methods, the Commissioner also has provided that a taxpayer may compute a constructive gross income from mining by any other method that, upon the taxpayer's request, the Commissioner determines to be more appropriate than the proportionate profits method under the taxpayer's particular circumstances. § 1.613–4 (d)(1)(ii).[6] For each of the tax years at issue in this case, respondent used the proportionate profits method to compute its constructive gross income from mining.[7]

The proportionate profits method uses the costs of and proceeds from the taxpayer's "first marketable product" to derive the taxpayer's constructive gross income from mining. The principle of the method is that each dollar of the total costs which the taxpayer incurs to produce, sell, and transport its first marketable product earns the same proportionate part of the proceeds from sales of that product. § 1.613–4 (d)(4)(i). The objective of the method is to identify—from among the total proceeds from sales of the first marketable product—that portion of the proceeds that has been earned by the costs which the taxpayer incurred in its mining operations. To identify that portion of the proceeds, the formula requires the taxpayer to apportion the total proceeds from its first marketable product between mining income and total income in the same ratio as its mining costs bear to its total costs. The amount of proceeds which bears the same

[6] The Commissioner himself has suggested two other methods that a taxpayer may propose as more appropriate than the proportionate profits method. See 26 CFR §§ 1.613–4 (d)(1)(ii)(e), (5), (6), (1980).

[7] The three tax years at issue in this case are those ending on March 31, 1970, 1971, and 1972.

relationship to total proceeds as mining costs bear to total costs is the taxpayer's constructive gross income from mining.[8]

On its returns for the tax years in question, respondent took the position that its first marketable product was cement sold in bulk. Respondent sells most of its cement in bulk, by loading finished cement directly from silos into customers' trucks or railroad tank cars. But respondent also sells cement in bags to customers who want to buy relatively

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[8] The Treasury Regulations explain the proportionate profits method this way:

"(i) The objective of the 'proportionate profits method' of computation is to ascertain gross income from mining by applying the principle that each dollar of the total costs paid or incurred to produce, sell, and transport the first marketable product or group of products (as defined in subdivision (iv) of this subparagraph) earns the same percentage of profit. Accordingly, in the proportionate profits method no ranking of costs is permissible which results in excluding or minimizing the effect of any costs incurred to produce, sell, and transport the first marketable product or group of products. . . .

"(ii) The proportionate profits method of computation is applied by multiplying the taxpayer's gross sales (actual or constructive) of his first marketable product or group of products . . . by a fraction whose numerator is the sum of all the costs allocable to those mining processes which are applied to produce, sell, and transport the first marketable product or group of products, and whose denominator is the total of all the mining and nonmining costs paid or incurred to produce, sell, and transport the first marketable product or group of products . . . . The method as described herein is merely a restatement of the method formerly set forth in the second sentence of Regulations 118, section 39.23 (m)–1 (e)(3) (1939 Code). The proportionate profits method of computation may be illustrated by the following equation:

$$\frac{\text{Mining Costs}}{\text{Total Costs}} \times \text{Gross Sales} = \text{Gross Income from Mining}"$$

26 CFR §§ 1.613–4 (d)(4)(i), (ii) (1980).

The Tax Court has captured the gist of the method in fewer words: "The purpose of the proportionate-profits formula is to separate the sales price of a product into its mining and nonmining components." *North Carolina Granite Corp.* v. *Commissioner*, 56 T. C. 1281, 1291 (1971).

small quantities.[9] Cement is bagged by running it from the storage silo into a bin above a bagging machine, which then pours the cement into bags and seals them. The cost that respondent incurs for bags and bagging exceeds the increase in proceeds, known as the bagging premium, that respondent receives for selling cement in bags.[10] Respondent still receives a profit on the cement it sells in bags, but less profit than if it had sold the cement in bulk.[11]

Because respondent considered its first marketable product to be cement sold in bulk rather than all cement sold, whether in bulk or in bags, respondent did not include proceeds from the sale of cement in bags in the total-proceeds figure of the proportionate profits method. Nor did respondent include in the total-costs figure the costs it incurred for bags, bagging, storage, distribution, and sales.[12] The result of this position was that the proportionate profits method yielded a greater constructive gross income from mining, and respondent reported a correspondingly greater depletion deduction, than would have been the case if respondent had included those proceeds and costs in its computation by the method.

After an audit, the Commissioner determined that respond-

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[9] During the tax years in question, respondent sold approximately 92–94% of its finished cement in bulk. Respondent sold the other 6–8% in bags.

[10] The parties stipulated in the Tax Court that respondent's bagging costs exceeded the bagging premium by $55,410.88 for tax year 1970, by $66,667.45 for tax year 1971, and by $64,590.41 for tax year 1972.

[11] The parties stipulated in the Tax Court "that although for each year there was an excess of costs over bag premium, . . . [respondent] nevertheless realized a net profit on the sale of each bag of cement."

[12] To state respondent's position in the formulaic terms used in Treas. Reg. § 1.613–4 (d) (4) (ii), 26 CFR § 1.613–4 (d) (4) (ii) (1980), respondent did not include proceeds from the sale of cement in bags in the multiplier of the proportionate profits method; and respondent did not include the costs of bags, bagging, storage, distribution, and sales in the denominator of the method's fraction.

ent's reported tax liabilities were deficient.[13] The Commissioner took the position that respondent's first marketable product is cement, whether sold in bulk or in bags, that respondent therefore should have included proceeds from its sales of bagged cement in its total-proceeds figure, and also that respondent should have included in its total-costs figure the costs it incurred for bags, bagging, storage, distribution, and sales. Respondent then filed this suit in the Tax Court for a redetermination.

The Tax Court, following its rule of applying the law of the court of appeals to which an appeal would be taken,[14] relied upon *United States* v. *Ideal Basic Industries, Inc.*, 404 F. 2d 122 (CA10 1968), cert. denied, 395 U. S. 936 (1969), and accepted respondent's position. 36 TCM 578 (1977), ¶ 77,137 P–H Memo TC. *Ideal Basic Industries* had held that cement sold in bulk is the first marketable product of an integrated miner-manufacturer and that revenues from sales of cement in bags, and the costs of bags, bagging, storage, distribution, and sales, should not be included in calculations under the proportionate profits method. 404 F. 2d, at 125–126. The Court of Appeals for the Tenth Circuit affirmed, also adhering to *Ideal Basic Industries*. 614 F. 2d 724 (1980) (*per curiam*). It rejected the Commissioner's argument that Treasury Regulations dictate the opposite result. We granted the Commissioner's petition for a writ of certiorari because other Courts of Appeals have accepted the Commissioner's position in cases with substantially identical facts.[15] 449 U. S. 818 (1980). We now reverse.

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[13] The asserted deficiencies were $44,200, $41,509, and $7,175 for tax years 1970, 1971, and 1972, respectively. See 36 TCM, at 578, ¶ 77,137, p. 582, P–H Memo TC.

[14] See *Golsen* v. *Commissioner*, 54 T. C. 742 (1970), aff'd on other grounds, 445 F. 2d 985 (CA10), cert. denied, 404 U. S. 940 (1971).

[15] See *General Portland Cement Co.* v. *United States*, 628 F. 2d 321 (CA5 1980), cert. pending, No. 80–1211; *Arvonia-Buckingham Slate Co.* v. *United States*, 426 F. 2d 484 (CA4 1970); *United States* v. *California*

II

Congress requires in § 611 that the allowance of the depletion deduction is "in all cases to be made under regulations prescribed by the Secretary." The Commissioner provided the proportionate profits method pursuant to this delegation of authority.[16] Also pursuant to this authority, the Commissioner has promulgated regulations which specifically address the questions before us. We find these regulations dispositive.

The Treasury Regulations define "first marketable product" as "the product (or group of essentially the same products) produced by the taxpayer as a result of the application of nonmining processes, in the form or condition in which such product or products are first marketed in significant quantities by the taxpayer or by others in the taxpayer's marketing area." 26 CFR § 1.613–4 (d)(4)(iv) (1980). This definition continues:

> "For this purpose, bulk and packaged products are considered to be essentially the same product. . . . The first marketable product or group of products does not include any product which results from additional manufacturing or other nonmining processes applied to the product or products first marketed in significant quanti-

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Portland Cement Co., 413 F. 2d 161 (CA9 1969); *Whitehall Cement Manufacturing Co.* v. *United States*, 369 F. 2d 468 (CA3 1966).

[16] The Commissioner has prescribed the computation of gross income from mining by reference to proportionate profits in successive regulations since 1940. The principle now set forth in Treas. Reg. § 1.613–4 (d)(4) first appeared in Treas. Regs. 103, § 19.23 (m)–1 (f) (1940), and it continued in successive regulations to the 1939 Code. Treas. Regs. 111, § 29.23 (m)–1 (f) (1943); Treas. Regs. 118, § 39.23 (m)–(e)(3) (1953). Treasury Regulations 118 continued in force under the 1954 Code until superseded by Treas. Reg. §§ 1.613–3 (d)(1)(i), (ii). See T. D. 6965, 1968–2 Cum. Bull. 265. These regulations were superseded by the present Treas. Reg. §§ 1.613–4 (d)(1) and (4)(i), (ii), 26 CFR §§ 1.613–4 (d)(1) and (4)(i), (ii) (1980). See T. D. 7170, 1972–1 Cum. Bull. 178.

ties by the taxpayer or others in the taxpayer's marketing area. For example, if a cement manufacturer sells his own finished cement in bulk and bags and also sells concrete blocks or dry ready-mix aggregates containing additives, the finished cement, in bulk and bags, constitutes the first marketable product or group of products produced by him."

This regulation supports the Commissioner's position that cement sold in bulk is the same product as cement sold in bags, and that the container for the cement—whether a tank car supplied by the customer or a bag supplied by respondent—does not distinguish cement in bulk from cement in bags for the purpose of determining respondent's first marketable product. Federal Courts of Appeals other than the court below have relied on the regulation to uphold the Commissioner's position. *General Portland Cement Co.* v. *United States,* 628 F. 2d 321, 323 (CA5 1980), cert. pending, No. 80–1211; *United States* v. *California Portland Cement Co.,* 413 F. 2d 161 (CA9 1969). Indeed, the Commissioner's position also is supported by respondent's stipulation in the Tax Court that "[t]hat portion of its cement sold . . . in bags is the same material as the cement sold in bulk."

The Treasury Regulations also support the Commissioner's position that respondent must include in the total-costs figure of the method the costs of bags, bagging, storage, and distribution. To derive the portion of total proceeds that reflects the ratio between respondent's mining costs and its total costs, respondent must include in the total-costs figure "all the mining and nonmining costs paid or incurred to produce, sell, and transport the first marketable product." 26 CFR § 1.613–4 (d)(4)(ii) (1980). The exclusion of nonmining costs from the total-costs figure has the effect of including the proportionate profits earned by such costs within respondent's depletion base. Such inclusion enhances

respondent's depletion base by proceeds that were not earned by respondent's mining operation, and accordingly respondent's depletion deduction becomes a recoupment for more than the exhaustion of respondent's mine. It is undisputed, however, that Congress allows the depletion deduction to permit recoupment for the exhaustion of the mineral only. See *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S., at 81, 85–86; *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 312 (1956); *General Portland Cement Co.* v. *United States, supra,* at 322. It also is undisputed that the Treasury Regulations classify the costs of bags, bagging, storage, and distribution as nonmining costs. 26 CFR § 1.613–4 (d)(3)(iii) (1980).[17] Courts of Appeals have accepted the Commissioner's position on this question also. *General Portland Cement Co.* v. *United States, supra,* at 326; *Southwestern Portland Cement Co.* v. *United States,* 435 F. 2d 504, 508, 510

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[17] Title 26 CFR § 1.613–4 (d)(3)(iii) (1980) provides in pertinent part:

"In determining gross income from mining by use of methods based on the taxpayer's costs—

"(a) The costs attributable to containers, bags, packages, pallets, and similar items as well as the costs of materials and labor attributable to bagging, packaging, palletizing, or similar operations shall be considered as nonmining costs

. . . . . .

"(c) The costs attributable to the operation of warehouses or distribution terminals for manufactured products shall be considered as nonmining costs.

"Accordingly, all profits attributable thereto are treated as nonmining profits."

The court below did not dispute the regulations' characterization of these costs. 614 F. 2d 724, 725 (1980). To the contrary, *United States* v. *Ideal Basic Industries, Inc.*, 404 F. 2d 122 (CA10 1968), cert. denied, 395 U. S. 936 (1969), concluded before these regulations were promulgated that such costs are nonmining costs. 404 F. 2d, at 125–126. But the court, following *Ideal Basic Industries,* excluded these costs from the proportionate profits method on the ground that they were not incurred in producing and transporting cement sold in bulk. See 614 F. 2d, at 726.

(CA9 1970); *United States* v. *California Portland Cement Co.*, *supra*, at 168–169; *Whitehall Cement Manufacturing Co.* v. *United States*, 369 F. 2d 468, 473–474 (CA3 1966).

Finally, the Treasury Regulations support the Commissioner's position that respondent must include as nonmining costs the costs incurred in selling the first marketable product. The regulations provide that integrated miner-manufacturers must treat sales expenses as nonmining costs absent evidence that unintegrated miners typically incur such expenses in selling their mineral product. §§ 1.613–4 (d)(3)(iv), 1.613–5 (c)(4)(ii).[18] These regulations simply recognize that sales of finished cement occur after the point at which an integrated miner-manufacturer's mining phase ends and its manufacturing phase begins. See 26 U. S. C. § 613 (c)(4)(F); cf. *General Portland Cement Co.* v. *United States*, *supra*, at 333. Integrated miner-manufacturers may allocate selling costs between their mining and manufacturing phases

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[18] Title 26 CFR § 1.613–4 (d)(3)(iv) (1980) provides:

"In computing gross income from mining by the use of methods based on the taxpayer's costs, the principles set forth in paragraph (c) of § 1.613–5 shall apply when determining whether selling expenses . . . are to be treated, in whole or in part, as mining costs or as nonmining costs. To the extent that selling expenses . . . are treated as nonmining costs, all profits attributable thereto are treated as nonmining profits."

Title 26 CFR § 1.613–5 (c)(4)(ii) (1980) provides:

"A reasonable portion of the expenses of selling a refined, manufactured, or fabricated product shall be subtracted from gross income from the property. Such reasonable portion shall be equivalent to the typical selling expenses which are incurred by unintegrated miners or producers in the same mineral industry so as to maintain equality in the tax treatment of unintegrated miners or producers in comparison with integrated miner-manufacturers or producer-manufacturers. If unintegrated miners or producers in the same mineral industry do not typically incur any selling expenses, then no portion of the expenses of selling a refined, manufactured, or fabricated product shall be subtracted from gross income from the property when determining the taxpayer's taxable income from the property."

if they can show that unintegrated miners typically incur selling expenses, for that maintains a parity of tax treatment between integrated miner-manufacturers and unintegrated miners. But respondent has not put forth such evidence in this case, there being no unintegrated miners in the cement industry.

These regulations command our respect, for Congress has delegated to the Secretary of the Treasury, not to this Court, the task "of administering the tax laws of the Nation." *United States* v. *Cartwright,* 411 U. S. 546, 550 (1973); accord, *United States* v. *Correll,* 389 U. S. 299, 307 (1967); see 26 U. S. C. § 7805 (a). We therefore must defer to Treasury Regulations that "implement the congressional mandate in some reasonable manner." *United States* v. *Correll, supra,* at 307; accord, *National Muffler Dealers Assn.* v. *United States,* 440 U. S. 472, 476–477 (1979). To put the same principle conversely, Treasury Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.,* 333 U. S. 496, 501 (1948); accord, *Fulman* v. *United States,* 434 U. S. 528, 533 (1978); *Bingler* v. *Johnson,* 394 U. S. 741, 749–751 (1969). Indeed, our customary deference to Treasury Regulations is particularly appropriate in this case, for the Court previously has recognized the necessity of a "broad rule-making delegation" of authority in the area of depletion: "As Congress obviously could not foresee the multifarious circumstances which would involve questions of depletion, it delegated to the Commissioner the duty of making the regulations." *Douglas* v. *Commissioner,* 322 U. S. 275, 280, 281 (1944);[19] accord, *Helvering* v. *Wilshire Oil Co., Inc.,* 308 U. S. 90, 102–103 (1939).

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[19] *Douglas* v. *Commissioner* involved § 23, Revenue Act of 1936, which was identical to the present § 611 in all ways significant to this case. See 322 U. S., at 278.

III

Respondent does not contend that these Treasury Regulations are either unreasonable on their face or inconsistent with the Code. To the contrary, respondent acknowledges that several courts have found the regulations to prescribe a reasonable formula for determining gross income from mining in cases where no actual income is realized and no representative market price is available. Respondent's contention is that the Commissioner's position will yield a distorted constructive gross income from mining if it is applied without regard to the particular circumstances in this case.

A

Respondent's position rests upon (i) an assumption about gross income from mining and (ii) an interpretation of this Court's decision in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S. 76 (1960). Respondent deems "gross income from mining," for the purpose of the percentage depletion deduction, to be the same thing as "the market value of the extracted minerals" at the end of the mining phase, Brief for Respondent 14; and respondent reads *Cannelton* to hold that, for the purpose of determining gross income from mining, the mining phase of an integrated mining-manufacturing operation should be considered one independent business selling its product to another independent business, the manufacturing phase. On the basis of these notions, respondent perceives a potential for distortion of constructive gross income inhering in the premise of the proportionate profits method. The premise of that method is that each dollar of costs, mining and nonmining alike, earns the same proportionate part of the proceeds from the first marketable product. In respondent's view, however, it simply will not be true in some cases that each dollar of costs earns the same share of proceeds. For example, respondent contends, market forces and arm's-length negotiations may so affect market value when an in-

dependent miner sells to an independent manufacturer that it will not be true that each dollar of cost earns the same share of proceeds; and respondent contends that it certainly is not true in this case that each of its dollars of cost earned the same share of proceeds, for the cost of bags and bagging exceeds the bagging premium.

Respondent does not conclude from this reasoning that the proportionate profits method is unreasonable in itself. Rather, it argues that the method will distort constructive gross income from mining to the extent that the particular facts of a case deviate from the method's premise, and that the possibility of distortion increases as costs and proceeds attending postmining processes are included. To remedy this, respondent asks that the Commissioner take into account the "peculiar" circumstance that respondent's bagging costs exceed its bagging premium.[20] If this were done, respondent says, the distortion that it perceives could be obviated by considering its first marketable product to be only cement sold in bulk, not cement sold both in bulk and in bags. If only bulk sales are considered to be the first marketable product, then the proceeds from cement sold in bags, and the costs of bags, bagging, storage, and distribution, will

[20] In support of its argument, respondent relies in part upon the language of § 611 (a), which provides that the depletion deduction is to be allowed "according to the peculiar conditions in each case." Respondent has read this phrase out of context. In fuller reading, § 611 (a) provides:

"*In the case* of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions *in each case;* such reasonable allowance *in all cases* to be made under regulations prescribed by the Secretary. . . ." (Emphasis added.)

Read in context, "in each case" refers to the different types of depletable resource, not to individual taxpayers. Accordingly, this language does not support respondent's argument that the Treasury Regulations providing the proportionate profits method must be modified with regard to the circumstances in each case.

be excluded from the proportionate profits method. This was essentially the reasoning and holding of *Ideal Basic Industries*, 404 F. 2d, at 125–127.

We cannot accept respondent's contention, for it misperceives both the meaning of "gross income from mining" and the holding in *Cannelton*. Respondent cites nothing to support the assumption that gross income from mining means market value of the mining product. The language of §§ 613 (a) and (c) does not support this assumption; and *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 381–382 (1938), rejected it.[21] See also *Commissioner* v. *Southwest Exploration Co.*, 350 U. S., at 312. Under the Code and regulations, gross income from mining means income received, whether actually or constructively, without regard to value. Nor does *Cannelton* support respondent's argument. That case did not involve the proportionate profits method of determining constructive gross income from mining. The question there, under an earlier statutory definition of "mining," was when the mining phase ended in the operation of an integrated miner-manufacturer of burnt clay products. See 364 U. S., at 84, and n. 8. In interpreting the definition of "mining," the Court observed that "the Congress intended integrated

[21] *Helvering* v. *Mountain Producers Corp.* involved a depletion deduction in the case of oil and gas wells. By contract, the owner of oil-field leases agreed to sell oil to an oil refiner at a set price. In return, the refiner agreed, as part of the price of the oil, to conduct all operations to develop and produce the oil. The owner then claimed that its "gross income from the property," for the purpose of percentage depletion deduction, consisted of the total cash payments received from the refiner, plus the cost of production defrayed by the refiner under the contract. 303 U. S., at 378–379. The Court rejected this claim. It held that the deductible percentage of gross income "is a fixed factor, not to be increased or lessened by asserted equities," such as the fact that "gross income from time to time may be more or less than market value according to the bearing of particular contracts." *Id.*, at 382. The Court added: "With the motives which lead the taxpayer to be satisfied with the proceeds he receives we are not concerned." *Ibid.*

mining-manufacturing operations to be treated as if the operator were selling the mineral mined to himself for fabrication." *Id.*, at 89. This statement, in the context in which it occurs, does not support respondent's contention that the method used to determine constructive gross income must take into account forces that might cause income to differ from value.

Nor does the difference between bagging costs and the bagging premium warrant a deviation from the Treasury Regulation's definition of "first marketable product." Respondent receives a net profit on every bag of cement that it sells, despite the fact that bagging costs exceed markup on the product. It is reasonable to infer, therefore, that the costs of bagging the cement contribute to respondent's profits from sales of cement in bags. Courts of Appeals other than the court below have found this inference reasonable. *General Portland Cement Co.* v. *United States,* 628 F. 2d, at 330–331; *Whitehall Cement Manufacturing Co.* v. *United States,* 369 F. 2d, at 474; see also *United States* v. *California Portland Cement,* 413 F. 2d, at 169.

B

There remains only respondent's contention that the costs it incurred in the storage, distribution, and sales of its first marketable product, if they must be included in the proportionate profits method, should be treated as indirect costs which benefit the entire mining-manufacturing operation. For that reason, respondent urges that these costs should be allocated between mining and manufacturing.

The statutory definition of "mining" forecloses this contention. Section 613 (c)(4)(F) of the Code defines "mining" to include all processes up to the introduction of the kiln feed into the kiln, "but not . . . any subsequent process." The regulations recognize that storage, distribution, and sales are "subsequent process[es]," and we find the regulations reasonable. 26 CFR § 1.613–4 (d)(3)(iii) (1980) (storage and

distribution); §§ 1.613–4 (d)(3)(iv) and 1.613–5 (c)(4)(ii) (sales). These regulations allow a different treatment only for sales expenses. See *supra*, at 168–169. Respondent, who bore the burden of proof in the Tax Court, made no showing to warrant treating sales expenses as anything but nonmining costs.[22]

IV

In sum, the Treasury Regulations defining first marketable product, and those prescribing the treatment of the costs of bags, bagging, storage, distribution, and sales, dictate the result in this case. To be sure, the proportionate profits method can only approximate gross income from mining. The Commissioner does not contend that the method does more than approximate. But an approximation must suffice absent an actual gross income from mining, and respondent concedes that the proportionate profits method is a reasonable means of approximating. The method also is a means that respondent accepted, as it did not seek the Commissioner's approval of any other method.[23] Accordingly, respondent must apply the method as prescribed by the Commissioner.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[22] Respondent relies upon decisions which hold that an integrated miner-manufacturer may allocate sales expenses between mining and nonmining costs. *E. g., United States* v. *California Portland Cement Co.*, 413 F. 2d, at 170–172. These cases were decided before the issuance in 1972 of Treas. Regs. §§ 1.613–4 (d)(3)(iv) and 1.613–5 (c)(4)(ii). Prior to 1972, no regulations answered the question whether selling expenses were nonmining costs or allocable between mining and nonmining costs. The 1972 regulations assume, on the basis of the statutory definition of "mining," that they are nonmining costs. Nonetheless, the integrated miner-manufacturer may show otherwise.

[23] See *supra*, at 161, and n. 6.

Syllabus

DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* DIEHR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 79–1112. Argued October 14, 1980—Decided March 3, 1981

Respondents filed a patent application claiming invention for a process for molding raw, uncured synthetic rubber into cured precision products. While it was possible, by using well-known time, temperature, and cure relationships, to calculate by means of an established mathematical equation when to open the molding press and remove the cured product, according to respondents the industry had not been able to measure precisely the temperature *inside* the press, thus making it difficult to make the necessary computations to determine the proper cure time. Respondents characterized their contribution to the art to reside in the process of constantly measuring the temperature inside the mold and feeding the temperature measurements into a computer that repeatedly recalculates the cure time by use of the mathematical equation and then signals a device to open the press at the proper time. The patent examiner rejected respondents' claims on the ground that they were drawn to nonstatutory subject matter under 35 U. S. C. § 101, which provides for the issuance of patents to "[w]hoever invents or discovers any new and useful *process,* machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . ." The Patent and Trademark Office Board of Appeals agreed, but the Court of Customs and Patent Appeals reversed.

Held: Respondents' claims recited subject matter that was eligible for patent protection under § 101. Pp. 181–193.

(a) For purposes of § 101, a "process" is "an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. . . . The machinery pointed out as suitable to perform the process may or may not be new or patentable." *Cochrane* v. *Deener,* 94 U. S. 780, 788. Industrial processes such as respondents' claims for transforming raw, uncured synthetic rubber into a different state or thing are the types which have historically been eligible to receive patent-law protection. Pp. 181–184.

(b) While a mathematical formula, like a law of nature, cannot be the subject of a patent, cf. *Gottschalk* v. *Benson,* 409 U. S. 63; *Parker* v.

Flook, 437 U S 584, respondents do not seek to patent a mathematical formula, but instead seek protection for a process of curing synthetic rubber Although their process employs a well-known mathematical equation, they do not seek to pre-empt the use of that equation, except in conjunction with all of the other steps in their claimed process. A claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or digital computer. Respondents' claims must be considered as a whole, it being inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis The questions of whether a particular invention meets the "novelty" requirements of 35 U. S C. § 102 or the "nonobviousness" requirements of § 103 do not affect the determination of whether the invention falls into a category of subject matter that is eligible for patent protection under § 101. Pp. 185–191.

(c) When a claim containing a mathematical formula implements or applies the formula in a structure or process which, when considered as a whole, is performing a function which the patent laws were designed to protect (*e. g.*, transforming or reducing an article to a different state or thing), then the claim satisfies § 101's requirements. Pp. 191–193.

602 F. 2d 982, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 193.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Litvack, Harriet S. Shapiro, Robert B. Nicholson, Frederic Freilicher, Joseph F. Nakamura,* and *Thomas E. Lynch.*

Robert E. Wichersham argued the cause for respondents. With him on the brief were *Robert F. Hess, Jay M. Cantor,* and *Thomas M. Freiburger.**

**Edward S. Irons, Mary Helen Sears,* and *Robert P. Beshar* filed a brief for National Semiconductor Corp. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Donald R. Dunner, Kenneth E. Kuffner,* and *Travis Gordon White* for the American Patent

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to determine whether a process for curing synthetic rubber which includes in several of its steps the use of a mathematical formula and a programmed digital computer is patentable subject matter under 35 U. S. C. § 101.

I

The patent application at issue was filed by the respondents on August 6, 1975. The claimed invention is a process for molding raw, uncured synthetic rubber into cured precision products. The process uses a mold for precisely shaping the uncured material under heat and pressure and then curing the synthetic rubber in the mold so that the product will retain its shape and be functionally operative after the molding is completed.[1]

Respondents claim that their process ensures the production of molded articles which are properly cured. Achieving the perfect cure depends upon several factors including the thickness of the article to be molded, the temperature of the molding process, and the amount of time that the article is allowed to remain in the press. It is possible using well-known time, temperature, and cure relationships to calculate by means of the Arrhenius equation [2] when to open the press

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Law Association, Inc.; by *Morton C. Jacobs* for Applied Data Research, Inc.; by *William L. Mathis* and *Harold D. Messner* for Chevron Research Co.; and by *Reed C. Lawlor* and *James W. Geriak* for the Los Angeles Patent Law Association.

[1] A "cure" is obtained by mixing curing agents into the uncured polymer in advance of molding, and then applying heat over a period of time. If the synthetic rubber is cured for the right length of time at the right temperature, it becomes a usable product.

[2] The equation is named after its discoverer Svante Arrhenius and has long been used to calculate the cure time in rubber-molding presses. The equation can be expressed as follows:

$$\ln v = CZ + x$$

wherein ln v is the natural logarithm of v, the total required cure time;

and remove the cured product. Nonetheless, according to the respondents, the industry has not been able to obtain uniformly accurate cures because the temperature of the molding press could not be precisely measured, thus making it difficult to do the necessary computations to determine cure time.[3] Because the temperature *inside* the press has heretofore been viewed as an uncontrollable variable, the conventional industry practice has been to calculate the cure time as the shortest time in which all parts of the product will definitely be cured, assuming a reasonable amount of mold-opening time during loading and unloading. But the shortcoming of this practice is that operating with an uncontrollable variable inevitably led in some instances to overestimating the mold-opening time and overcuring the rubber, and in other instances to underestimating that time and undercuring the product.[4]

Respondents characterize their contribution to the art to reside in the process of constantly measuring the actual temperature inside the mold. These temperature measurements are then automatically fed into a computer which repeatedly recalculates the cure time by use of the Arrhenius equation.

C is the activation constant, a unique figure for each batch of each compound being molded, determined in accordance with rheometer measurements of each batch; Z is the temperature in the mold; and x is a constant dependent on the geometry of the particular mold in the press. A rheometer is an instrument to measure flow of viscous substances.

[3] During the time a press is open for loading, it will cool. The longer it is open, the cooler it becomes and the longer it takes to reheat the press to the desired temperature range. Thus, the time necessary to raise the mold temperature to curing temperature is an unpredictable variable. The respondents claim to have overcome this problem by continuously measuring the actual temperature in the closed press through the use of a thermocouple.

[4] We note that the petitioner does not seriously contest the respondents' assertions regarding the inability of the industry to obtain accurate cures on a uniform basis. See Brief for Petitioner 3.

When the recalculated time equals the actual time that has elapsed since the press was closed, the computer signals a device to open the press. According to the respondents, the continuous measuring of the temperature inside the mold cavity, the feeding of this information to a digital computer which constantly recalculates the cure time, and the signaling by the computer to open the press, are all new in the art.

The patent examiner rejected the respondents' claims on the sole ground that they were drawn to nonstatutory subject matter under 35 U. S. C. § 101.[5] He determined that those

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[5] Respondents' application contained 11 different claims. Three examples are claims 1, 2, and 11 which provide:

"1. A method of operating a rubber-molding press for precision molded compounds with the aid of a digital computer, comprising:

"providing said computer with a data base for said press including at least,

"natural logarithm conversion data (ln),

"the activation energy constant (C) unique to each batch of said compound being molded, and

"a constant (x) dependent upon the geometry of the particular mold of the press,

"initiating an interval timer in said computer upon the closure of the press for monitoring the elapsed time of said closure,

"constantly determining the temperature (Z) of the mold at a location closely adjacent to the mold cavity in the press during molding,

"constantly providing the computer with the temperature (Z),

"repetitively calculating in the computer, at frequent intervals during each cure, the Arrhenius equation for reaction time during the cure, which is

"ln v=CZ+x

"where v is the total required cure time,

"repetitively comparing in the computer at said frequent intervals during the cure each said calculation of the total required cure time calculated with the Arrhenius equation and said elapsed time, and

"opening the press automatically when a said comparison indicates equivalence.

"2. The method of claim 1 including measuring the activation energy constant for the compound being molded in the press with a rheometer and automatically updating said data base within the computer in the

steps in respondents' claims that are carried out by a computer under control of a stored program constituted nonstatutory subject matter under this Court's decision in *Gottschalk* v. *Benson*, 409 U. S. 63 (1972). The remaining steps—installing rubber in the press and the subsequent closing of the

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event of changes in the compound being molded in said press as measured by said rheometer.

. . . . .

"11. A method of manufacturing precision molded articles from selected synthetic rubber compounds in an openable rubber molding press having at least one heated precision mold, comprising:

"(a) heating said mold to a temperature range approximating a predetermined rubber curing temperature,

"(b) installing prepared unmolded synthetic rubber of a known compound in a molding cavity of predetermined geometry as defined by said mold,

"(c) closing said press to mold said rubber to occupy said cavity in conformance with the contour of said mold and to cure said rubber by transfer of heat thereto from said mold,

"(d) initiating an interval timer upon the closure of said press for monitoring the elapsed time of said closure,

"(e) heating said mold during said closure to maintain the temperature thereof within said range approximating said rubber curing temperature,

"(f) constantly determining the temperature of said mold at a location closely adjacent said cavity thereof throughout closure of said press,

"(g) repetitively calculating at frequent periodic intervals throughout closure of said press the Arrhenius equation for reaction time of said rubber to determine total required cure time v as follows:

"$\ln v = cz + x$

"wherein c is an activation energy constant determined for said rubber being molded and cured in said press, z is the temperature of said mold at the time of each calculation of said Arrhenius equation, and x is a constant which is a function of said predetermined geometry of said mold,

"(h) for each repetition of calculation of said Arrhenius equation herein, comparing the resultant calculated total required cure time with the monitored elapsed time measured by said interval timer,

"(i) opening said press when a said comparison of calculated total required cure time and monitored elapsed time indicates equivalence, and

"(j) removing from said mold the resultant precision molded and cured rubber article."

press—were "conventional and necessary to the process and cannot be the basis of patentability." The examiner concluded that respondents' claims defined and sought protection of a computer program for operating a rubber-molding press.

The Patent and Trademark Office Board of Appeals agreed with the examiner, but the Court of Customs and Patent Appeals reversed. *In re Diehr,* 602 F. 2d 892 (1979). The court noted that a claim drawn to subject matter otherwise statutory does not become nonstatutory because a computer is involved. The respondents' claims were not directed to a mathematical algorithm or an improved method of calculation but rather recited an improved process for molding rubber articles by solving a practical problem which had arisen in the molding of rubber products.

The Commissioner of Patents and Trademarks sought certiorari arguing that the decision of the Court of Customs and Patent Appeals was inconsistent with prior decisions of this Court. Because of the importance of the question presented, we granted the writ. 445 U. S. 926 (1980).

II

Last Term in *Diamond* v. *Chakrabarty,* 447 U. S. 303 (1980), this Court discussed the historical purposes of the patent laws and in particular 35 U. S. C. § 101. As in *Chakrabarty,* we must here construe 35 U. S. C. § 101 which provides:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." [6]

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[6] The word "process" is defined in 35 U. S. C. § 100 (b):

"The term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material."

In cases of statutory construction, we begin with the language of the statute. Unless otherwise defined, "words will be interpreted as taking their ordinary, contemporary, common meaning," *Perrin* v. *United States*, 444 U. S. 37, 42 (1979), and, in dealing with the patent laws, we have more than once cautioned that "courts 'should not read into the patent laws limitations and conditions which the legislature has not expressed.' " *Diamond* v. *Chakrabarty*, *supra*, at 308, quoting *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 199 (1933).

The Patent Act of 1793 defined statutory subject matter as "any new and useful art, machine, manufacture or composition of matter, or any new or useful improvement [thereof]." Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318. Not until the patent laws were recodified in 1952 did Congress replace the word "art" with the word "process." It is that latter word which we confront today, and in order to determine its meaning we may not be unmindful of the Committee Reports accompanying the 1952 Act which inform us that Congress intended statutory subject matter to "include anything under the sun that is made by man." S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952).

Although the term "process" was not added to 35 U. S. C. § 101 until 1952, a process has historically enjoyed patent protection because it was considered a form of "art" as that term was used in the 1793 Act.[7] In defining the nature of a patentable process, the Court stated:

"That a process may be patentable, irrespective of the

[7] In *Corning* v. *Burden*, 15 How. 252, 267–268 (1854), this Court explained:

"A process, *eo nomine*, is not made the subject of a patent in our act of congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term machine includes every mechanical device or combination of mechanical powers and devices to perform some

particular form of the instrumentalities used, cannot be disputed. . . . A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires

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function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations, are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making water-proof cloth, vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, &c., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to his patent. As, for instance, A has discovered that by exposing India rubber to a certain degree of heat, in mixture or connection with certain metalic salts, he can produce a valuable product, or manufacture; he is entitled to a patent for his discovery, as a process or improvement in the art, irrespective of any machine or mechanical device. B, on the contrary, may invent a new furnace or stove, or steam apparatus, by which this process may be carried on with much saving of labor, and expense of fuel; and he will be entitled to a patent for his machine, as an improvement in the art. Yet A could not have a patent for a machine, or B for a process; but each would have a patent for the means or method of producing a certain result, or effect, and not for the result or effect produced. It is for the discovery or invention of some practical method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the term process is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations."

> that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." *Cochrane* v. *Deener*, 94 U. S. 780, 787–788 (1877).

Analysis of the eligibility of a claim of patent protection for a "process" did not change with the addition of that term to § 101. Recently, in *Gottschalk* v. *Benson*, 409 U. S. 63 (1972), we repeated the above definition recited in *Cochrane* v. *Deener*, adding: "Transformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines." 409 U. S., at 70.

Analyzing respondents' claims according to the above statements from our cases, we think that a physical and chemical process for molding precision synthetic rubber products falls within the § 101 categories of possibly patentable subject matter. That respondents' claims involve the transformation of an article, in this case raw, uncured synthetic rubber, into a different state or thing cannot be disputed. The respondents' claims describe in detail a step-by-step method for accomplishing such, beginning with the loading of a mold with raw, uncured rubber and ending with the eventual opening of the press at the conclusion of the cure. Industrial processes such as this are the types which have historically been eligible to receive the protection of our patent laws.[8]

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[8] We note that as early as 1854 this Court approvingly referred to patent eligibility of processes for curing rubber. See *id.*, at 267; n. 7, *supra*. In *Tilghman* v. *Proctor*, 102 U. S. 707 (1881), we referred to the original patent Charles Goodyear received on his process for "vulcanizing" or curing rubber. We stated:

"That a patent can be granted for a process, there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art, within the meaning of the law. Goodyear's patent was for a process, namely, the process of vulcanizing india-rubber by subjecting it to a high degree of heat when mixed with sulphur

III

Our conclusion regarding respondents' claims is not altered by the fact that in several steps of the process a mathematical equation and a programmed digital computer are used. This Court has undoubtedly recognized limits to § 101 and every discovery is not embraced within the statutory terms. Excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas. See *Parker* v. *Flook*, 437 U. S. 584 (1978); *Gottschalk* v. *Benson*, *supra*, at 67; *Funk Bros. Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948). "An idea of itself is not patentable," *Rubber-Tip Pencil Co.* v. *Howard*, 20 Wall. 498, 507 (1874). "A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right." *Le Roy* v. *Tatham*, 14 How. 156, 175 (1853). Only last Term, we explained:

> "[A] new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are 'manifestations of . . . nature, free to all men and reserved exclusively to none.' " *Diamond* v. *Chakrabarty*, 447 U. S., at 309, quoting *Funk Bros. Seed Co.* v. *Kalo Inoculant Co.*, *supra*, at 130.

Our recent holdings in *Gottschalk* v. *Benson*, *supra*, and *Parker* v. *Flook*, *supra*, both of which are computer-related, stand for no more than these long-established principles. In *Benson*, we held unpatentable claims for an algorithm used to convert binary code decimal numbers to equivalent pure binary numbers. The sole practical application of the algorithm was in connection with the programming of a

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and a mineral salt. The apparatus for performing the process was not patented, and was not material. The patent pointed out how the process could be effected, and that was deemed sufficient." *Id.*, at 722.

general purpose digital computer. We defined "algorithm" as a "procedure for solving a given type of mathematical problem," and we concluded that such an algorithm, or mathematical formula, is like a law of nature, which cannot be the subject of a patent.[9]

Parker v. *Flook, supra,* presented a similar situation. The claims were drawn to a method for computing an "alarm limit." An "alarm limit" is simply a number and the Court concluded that the application sought to protect a formula for computing this number. Using this formula, the updated alarm limit could be calculated if several other variables were known. The application, however, did not purport to explain how these other variables were to be determined,[10] nor

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[9] The term "algorithm" is subject to a variety of definitions. The petitioner defines the term to mean:

" '1. A fixed step-by-step procedure for accomplishing a given result; usually a simplified procedure for solving a complex problem, also a full statement of a finite number of steps. 2. A defined process or set of rules that leads [*sic*] and assures development of a desired output from a given input. A sequence of formulas and/or algebraic/logical steps to calculate or determine a given task; processing rules.' " Brief for Petitioner in *Diamond* v. *Bradley,* O. T. 1980, No. 79–855, p. 6, n. 12, quoting C. Sippl & R. Sippl, Computer Dictionary and Handbook 23 (2d ed. 1972).

This definition is significantly broader than the definition this Court employed in *Benson* and *Flook.* Our previous decisions regarding the patentability of "algorithms" are necessarily limited to the more narrow definition employed by the Court, and we do not pass judgment on whether processes falling outside the definition previously used by this Court, but within the definition offered by the petitioner, would be patentable subject matter.

[10] As we explained in *Flook,* in order for an operator using the formula to calculate an updated alarm limit the operator would need to know the original alarm base, the appropriate margin of safety, the time interval that should elapse between each updating, the current temperature (or other process variable), and the appropriate weighing factor to be used to average the alarm base and the current temperature. 437 U. S., at 586. The patent application did not "explain how to select the approximate margin of safety, the weighing factor, or any of the other variables." *Ibid.*

did it purport "to contain any disclosure relating to the chemical processes at work, the monitoring of process variables, or the means of setting off an alarm or adjusting an alarm system. All that it provides is a formula for computing an updated alarm limit." 437 U. S., at 586.

In contrast, the respondents here do not seek to patent a mathematical formula. Instead, they seek patent protection for a process of curing synthetic rubber. Their process admittedly employs a well-known mathematical equation, but they do not seek to pre-empt the use of that equation. Rather, they seek only to foreclose from others the use of that equation in conjunction with all of the other steps in their claimed process. These include installing rubber in a press, closing the mold, constantly determining the temperature of the mold, constantly recalculating the appropriate cure time through the use of the formula and a digital computer, and automatically opening the press at the proper time. Obviously, one does not need a "computer" to cure natural or synthetic rubber, but if the computer use incorporated in the process patent significantly lessens the possibility of "overcuring" or "undercuring," the process as a whole does not thereby become unpatentable subject matter.

Our earlier opinions lend support to our present conclusion that a claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or digital computer. In *Gottschalk* v. *Benson* we noted: "It is said that the decision precludes a patent for any program servicing a computer. We do not so hold." 409 U. S., at 71. Similarly, in *Parker* v. *Flook* we stated that "a process is not unpatentable simply because it contains a law of nature or a mathematical algorithm." 437 U. S., at 590. It is now commonplace that an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection. See, *e. g., Funk Bros. Seed*

Co. v. *Kalo Inoculant Co.*, 333 U. S. 127 (1948); *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U. S. 45 (1923); *Cochrane* v. *Deener*, 94 U. S. 780 (1877); *O'Reilly* v. *Morse*, 15 How. 62 (1854); and *Le Roy* v. *Tatham*, 14 How. 156 (1853). As Justice Stone explained four decades ago:

> "While a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be." *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U. S. 86, 94 (1939).[11]

We think this statement in *Mackay* takes us a long way toward the correct answer in this case. Arrhenius' equation is not patentable in isolation, but when a process for curing rubber is devised which incorporates in it a more efficient solution of the equation, that process is at the very least not barred at the threshold by § 101.

In determining the eligibility of respondents' claimed process for patent protection under § 101, their claims must be considered as a whole. It is inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis. This is particularly true in a process claim because a new combination of steps in a process may be patentable even though all the constituents of the combination were well known and in common use before the combination was made. The "novelty" of any element or steps in a process, or even of the

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[11] We noted in *Funk Bros. Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948):

"He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end."

Although we were dealing with a "product" claim in *Funk Bros.*, the same principle applies to a process claim. *Gottschalk* v. *Benson*, 409 U. S. 63, 68 (1972).

process itself, is of no relevance in determining whether the subject matter of a claim falls within the § 101 categories of possibly patentable subject matter.[12]

It has been urged that novelty is an appropriate consideration under § 101. Presumably, this argument results from the language in § 101 referring to any "new and useful" process, machine, etc. Section 101, however, is a general statement of the type of subject matter that is eligible for patent protection "subject to the conditions and requirements of this title." Specific conditions for patentability follow and § 102 covers in detail the conditions relating to novelty.[13]

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[12] It is argued that the procedure of dissecting a claim into old and new elements is mandated by our decision in *Flook* which noted that a mathematical algorithm must be assumed to be within the "prior art." It is from this language that the petitioner premises his argument that if everything other than the algorithm is determined to be old in the art, then the claim cannot recite statutory subject matter. The fallacy in this argument is that we did not hold in *Flook* that the mathematical algorithm could not be considered at all when making the § 101 determination. To accept the analysis proffered by the petitioner would, if carried to its extreme, make all inventions unpatentable because all inventions can be reduced to underlying principles of nature which, once known, make their implementation obvious. The analysis suggested by the petitioner would also undermine our earlier decisions regarding the criteria to consider in determining the eligibility of a process for patent protection. See, *e. g., Gottschalk* v. *Benson, supra;* and *Cochrane* v. *Deener,* 94 U. S. 780 (1877).

[13] Section 102 is titled "Conditions for patentability; novelty and loss of right to patent," and provides:

"A person shall be entitled to a patent unless—

"(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

"(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

"(c) he has abandoned the invention, or

"(d) the invention was first patented or caused to be patented, or was

The question therefore of whether a particular invention is novel is "wholly apart from whether the invention falls into a category of statutory subject matter." *In re Bergy,* 596 F. 2d 952, 961 (CCPA 1979) (emphasis deleted). See also *Nickola* v. *Peterson,* 580 F. 2d 898 (CA6 1978). The legislative history of the 1952 Patent Act is in accord with this reasoning. The Senate Report stated:

> "Section 101 sets forth the subject matter that can be patented, 'subject to the conditions and requirements of this title.' The conditions under which a patent may be obtained follow, and *Section 102 covers the conditions relating to novelty.*" S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952) (emphasis supplied).

It is later stated in the same Report:

> "Section 102, in general, may be said to describe the statutory novelty required for patentability, and in-

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the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or

"(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371 (c) of this title before the invention thereof by the applicant for patent, or

"(f) he did not himself invent the subject matter sought to be patented, or

"(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other."

> cludes, in effect, an amplification and definition of 'new' in section 101." *Id.*, at 6.

Finally, it is stated in the "Revision Notes":

> "The corresponding section of [the] existing statute is split into two sections, section 101 relating to the subject matter for which patents may be obtained, and section 102 defining statutory novelty and stating other conditions for patentability." *Id.*, at 17.

See also H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6, 7, and 17 (1952).

In this case, it may later be determined that the respondents' process is not deserving of patent protection because it fails to satisfy the statutory conditions of novelty under § 102 or nonobviousness under § 103. A rejection on either of these grounds does not affect the determination that respondents' claims recited subject matter which was eligible for patent protection under § 101.

IV

We have before us today only the question of whether respondents' claims fall within the § 101 categories of possibly patentable subject matter. We view respondents' claims as nothing more than a process for molding rubber products and not as an attempt to patent a mathematical formula. We recognize, of course, that when a claim recites a mathematical formula (or scientific principle or phenomenon of nature), an inquiry must be made into whether the claim is seeking patent protection for that formula in the abstract. A mathematical formula as such is not accorded the protection of our patent laws, *Gottschalk* v. *Benson,* 409 U. S. 63 (1972), and this principle cannot be circumvented by attempting to limit the use of the formula to a particular technological environment. *Parker* v. *Flook,* 437 U. S. 584 (1978). Similarly, insignificant postsolution activity will not trans-

form an unpatentable principle into a patentable process. *Ibid.*[14] To hold otherwise would allow a competent draftsman to evade the recognized limitations on the type of subject matter eligible for patent protection. On the other hand, when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent laws were designed to protect (*e. g.*, transforming or reducing an article to a different state or thing), then the claim satisfies the requirements of § 101. Because we do not view respondents' claims as an attempt to patent a mathematical formula, but rather to be drawn to an industrial proc-

[14] Arguably, the claims in *Flook* did more than present a mathematical formula. The claims also solved the calculation in order to produce a new number or "alarm limit" and then replaced the old number with the number newly produced. The claims covered all uses of the formula in processes "comprising the catalytic chemical conversion of hydrocarbons." There are numerous such processes in the petrochemical and oil refinery industries and the claims therefore covered a broad range of potential uses. 437 U. S., at 586. The claims, however, did not cover every conceivable application of the formula. We rejected in *Flook* the argument that because all possible uses of the mathematical formula were not pre-empted, the claim should be eligible for patent protection. Our reasoning in *Flook* is in no way inconsistent with our reasoning here. A mathematical formula does not suddenly become patentable subject matter simply by having the applicant acquiesce to limiting the reach of the patent for the formula to a particular technological use. A mathematical formula in the abstract is nonstatutory subject matter regardless of whether the patent is intended to cover all uses of the formula or only limited uses. Similarly, a mathematical formula does not become patentable subject matter merely by including in the claim for the formula token postsolution activity such as the type claimed in *Flook*. We were careful to note in *Flook* that the patent application did not purport to explain how the variables used in the formula were to be selected, nor did the application contain any disclosure relating to chemical processes at work or the means of setting off an alarm or adjusting the alarm limit. *Ibid.* All the application provided was a "formula for computing an updated alarm limit." *Ibid.*

ess for the molding of rubber products, we affirm the judgment of the Court of Customs and Patent Appeals.[15]

It is so ordered.

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

The starting point in the proper adjudication of patent litigation is an understanding of what the inventor claims

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[15] The dissent's analysis rises and falls on its characterization of respondents' claims as presenting nothing more than "an improved method of calculating the time that the mold should remain closed during the curing process." *Post,* at 206–207. The dissent states that respondents claim only to have developed "a new method of programming a digital computer in order to calculate—promptly and repeatedly—the correct curing time in a familiar process." *Post,* at 213. Respondents' claims, however, are not limited to the isolated step of "programming a digital computer." Rather, respondents' claims describe a process of curing rubber beginning with the loading of the mold and ending with the opening of the press and the production of a synthetic rubber product that has been perfectly cured—a result heretofore unknown in the art. See n. 5, *supra.* The fact that one or more of the steps in respondents' process may not, in isolation, be novel or independently eligible for patent protection is irrelevant to the question of whether the claims as a whole recite subject matter *eligible* for patent protection under § 101. As we explained when discussing machine patents in *Deepsouth Packing Co.* v. *Laitram Corp.,* 406 U. S. 518 (1972):

"The patents were warranted not by the novelty of their elements but by the novelty of the combination they represented. Invention was recognized because Laitram's assignors combined ordinary elements in an extraordinary way—a novel union of old means was designed to achieve new ends. Thus, for both inventions 'the whole in some way exceed[ed] the sum of its parts.' *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.,* 340 U. S. 147, 152 (1950)." *Id.,* at 521–522 (footnote omitted).

In order for the dissent to reach its conclusion it is necessary for it to read out of respondents' patent application all the steps in the claimed process which it determined were not novel or "inventive." That is not the purpose of the § 101 inquiry and conflicts with the proposition recited above that a claimed invention may be entitled to patent protection even though some or all of its elements are not "novel."

to have discovered. The Court's decision in this case rests on a misreading of the Diehr and Lutton patent application. Moreover, the Court has compounded its error by ignoring the critical distinction between the character of the subject matter that the inventor claims to be novel—the § 101 issue—and the question whether that subject matter is in fact novel—the § 102 issue.

I

Before discussing the major flaws in the Court's opinion, a word of history may be helpful. As the Court recognized in *Parker* v. *Flook*, 437 U. S. 584, 595 (1978), the computer industry is relatively young. Although computer technology seems commonplace today, the first digital computer capable of utilizing stored programs was developed less than 30 years ago.[1] Patent law developments in response to this new technology are of even more recent vintage. The subject of legal protection for computer programs did not begin to receive serious consideration until over a decade after completion of the first programmable digital computer.[2] It was 1968 be-

[1] ENIAC, the first general purpose electronic digital computer, was built in 1946. Unlike modern computers, this machine was externally programmed; its circuitry had to be manually rewired each time it was used to perform a new task. See Gemignani, Legal Protection for Computer Software: The View From '79, 7 Rutgers J. Computers, Tech. & L. 269, 270 (1980). In 1952, a group of scientists at the Institute for Advanced Study completed MANIAC I, the first digital computer capable of operating upon stored programs, as opposed to hard-wired circuitry. See Ulam, Computers, 211 Scientific American 203 (1964).

[2] The subject received some scholarly attention prior to 1964. See, *e. g.*, Seidel, Antitrust, Patent and Copyright Law Implications of Computer Technology, 44 J. Pat. Off. Soc. 116 (1962); Comment, The Patentability of Computer Programs, 38 N. Y. U. L. Rev. 891 (1963). In 1964, the Copyright Office began registering computer programs. See 11 Copyright Soc. Bull. 361 (1964); Davis, Computer Programs and Subject Matter Patentability, 6 Rutgers J. Computers, Tech. & L. 1, 5 (1977). Also in 1964, the Patent Office Board of Appeals issued what appears to be the first published opinion concerning the patentability of a computer-related invention. See *Ex parte King*, 146 USPQ 590.

fore the federal courts squarely addressed the subject,[3] and 1972 before this Court announced its first decision in the area.[4]

Prior to 1968, well-established principles of patent law probably would have prevented the issuance of a valid patent on almost any conceivable computer program. Under the "mental steps" doctrine, processes involving mental operations were considered unpatentable. See, *e. g., In re Heritage,* 32 C. C. P. A. (Pat.) 1170, 1173–1177, 150 F. 2d 554, 556–558 (1945); *In re Shao Wen Yuan,* 38 C. C. P. A. (Pat.) 967, 972–976, 188 F. 2d 377, 380–383 (1951). The mental-steps doctrine was based upon the familiar principle that a scientific concept or mere idea cannot be the subject of a valid patent. See *In re Bolongaro,* 20 C. C. P. A. (Pat.) 845, 846–847, 62 F. 2d 1059, 1060 (1933).[5] The doctrine was regularly invoked to deny patents to inventions consisting primarily of mathematical formulae or methods of computation.[6] It was also applied against patent claims in which a mental operation or mathematical computation was the sole novel element or inventive contribution; it was clear that patentability

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[3] *In re Prater,* 56 C. C. P. A. (Pat.) 1360, 415 F. 2d 1378 (1968), modified on rehearing, 56 C. C. P. A. (Pat.) 1381, 415 F. 2d 1393 (1969), is generally identified as the first significant judicial decision to consider the subject-matter patentability of computer program-related inventions. The Court of Customs and Patent Appeals earlier decided *In re Naquin,* 55 C. C. P. A. (Pat.) 1428, 398 F. 2d 863 (1968), in which it rejected a challenge to an application for a patent on a program-related invention on grounds of inadequate disclosure under § 112.

[4] See *Gottschalk* v. *Benson,* 409 U. S. 63 (1972).

[5] See also Novick & Wallenstein, The Algorithm and Computer Software Patentability: A Scientific View of a Legal Problem, 7 Rutgers J. Computers, Tech. & L. 313, 316–317 (1980).

[6] See, *e. g., Don Lee, Inc.* v. *Walker,* 61 F. 2d 58, 67 (CA9 1932); *In re Bolongaro,* 20 C. C. P. A. (Pat.) 845, 846–847, 62 F. 2d 1059, 1060 (1933); *In re Shao Wen Yuan,* 38 C. C. P. A. (Pat.) 967, 969–972, 188 F. 2d 377, 379–380 (1951); *Lyman* v. *Ladd,* 120 U. S. App. D. C. 388, 389, 347 F. 2d 482, 483 (1965).

could not be predicated upon a mental step.[7] Under the "function of a machine" doctrine, a process which amounted to nothing more than a description of the function of a machine was unpatentable. This doctrine had its origin in several 19th-century decisions of this Court,[8] and it had been consistently followed thereafter by the lower federal courts.[9]

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[7] See, *e. g*, *In re Cooper*, 30 C. C. P. A. (Pat.) 946, 949, 134 F. 2d 630, 632 (1943); *Halliburton Oil Well Cementing Co.* v. *Walker*, 146 F. 2d 817, 821, 823 (CA9 1944), rev'd on other grounds, 329 U. S. 1 (1946); *In re Heritage*, 32 C. C. P. A. (Pat.) 1170, 1173–1177, 150 F. 2d 554, 556–558 (1945); *In re Abrams*, 38 C C. P. A. (Pat.) 945, 950–953, 188 F. 2d 165, 168–170 (1951); *In re Shao Wen Yuan*, *supra*, at 975–976, 188 F. 2d, at 383; *In re Lundberg*, 39 C. C. P. A. (Pat.) 971, 975, 197 F. 2d 336, 339 (1952); *In re Venner*, 46 C. C. P. A. (Pat.) 754, 758–759, 262 F. 2d 91, 95 (1958).

[8] The "function of a machine" doctrine is generally traced to *Corning* v. *Burden*, 15 How. 252, 268 (1854), in which the Court stated: "[I]t is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it." The doctrine was subsequently reaffirmed on several occasions. See, *e. g.*, *Risdon Iron & Locomotive Works* v. *Medart*, 158 U. S. 68, 78–79, 84 (1895); *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, 554–557 (1898); *Busch* v. *Jones*, 184 U. S. 598, 607 (1902); *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 383 (1909).

[9] See, *e. g.*, *In re Weston*, 17 App. D. C. 431, 436–442 (1901); *Chisholm-Ryder Co.* v. *Buck*, 65 F. 2d 735, 736 (CA4 1933); *In re Ernst*, 21 C. C. P. A. (Pat.) 1235, 1238–1240, 71 F. 2d 169, 171–172 (1934); *In re McCurdy*, 22 C. C. P. A. (Pat.) 1140, 1142–1145, 76 F. 2d 400, 402–403, (1935); *In re Parker*, 23 C. C. P. A. (Pat.) 721, 722–725, 79 F. 2d 908, 909–910 (1935); *Black-Clawson Co.* v. *Centrifugal Engineering & Patents Corp.*, 83 F. 2d 116, 119–120 (CA6), cert. denied, 299 U. S. 554 (1936); *In re Wadman*, 25 C. C. P. A. (Pat.) 936, 943–944, 94 F. 2d 993, 998 (1938); *In re Mead*, 29 C. C. P. A. (Pat.) 1001, 1004, 127 F. 2d 302, 304 (1942); *In re Solakian*, 33 C. C. P. A. (Pat.) 1054, 1059, 155 F. 2d 404, 407 (1946); *In re Middleton*, 35 C. C. P. A. (Pat.) 1166, 1167–1168, 167 F. 2d 1012, 1013–1014 (1948); *In re Nichols*, 36 C. C. P. A. (Pat.) 759, 762–763, 171 F. 2d 300, 302–303 (1948); *In re Ashbaugh*, 36 C. C. P. A. (Pat.) 902, 904–905, 173 F. 2d 273, 274–275 (1949); *In re Horvath*, 41 C. C. P. A. (Pat.) 844, 849–851, 211 F. 2d 604, 607–608 (1954); *In re Gartner*, 42 C. C. P. A. (Pat.) 1022, 1025–1026, 223 F. 2d 502, 504 (1955).

Finally, the definition of "process" announced by this Court in *Cochrane* v. *Deener,* 94 U. S. 780, 787–788 (1877), seemed to indicate that a patentable process must cause a physical transformation in the materials to which the process is applied. See *ante,* at 182–184.

Concern with the patent system's ability to deal with rapidly changing technology in the computer and other fields led to the formation in 1965 of the President's Commission on the Patent System. After studying the question of computer program patentability, the Commission recommended that computer programs be expressly excluded from the coverage of the patent laws; this recommendation was based primarily upon the Patent Office's inability to deal with the administrative burden of examining program applications.[10] At approximately the time that the Commission issued its report, the Patent Office published notice of its intention to prescribe guidelines for the examination of applications for patents on computer programs. See 829 Off. Gaz. Pat. Off. 865 (Aug. 16, 1966). Under the proposed guidelines, a computer program, whether claimed as an apparatus or as a process, was unpatentable.[11] The Patent Office indicated, how-

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[10] The Commission's report contained the following evaluation of the current state of the law with respect to computer program patentability:

"Uncertainty now exists as to whether the statute permits a valid patent to be granted on programs. Direct attempts to patent programs have been rejected on the ground of nonstatutory subject matter. Indirect attempts to obtain patents and avoid the rejection, by drafting claims as a process, or a machine or components thereof programmed in a given manner, rather than as a program itself, have confused the issue further and should not be permitted." Report of the President's Commission on the Patent System, "To Promote the Progress of . . . Useful Arts" in an Age of Exploding Technology 14 (1966).

[11] The Patent Office guidelines were based primarily upon the mental-steps doctrine and the *Cochrane* v. *Deener,* 94 U. S. 780 (1877), definition of "process." See 829 Off. Gaz. Pat. Off. 865 (Aug. 16, 1966); 33 Fed. Reg. 15609 (1968).

ever, that a programmed computer could be a component of a patentable process if combined with unobvious elements to produce a physical result. The Patent Office formally adopted the guidelines in 1968. See 33 Fed. Reg. 15609 (1968).

The new guidelines were to have a short life. Beginning with two decisions in 1968, a dramatic change in the law as understood by the Court of Customs and Patent Appeals took place. By repudiating the well-settled "function of a machine" and "mental steps" doctrines, that court reinterpreted § 101 of the Patent Code to enlarge drastically the categories of patentable subject matter. This reinterpretation would lead to the conclusion that computer programs were within the categories of inventions to which Congress intended to extend patent protection.

In *In re Tarczy-Hornoch*, 55 C. C. P. A. (Pat.) 1441, 397 F. 2d 856 (1968), a divided Court of Customs and Patent Appeals overruled the line of cases developing and applying the "function of a machine" doctrine. The majority acknowledged that the doctrine had originated with decisions of this Court and that the lower federal courts, including the Court of Customs and Patent Appeals, had consistently adhered to it during the preceding 70 years. Nonetheless, the court concluded that the doctrine rested on a misinterpretation of the precedents and that it was contrary to "the basic purposes of the patent system and productive of a range of undesirable results from the harshly inequitable to the silly." *Id.*, at 1454, 397 F. 2d, at 867.[12] Shortly thereafter, a similar

[12] Judge Kirkpatrick, joined by Chief Judge Worley, wrote a vigorous dissent objecting to the majority's decision to abandon "a rule which is about as solidly established as any rule of the patent law." 55 C. C. P. A. (Pat.), at 1457, 397 F. 2d, at 868. Unlike the majority, the dissenting judges did not consider the doctrine inequitable or silly, and they observed that it had functioned in a satisfactory manner in the past. *Id.*, at 1457–1458, 397 F. 2d, at 869. In addition, they considered the doctrine to be so well established that it had been adopted by implication in the Patent Act of 1952. *Id.*, at 1458, 397 F. 2d, at 869.

fate befell the "mental steps" doctrine. In *In re Prater*, 56 C. C. P. A. (Pat.) 1360, 415 F. 2d 1378 (1968), modified on rehearing, 56 C. C. A. P. (Pat.) 1381, 415 F. 2d 1393 (1969), the court found that the precedents on which that doctrine was based either were poorly reasoned or had been misinterpreted over the years. 56 C. C. P. A. (Pat.), at 1366–1372, 415 F. 2d, at 1382–1387. The court concluded that the fact that a process may be performed mentally should not foreclose patentability if the claims reveal that the process also may be performed without mental operations. *Id.*, at 1374–1375, 415 F. 2d, at 1389.[13] This aspect of the original *Prater* opinion was substantially undisturbed by the opinion issued after rehearing. However, the second *Prater* opinion clearly indicated that patent claims broad enough to encompass the operation of a programmed computer would not be rejected for lack of patentable subject matter. 56 C. C. P. A. (Pat.), at 1394, n. 29, 415 F. 2d, at 1403, n. 29.[14]

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[13] In *Prater*, the patent application claimed an improved method for processing spectrographic data. The method analyzed conventionally obtained data by using well-known equations. The inventors had discovered a particular mathematical characteristic of the equations which enabled them to select the specific subset of equations that would yield optimum results. The application disclosed an analog computer as the preferred embodiment of the invention, but indicated that a programmed digital computer could also be used. 56 C. C. P. A. (Pat.), at 1361–1363, 415 F. 2d, at 1379–1380. The Patent Office had rejected the process claims on a mental-steps theory because the only novel aspect of the claimed method was the discovery of an unpatentable mathematical principle. The apparatus claim was rejected essentially because, when the mathematical principle was assumed to be within the prior art, the claim disclosed no invention entitled to patent protection. *Id.*, at 1364–1365, 1375, 415 F. 2d, at 1381, 1399.

[14] It is interesting to note that the Court of Customs and Patent Appeals in the second *Prater* opinion expressly rejected the Patent Office's procedure for analyzing the apparatus claim pursuant to which the mathematical principle was treated as though it were within the prior art. 56 C. C. P. A. (Pat.), at 1397, 415 F. 2d, at 1405–1406. This precise procedure, of course, was later employed by this Court in *Parker* v. *Flook*, 437 U. S. 584 (1978).

The Court of Customs and Patent Appeals soon replaced the overruled doctrines with more expansive principles formulated with computer technology in mind. In *In re Bernhart*, 57 C. C. P. A. (Pat.) 737, 417 F. 2d 1395 (1969), the court reaffirmed *Prater*, and indicated that all that remained of the mental-steps doctrine was a prohibition on the granting of a patent that would confer a monopoly on all uses of a scientific principle or mathematical equation. *Id.*, at 743, 417 F. 2d, at 1399. The court also announced that a computer programmed with a new and unobvious program was physically different from the same computer without that program; the programmed computer was a new machine or at least a new improvement over the unprogrammed computer. *Id.*, at 744, 417 F. 2d, at 1400. Therefore, patent protection could be obtained for new computer programs if the patent claims were drafted in apparatus form.

The Court of Customs and Patent Appeals turned its attention to process claims encompassing computer programs in *In re Musgrave*, 57 C. C. P. A. (Pat.) 1352, 431 F. 2d 882 (1970). In that case, the court emphasized the fact that *Prater* had done away with the mental-steps doctrine; in particular, the court rejected the Patent Office's continued reliance upon the "point of novelty" approach to claim analysis. *Id.*, at 1362, 431 F. 2d, at 889.[15] The court also announced a new standard for evaluating process claims under § 101: any sequence of operational steps was a patentable process under § 101 as long as it was within the "technological arts." *Id.*, at 1366–1367, 431 F. 2d, at 893. This standard effectively disposed of any vestiges of the mental-steps doctrine remain-

[15] Under the "point of novelty" approach, if the novelty or advancement in the art claimed by the inventor resided solely in a step of the process embodying a mental operation or other unpatentable element, the claim was rejected under § 101 as being directed to nonstatutory subject matter. See Blumenthal & Riter, Statutory or Non-Statutory?: An Analysis of the Patentability of Computer Related Inventions, 62 J. Pat. Off. Soc. 454, 457, 461, 470 (1980).

ing after *Prater* and *Bernhart*.[16] The "technological arts" standard was refined in *In re Benson*, 58 C. C. P. A. (Pat.) 1134, 441 F. 2d 682 (1971), in which the court held that computers, regardless of the uses to which they are put, are within the technological arts for purposes of § 101. *Id.*, at 1142, 441 F. 2d, at 688.

In re Benson, of course, was reversed by this Court in *Gottschalk* v. *Benson*, 409 U. S. 63 (1972).[17] Justice Douglas' opinion for a unanimous Court made no reference to the lower court's rejection of the mental-steps doctrine or to the new technological-arts standard.[18] Rather, the Court clearly held that new mathematical procedures that can be conducted in old computers, like mental processes and abstract intellectual concepts, see *id.*, at 67, are not patentable processes within the meaning of § 101.

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[16] The author of the second *Prater* opinion, Judge Baldwin, disagreed with the *Musgrave* "technological arts" standard for process claims. He described that standard as "a major and radical shift in this area of the law." 57 C. C. P. A. (Pat.), at 1367, 431 F. 2d, at 893–894. As Judge Baldwin read the majority opinion, claims drawn solely to purely mental processes were now entitled to patent protection. *Id.*, at 1369, 431 F. 2d, at 895–896. Judge Baldwin's understanding of *Musgrave* seems to have been confirmed in *In re Foster*, 58 C. C. P. A. (Pat.) 1001, 1004–1005, 438 F. 2d 1011, 1014–1015 (1971).

[17] In the interval between the two *Benson* decisions, the Court of Customs and Patent Appeals decided several cases in which it addressed the patentability of computer-related inventions. In *In re McIlroy*, 58 C. C. P. A. (Pat.) 1249, 442 F. 2d 1397 (1971), and *In re Waldbaum*, 59 C. C. P. A. (Pat.) 940, 457 F. 2d 997 (1972), the court relied primarily upon *Musgrave* and *Benson*. In *In re Ghiron*, 58 C. C. P. A. (Pat.) 1207, 442 F. 2d 985 (1971), the court reaffirmed *Tarczy-Hornoch's* rejection of the "function of a machine" doctrine.

[18] Although the Court did not discuss the mental-steps doctrine in *Benson*, some commentators have suggested that the Court implicitly relied upon the doctrine in that case. See, *e. g.*, Davis, *supra* n. 2, at 14, and n. 92. Other commentators have observed that the Court's analysis in *Benson* was entirely consistent with the mental-steps doctrine. See, *e. g.*, Comment, Computer Program Classification: A Limitation on Program Patentability as a Process, 53 Or. L. Rev. 501, 517–518, n. 132 (1974).

The Court of Customs and Patent Appeals had its first opportunity to interpret *Benson* in *In re Christensen*, 478 F. 2d 1392 (1973). In *Christensen*, the claimed invention was a method in which the only novel element was a mathematical formula. The court resurrected the point-of-novelty approach abandoned in *Musgrave* and held that a process claim in which the point of novelty was a mathematical equation to be solved as the final step of the process did not define patentable subject matter after *Benson*. 478 F. 2d, at 1394. Accordingly, the court affirmed the Patent Office Board of Appeals' rejection of the claims under § 101.

The Court of Customs and Patent Appeals in subsequent cases began to narrow its interpretation of *Benson*. In *In re Johnston*, 502 F. 2d 765 (1974), the court held that a record-keeping machine system which comprised a programmed digital computer was patentable subject matter under § 101. *Id.*, at 771. The majority dismissed *Benson* with the observation that *Benson* involved only process, not apparatus, claims. 502 F. 2d, at 771. Judge Rich dissented, arguing that to limit *Benson* only to process claims would make patentability turn upon the form in which a program invention was claimed. 502 F. 2d, at 773–774.[19] The court again construed *Benson* as limited only to process claims in *In re Noll*, 545 F. 2d 141 (1976), cert. denied, 434 U. S. 875 (1977); apparatus claims were governed by the court's pre-*Benson* conclusion that a programmed computer was structurally different from the same computer without that particular program. 545 F. 2d, at 148. In dissent, Judge Lane, joined by Judge Rich, argued that *Benson* should be read as a general proscription of the patenting of computer programs regardless of the form of the claims. 545 F. 2d, at 151–152. Judge Lane's interpretation of *Benson* was rejected by the majority

[19] The decision of the Court of Customs and Patent Appeals was reversed by this Court on other grounds in *Dann* v. *Johnston*, 425 U. S. 219 (1976).

in *In re Chatfield,* 545 F. 2d 152 (1976), cert. denied, 434 U. S. 875 (1977), decided on the same day as *Noll.* In that case, the court construed *Benson* to preclude the patenting of program inventions claimed as processes only where the claims would pre-empt all uses of an algorithm or mathematical formula. 545 F. 2d, at 156, 158–159.[20] The dissenting judges argued, as they had in *Noll,* that *Benson* held that programs for general-purpose digital computers are not patentable subject matter. 545 F. 2d, at 161.

Following *Noll* and *Chatfield,* the Court of Customs and Patent Appeals consistently interpreted *Benson* to preclude the patenting of a program-related process invention only when the claims, if allowed, would wholly pre-empt the algorithm itself. One of the cases adopting this view was *In re Flook,* 559 F. 2d 21 (1977),[21] which was reversed in *Parker* v. *Flook,* 437 U. S. 584 (1978). Before this Court decided *Flook,* however, the lower court developed a two-step procedure for analyzing program-related inventions in light of *Benson.* In *In re Freeman,* 573 F. 2d 1237 (1978), the court held that such inventions must first be examined to determine whether a mathematical algorithm is directly or indirectly claimed; if an algorithm is recited, the court must then determine whether the claim would wholly pre-empt that algorithm. Only if a claim satisfied both inquiries was *Benson* considered applicable. 573 F. 2d, at 1245. See also *In re Toma,* 575 F. 2d 872, 877 (CCPA 1978).

[20] In addition to interpreting *Benson,* the majority also maintained that *Christensen,* despite its point-of-novelty language, had not signalled a return to that form of claim analysis. 545 F. 2d, at 158. The court would reaffirm this proposition consistently thereafter. See, *e. g., In re de Castelet,* 562 F. 2d 1236, 1240 (1977); *In re Richman,* 563 F. 2d 1026, 1029–1030 (1977); *In re Freeman,* 573 F. 2d 1237, 1243–1244 (1978); *In re Toma,* 575 F. 2d 872, 876 (1978); *In re Walter,* 618 F. 2d 758, 766–767 (1980).

[21] See also *In re Deutsch,* 553 F. 2d 689, 692–693 (CCPA 1977); *In re Waldbaum,* 559 F. 2d 611, 616–617 (CCPA 1977); *In re de Castelet, supra,* at 1243–1245.

In *Flook*, this Court clarified *Benson* in three significant respects. First, *Flook* held that the *Benson* rule of unpatentable subject matter was not limited, as the lower court believed, to claims which wholly pre-empted an algorithm or amounted to a patent on the algorithm itself. 437 U. S., at 589–590. Second, the Court made it clear that an improved method of calculation, even when employed as part of a physical process, is not patentable subject matter under § 101. *Id.*, at 595, n. 18. Finally, the Court explained the correct procedure for analyzing a patent claim employing a mathematical algorithm. Under this procedure, the algorithm is treated for § 101 purposes as though it were a familiar part of the prior art; the claim is then examined to determine whether it discloses "some other inventive concept." *Id.*, at 591–595.[22]

Although the Court of Customs and Patent Appeals in several post-*Flook* decisions held that program-related inventions were not patentable subject matter under § 101, see, *e. g.*, *In re Sarkar*, 588 F. 2d 1330 (1978); *In re Gelnovatch*, 595 F. 2d 32 (1979), in general *Flook* was not enthusiastically received by that court. In *In re Bergy*, 596 F. 2d 952 (1979), the majority engaged in an extensive critique of *Flook*, concluding that this Court had erroneously commingled "distinct statutory provisions which are conceptually unrelated." 596 F. 2d, at 959.[23] In subsequent cases, the court construed

[22] This form of claim analysis did not originate with *Flook*. Rather, the Court derived it from the landmark decision of *O'Reilly* v. *Morse*, 15 How. 62, 115 (1854). In addition, this analysis is functionally the same as the point-of-novelty analysis used in conjunction with the mental-steps doctrine. In fact, the Patent Office in the past occasionally phrased its mental-steps rejections in essentially the terms later employed in *Flook*. See nn. 13–15, *supra*. See generally Comment, 35 U. S. C. 101 Claim Analysis—The Point of Novelty Approach, 62 J. Pat. Off. Soc. 521 (1980).

[23] The Court of Customs and Patent Appeals suggested that the cause of this Court's error was the argument presented by the Solicitor General in *Flook*. According to the majority, the Solicitor General's briefs "badly, and with a seeming sense of purpose" confused the statutory requirements.

Flook as resting on nothing more than the way in which the patent claims had been drafted, and it expressly declined to use the method of claim analysis spelled out in that decision. The Court of Customs and Patent Appeals has taken the position that, if an application is drafted in a way that discloses an entire process as novel, it defines patentable subject matter even if the only novel element that the inventor claims to have discovered is a new computer program.[24] The court interpreted *Flook* in this manner in its opinion in this case. See *In re Diehr,* 602 F. 2d 982, 986–989 (1979). In my judgment, this reading of *Flook*—although entirely consistent with the lower court's expansive approach to § 101 during the past 12 years—trivializes the holding in *Flook,* the principle that underlies *Benson,* and the settled line of authority reviewed in those opinions.

II

As I stated at the outset, the starting point in the proper adjudication of patent litigation is an understanding of what the inventor claims to have discovered. Indeed, the outcome of such litigation is often determined by the judge's understanding of the patent application. This is such a case.

In the first sentence of its opinion, the Court states the question presented as "whether a process for curing synthetic rubber . . . is patentable subject matter." *Ante,* at 177. Of course, that question was effectively answered many years ago when Charles Goodyear obtained his patent on the vulcanization process.[25] The patent application filed by Diehr

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596 F. 2d, at 962. The court went on to describe part of the Solicitor General's argument in *Flook* as "subversive nonsense." 596 F 2d, at 963.

[24] See, *e. g., In re Johnson,* 589 F. 2d 1070 (1978); *In re Phillips,* 608 F. 2d 879 (1979); *In re Sherwood,* 613 F. 2d 809 (1980), cert. pending, No. 79–1941.

[25] In an opinion written over a century ago, the Court noted:

"A manufacturing process is clearly an art, within the meaning of the law. Goodyear's patent was for a process, namely, the process of vulcanizing

and Lutton, however, teaches nothing about the chemistry of the synthetic rubber-curing process, nothing about the raw materials to be used in curing synthetic rubber, nothing about the equipment to be used in the process, and nothing about the significance or effect of any process variable such as temperature, curing time, particular compositions of material, or mold configurations. In short, Diehr and Lutton do not claim to have discovered anything new about the process for curing synthetic rubber.

As the Court reads the claims in the Diehr and Lutton patent application, the inventors' discovery is a method of constantly measuring the actual temperature inside a rubber molding press.[26] As I read the claims, their discovery is an

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india-rubber by subjecting it to a high degree of heat when mixed with sulphur and a mineral salt.

. . . . .

"The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process." *Tilghman* v. *Proctor*, 102 U. S. 707, 722, 728 (1881).

See also *Corning* v. *Burden*, 15 How. 252, 267 (1854). Modern rubber curing methods apparently still are based in substantial part upon the concept discovered by Goodyear:

"Since the day 120 years ago when Goodyear first heated a mixture of rubber and sulphur on a domestic stove and so discovered vulcanisation, this action of heat and sulphur has remained the standard method of converting crude rubber, with all its limitations, into a commercially usable product, giving it the qualities of resistance to heat and cold in addition to considerable mechanical strength.

"Goodyear also conjured up the word 'cure' for vulcanisation, and this has become the recognised term in production circles." Mernagh, Practical Vulcanisation, in The Applied Science of Rubber 1053 (W. Naunton ed. 1961).

See generally Kimmich, Making Rubber Products for Engineering Uses, in Engineering Uses of Rubber 18, 28–34 (A. McPherson & A. Klemin eds. 1956)

[26] "Respondents characterize their contribution to the art to reside in the process of constantly measuring the actual temperature inside the mold." See *ante*, at 178.

improved method of calculating the time that the mold should remain closed during the curing process.[27] If the Court's reading of the claims were correct, I would agree that they disclose patentable subject matter. On the other hand, if the Court accepted my reading, I feel confident that the case would be decided differently.

There are three reasons why I cannot accept the Court's conclusion that Diehr and Lutton claim to have discovered a new method of constantly measuring the temperature inside a mold. First, there is not a word in the patent application that suggests that there is anything unusual about the temperature-reading devices used in this process—or indeed that any particular species of temperature-reading device should be used in it.[28] Second, since devices for constantly

[27] Claim 1 is quoted in full in n. 5 of the Court's opinion, *ante,* at 179. It describes a "method of operating a rubber-molding press for precision molded compounds with the aid of a digital computer." As the Court of Customs and Patent Appeals noted, the improvement claimed in the application consists of "opening the mold at precisely the correct time rather than at a time which has been determined by approximation or guesswork." *In re Diehr,* 602 F. 2d 982, 988 (1979).

[28] In the portion of the patent application entitled "Abstract of the Disclosure," the following reference to monitoring the temperature is found:

"An interval timer starts running from the time of mold closure, and the temperature within the mold cavity is measured often, typically every ten seconds. The temperature is fed to a computer . . . ." App. to Pet. for Cert. 38a.

In the portion of the application entitled "Background of the Invention," the following statement is found:

"By accurate and constant calculation and recalculation of the correct mold time under the temperatures actually present in the mold, the material can be cured accurately and can be relied upon to produce very few rejections, perhaps completely eliminating all rejections due to faulty mold cure." *Id.,* at 41a.

And, in the "Summary of the Invention," this statement appears:

"A surveillance system is maintained over the mold to determine the actual mold temperature substantially continuously, for example, every

measuring actual temperatures—on a back porch, for example—have been familiar articles for quite some time, I find it difficult to believe that a patent application filed in 1975 was premised on the notion that a "process of constantly measuring the actual temperature" had just been discovered. Finally, the Patent and Trademark Office Board of Appeals expressly found that "the only difference between the conventional methods of operating a molding press and that claimed in [the] application rests in those steps of the claims which relate to the calculation incident to the solution of the mathematical problem or formula used to control the mold heater and the automatic opening of the press." [29] This finding was not disturbed by the Court of Customs and Patent Appeals and is clearly correct.

A fair reading of the entire patent application, as well as the specific claims, makes it perfectly clear that what Diehr and Lutton claim to have discovered is a method of using a digital computer to determine the amount of time that a rubber molding press should remain closed during the synthetic rubber-curing process. There is no suggestion that there is anything novel in the instrumentation of the mold, in actuating a timer when the press is closed, or in automatically opening the press when the computed time expires.[30] Nor does the

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ten seconds, and to feed that information to the computer along with the pertinent stored data and along with the elapsed time information." *Ibid.* Finally, in a description of a simple hypothetical application using the invention described in Claim 1, this is the reference to the temperature-reading device:

"Thermocouples, or other temperature-detecting devices, located directly within the mold cavity may read the temperature at the surface where the molding compound touches the mold, so that it actually gets the temperature of the material at that surface." *Id.*, at 45a.

[29] *Id.*, at 24a.

[30] These elements of the rubber-curing process apparently have been well known for years. The following description of the vulcanization process appears in a text published in 1961:

"Vulcanisation is too important an operation to be left to human control, however experienced and conscientious. Instrumentation makes controlled

application suggest that Diehr and Lutton have discovered anything about the temperatures in the mold or the amount of curing time that will produce the best cure. What they claim to have discovered, in essence, is a method of updating the original estimated curing time by repetitively recalculating that time pursuant to a well-known mathematical formula in response to variations in temperature within the mold. Their method of updating the curing time calculation is strikingly reminiscent of the method of updating alarm limits that Dale Flook sought to patent.

Parker v. *Flook,* 437 U. S. 584 (1978), involved the use of a digital computer in connection with a catalytic conversion process. During the conversion process, variables such as temperature, pressure, and flow rates were constantly monitored and fed into the computer; in this case, temperature in the mold is the variable that is monitored and fed into the computer. In *Flook,* the digital computer repetitively recalculated the "alarm limit"—a number that might signal the need to terminate or modify the catalytic conversion process; in this case, the digital computer repetitively recalculates the correct curing time—a number that signals the time when the synthetic rubber molding press should open.

The essence of the claimed discovery in both cases was an algorithm that could be programmed on a digital computer.[31]

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cure possible, and in consequence instrument engineering is a highly important function in the modern rubber factory, skilled attention being necessary, not only in the maintenance of the instruments but also in their siting. There are instruments available which will indicate, record or control all the services involved in vulcanisation, including time, temperature and pressure, and are capable of setting in motion such operations as the opening and closing of moulds and, in general, will control any process variable which is capable of being converted into an electric charge or pneumatic or hydraulic pressure impulse." Mernagh, *supra* n. 25, at 1091–1092.

[31] Commentators critical of the *Flook* decision have noted the essential similarity of the two inventions:

"The *Diehr* invention improved the control system by continually re-

In *Flook*, the algorithm made use of multiple process variables; in this case, it makes use of only one. In *Flook*, the algorithm was expressed in a newly developed mathematical formula; in this case, the algorithm makes use of a well-known mathematical formula. Manifestly, neither of these differences can explain today's holding.[32] What I believe

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measuring the temperature and recalculating the proper cure time. The computer would simultaneously keep track of the elapsed time. When the elapsed time equalled the proper cure time, the rubber would be released automatically from the mold.

"The facts are difficult to distinguish from those in *Flook*. Both processes involved (1) an initial calculation, (2) continual remeasurement and recalculation, and (3) some control use of the value obtained from the calculation." Novick & Wallenstein, *supra* n. 5, at 326 (footnotes omitted).

[32] Indeed, the most significant distinction between the invention at issue in *Flook* and that at issue in this case lies not in the characteristics of the inventions themselves, but rather in the drafting of the claims. After noting that "[t]he Diehr claims are reminiscent of the claims in *Flook*," Blumenthal & Riter, *supra* n. 15, at 502–503 (footnote omitted), the authors of a recent article on the subject observe that the Court of Customs and Patent Appeals' analysis in this case "lends itself to an interesting exercise in claim drafting." *Id.*, at 505. To illustrate their point, the authors redrafted the Diehr and Lutton claims into the format employed in the *Flook* application:

"An improved method of calculating the cure time of a rubber molding process utilizing a digital computer comprising the steps of:

"a. inputting into said computer input values including

"1. natural logarithm conversion data ([l]n),

"2. an activation energy constant (C) unique to each batch of rubber being molded,

"3. a constant (X) dependent upon the geometry of the particular mold of the press, and

"4. continuous temperature values (Z) of the mold during molding;

"b. operating said computer for

"1. counting the elapsed cure time,

"2. calculating the cure time from the input values using the Arrhenius equation [l]n V=CZ+X, where V is the total cure time, and

does explain today's holding is a misunderstanding of the applicants' claimed invention and a failure to recognize the critical difference between the "discovery" requirement in § 101 and the "novelty" requirement in § 102.[33]

III

The Court misapplies *Parker* v. *Flook* because, like the Court of Customs and Patent Appeals, it fails to understand or completely disregards the distinction between the subject matter of what the inventor *claims* to have discovered—the § 101 issue—and the question whether that claimed discovery is in fact novel—the § 102 issue.[34] If there is not even a

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"c. providing output signals from said computer when said calculated cure time is equal to said elapsed cure time." *Ibid.*

The authors correctly conclude that even the lower court probably would have found that this claim was drawn to unpatentable subject matter under § 101. *Id.*, at 505-506.

[33] In addition to confusing the requirements of §§ 101 and 102, the Court also misapprehends the record in this case when it suggests that the Diehr and Lutton patent application may later be challenged for failure to satisfy the requirements of §§ 102 and 103. See *ante*, at 191. This suggestion disregards the fact that the applicants overcame all objections to issuance of the patent except the objection predicated on § 101. The Court seems to assume that §§ 102 and 103 issues of novelty and obviousness remain open on remand. As I understand the record, however, those issues have already been resolved. See Brief for Respondents 11–14; Reply Memorandum for Petitioner 3–4, and n. 4. Therefore, the Court is now deciding that the patent will issue.

[34] The early cases that the Court of Customs and Patent Appeals refused to follow in *Prater, Musgrave,* and *Benson* had recognized the distinction between the § 101 requirement that what the applicant claims to have invented must be patentable subject matter and the § 102 requirement that the invention must actually be novel. See, *e. g., In re Shao Wen Yuan,* 38 C. C. P. A. (Pat.), at 973–976, 188 F. 2d, at 382–383; *In re Abrams,* 38 C. C. P. A. (Pat.), at 951–952, 188 F. 2d, at 169; *In re Heritage,* 32 C. C. P. A. (Pat.), at 1173–1174, 1176–1177, 150 F. 2d, at 556, 558; *Halliburton Oil Well Cementing Co.* v. *Walker,* 146 F. 2d, at 821, 823. The lower court's error in this case, and its unenthusiastic reception of *Gottschalk* v. *Benson* and *Parker* v. *Flook,* is, of course, con-

claim that anything constituting patentable subject matter has been discovered, there is no occasion to address the novelty issue.[35] Or, as was true in *Flook*, if the only concept that the inventor claims to have discovered is not patentable subject matter, § 101 requires that the application be rejected without reaching any issue under § 102; for it is irrelevant that unpatentable subject matter—in that case a formula for updating alarm limits—may in fact be novel.

Proper analysis, therefore, must start with an understanding of what the inventor claims to have discovered—or phrased somewhat differently—what he considers his inventive concept to be.[36] It seems clear to me that Diehr and

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sistent with its expansive reading of § 101 in *Tarczy-Hornoch, Prater,* and their progeny.

[35] The Court's opinion in *Flook* itself pointed out this distinction:

"The obligation to determine what type of discovery is sought to be patented must precede the determination of whether that discovery is, in fact, new or obvious." 437 U. S., at 593.

As the Court of Customs and Patent Appeals noted in this case, "for the claim to be statutory, there must be some substance to it other than the recitation and solution of the equation or formula." 602 F. 2d, at 988. See Comment, 62 J. Pat. Off. Soc., *supra* n. 22, at 522–523.

[36] The Court fails to focus upon what Diehr and Lutton claim to have discovered apparently because it believes that this method of analysis would improperly import novelty considerations into § 101. See *ante,* at 188–191, 193, n. 15. Rather than directing its attention to the applicants' claimed discovery, the Court instead focuses upon the general industrial context in which the applicants intend their discovery to be used. Implicit in this interpretation of the patent application is the assumption that, as long as the claims describe a specific implication of the applicants' discovery, patentable subject matter is defined. This assumption was expressly rejected in *Flook:*

"This assumption is based on respondent's narrow reading of *Benson,* and is as untenable in the context of § 101 as it is in the context of that case. It would make the determination of patentable subject matter depend simply on the draftsman's art and would ill serve the principles underlying the prohibition against patents for 'ideas' or phenomena of nature. The rule that the discovery of a law of nature cannot be pat-

Lutton claim to have developed a new method of programming a digital computer in order to calculate—promptly and repeatedly—the correct curing time in a familiar process.[37] In the § 101 analysis, we must assume that the sequence of steps in this programming method is novel, unobvious, and useful. The threshold question of whether such a method is patentable subject matter remains.

If that method is regarded as an "algorithm" as that term was used in *Gottschalk* v. *Benson,* 409 U. S. 63 (1972), and in

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ented rests, not on the notion that natural phenomena are not processes, but rather on the more fundamental understanding that they are not the kind of 'discoveries' that the statute was enacted to protect." 437 U. S., at 593 (footnote omitted).

[37] A few excerpts from the original patent application will emphasize this point:

"The invention will probably best be understood by first describing a simple example, in which a single mold is involved and in which the information is relatively static.

. . . . . .

"A standard digital computer may be employed in this method. It has a data storage bank of suitable size which, of course, may vary when many molds are used and when more refinements are employed. However, Fig. 1 shows a relatively simple case which achieves results that are vast improvements over what has been done up to now. . . .

"The data bank of the computer is provided with a digital input into which the time-temperature cure data for the compound involved is fed, as shown in Fig. 1. All the data is available to the computer upon call, by random access, and the call can be automatic depending upon the temperature actually involved. In other words, the computer over and over questions the data storage, asking, what is the proper time of cure for the following summation of temperatures? The question may be asked each second, and the answer is readily provided.

. . . . . .

"Recalculation continues until the time that has elapsed since mold closure corresponds with the calculated time. Then, the computer actuates the mold-opening device and the mold is automatically opened." App. to Pet. for Cert. 43a–45a.

[*Footnote 37 is continued on p. 214*]

Parker v. *Flook*, 437 U. S. 584 (1978),[38] and if no other inventive concept is disclosed in the patent application, the question must be answered in the negative. In both *Benson* and *Flook*, the parties apparently agreed that the inventor's discovery was properly regarded as an algorithm; the holding that an algorithm was a "law of nature" that could not be

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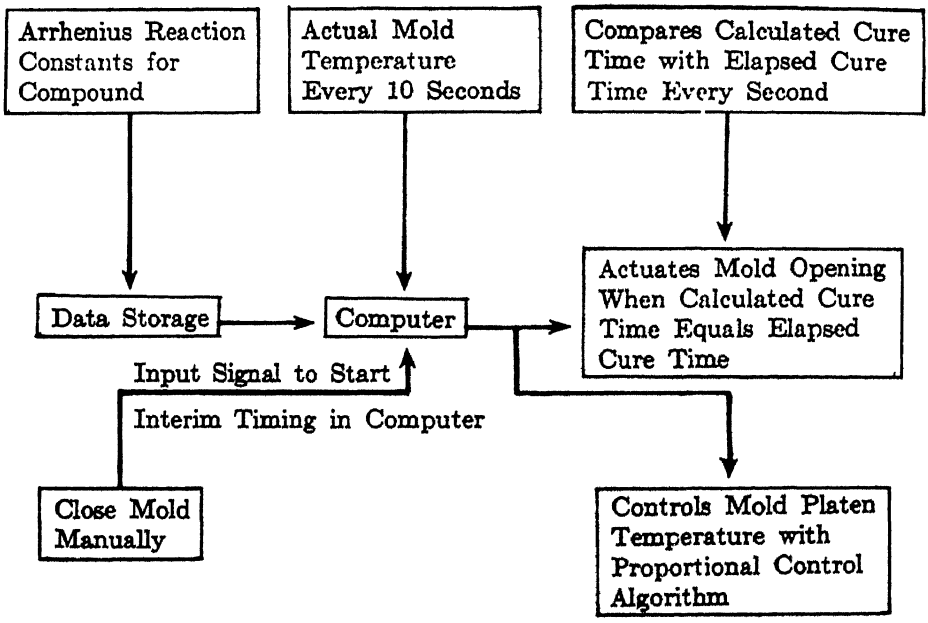
The Figure 1 referred to in the application is as follows:



Id., at 53a.

[38] In *Benson*, we explained the term "algorithm" in the following paragraph:

"The patent sought is on a method of programming a general-purpose digital computer to convert signals from binary-coded decimal form into pure binary form. A procedure for solving a given type of mathematical problem is known as an 'algorithm.' The procedures set forth in the present claims are of that kind; that is to say, they are a generalized formulation for programs to solve mathematical problems of converting one form of numerical representation to another. From the generic formulation, programs may be developed as specific applications." 409 U. S., at 65.

patented therefore determined that those discoveries were not patentable processes within the meaning of § 101.

As the Court recognizes today, *Flook* also rejected the argument that patent protection was available if the inventor did not claim a monopoly on every conceivable use of the algorithm but instead limited his claims by describing a specific postsolution activity—in that case setting off an alarm in a catalytic conversion process. In its effort to distinguish *Flook* from the instant case, the Court characterizes that postsolution activity as "insignificant," *ante,* at 191, or as merely "token" activity, *ante,* at 192, n. 14. As a practical matter, however, the postsolution activity described in the *Flook* application was no less significant than the automatic opening of the curing mold involved in this case. For setting off an alarm limit at the appropriate time is surely as important to the safe and efficient operation of a catalytic conversion process as is actuating the mold-opening device in a synthetic rubber-curing process. In both cases, the post-solution activity is a significant part of the industrial process. But in neither case should that activity have any *legal* significance because it does not constitute a part of the inventive concept that the applicants claimed to have discovered.[39]

In *Gottschalk* v. *Benson,* we held that a program for the

[39] In *Flook,* the Court's analysis of the postsolution activity recited in the patent application turned, not on the relative significance of that activity in the catalytic conversion process, but rather on the fact that that activity was not a part of the applicant's discovery:

"The notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process exalts form over substance. A competent draftsman could attach some form of post-solution activity to almost any mathematical formula; the Pythagorean theorem would not have been patentable, or partially patentable, because a patent application contained a final step indicating that the formula, when solved, could be usefully applied to existing surveying techniques. The concept of patentable subject matter under § 101 is not 'like a nose of wax which may be turned and twisted in any direction . . . .' *White* v. *Dunbar,* 119 U. S. 47, 51." 437 U. S., at 590 (footnote omitted).

solution by a digital computer of a mathematical problem was not a patentable process within the meaning of § 101. In *Parker* v. *Flook*, we further held that such a computer program could not be transformed into a patentable process by the addition of postsolution activity that was not claimed to be novel. That holding plainly requires the rejection of Claims 1 and 2 of the Diehr and Lutton application quoted in the Court's opinion. *Ante*, at 179–180, n. 5. In my opinion, it equally requires rejection of Claim 11 because the presolution activity described in that claim is admittedly a familiar part of the prior art.[40]

Even the Court does not suggest that the computer program developed by Diehr and Lutton is a patentable discovery. Accordingly, if we treat the program as though it were a familiar part of the prior art—as well-established precedent requires[41]—it is absolutely clear that their application contains no claim of patentable invention. Their application was therefore properly rejected under § 101 by the Patent Office and the Board of Appeals.

IV

The broad question whether computer programs should be given patent protection involves policy considerations that

[40] Although the Court of Customs and Patent Appeals erred because it ignored the distinction between the § 101 requirement that the applicant must claim to have discovered a novel process and the § 102 requirement that the discovery must actually be novel, that court correctly rejected the argument that any difference between Claim 11 and the earlier claims was relevant to the § 101 inquiry. See 602 F. 2d, at 984, 987–988.

[41] This well-established precedent was reviewed in *Parker* v. *Flook*:

"*Mackay Radio* and *Funk Bros.* point to the proper analysis for this case: The process itself, not merely the mathematical algorithm, must be new and useful. Indeed, the novelty of the mathematical algorithm is not a determining factor at all. Whether the algorithm was in fact known or unknown at the time of the claimed invention, as one of the 'basic tools of scientific and technological work,' see *Gottschalk* v. *Benson*, 409 U. S., at 67, it is treated as though it were a familiar part of the prior art." 437 U. S., at 591–592.

this Court is not authorized to address. See *Gottschalk* v. *Benson,* 409 U. S., at 72–73; *Parker* v. *Flook,* 437 U. S., at 595–596. As the numerous briefs *amicus curiae* filed in *Gottschalk* v. *Benson, supra, Dann* v. *Johnston,* 425 U. S. 219 (1976), *Parker* v. *Flook, supra,* and this case demonstrate, that question is not only difficult and important, but apparently also one that may be affected by institutional bias. In each of those cases, the spokesmen for the organized patent bar have uniformly favored patentability and industry representatives have taken positions properly motivated by their economic self-interest. Notwithstanding fervent argument that patent protection is essential for the growth of the software industry,[42] commentators have noted that "this industry is growing by leaps and bounds without it."[43] In addition, even

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[42] For example, the Association of Data Processing Service Organizations, appearing as *amicus curiae* in *Flook,* made the following policy argument:

"The need of the incentive of patents for software is at least as great as that of the incentive available for hardware, because: 'Today, providing computer software involves greater . . . risk than providing computer . . . hardware. . . .'

"To a financial giant, the economic value of a patent may not loom large; to the small software products companies upon which the future of the development of quality software depends, the value of the patent in financing a small company may spell the difference between life and death. To banks and financial institutions the existence of a patent or even the potentiality of obtaining one may well be a decisive factor in determining whether a loan should be granted. To prospective investors a patent or the possibility of obtaining one may be the principal element in the decision whether to invest.

"Making clear that patents may be available for inventions in software would unleash important innovative talent. It would have the direct opposite effect forecast by the . . . hardware manufacturers; it would enable competition with those companies and provide the needed incentive to stimulate innovation." Brief for ADAPSO as *Amicus Curiae* in *Parker* v. *Flook,* O. T. 1977, No. 77–642, p. 44 (footnote omitted).

[43] Gemignani, *supra* n. 1, at 309. In a footnote to that comment, Professor Gemignani added that the rate of growth of the software industry

some commentators who believe that legal protection for computer programs is desirable have expressed doubts that the present patent system can provide the needed protection.[44]

Within the Federal Government, patterns of decision have also emerged. Gottschalk, Dann, Parker, and Diamond were not ordinary litigants—each was serving as Commissioner of Patents and Trademarks when he opposed the availability of patent protection for a program-related invention. No doubt each may have been motivated by a concern about the ability of the Patent Office to process effectively the flood of applications that would inevitably flow from a decision that computer programs are patentable.[45] The consistent concern evidenced by the Commissioner of Patents and Trademarks and by the Board of Appeals of the Patent and Trademark Office has not been shared by the Court of Customs and Patent Appeals, which reversed the Board in *Benson*, *Johnston*, and *Flook*, and was in turn reversed by this Court in each of those cases.[46]

"has been even faster lately than that of the hardware industry which does enjoy patent protections." *Id.*, at 309, n. 259. Other commentators are in accord. See Nycum, Legal Protection for Computer Programs, 1 Computer L. J. 1, 55–58 (1978); Note, Protection of Computer Programs: Resurrection of the Standard, 50 Notre Dame Law. 333, 344 (1974).

[44] See, *e. g.*, Gemignani, *supra* n. 1, at 301–312; Keefe & Mahn, Protecting Software: Is It Worth All the Trouble?, 62 A. B. A. J. 906, 907 (1976).

[45] This concern influenced the President's Commission on the Patent System when it recommended against patent protection for computer programs. In its report, the President's Commission stated:

"The Patent Office now cannot examine applications for programs because of the lack of a classification technique and the requisite search files. Even if these were available, reliable searches would not be feasible or economic because of the tremendous volume of prior art being generated. Without this search, the patenting of programs would be tantamount to mere registration and the presumption of validity would be all but nonexistent." Report of the President's Commission, *supra* n. 10, at 13.

[46] It is noteworthy that the position of the Court of Customs and Patent Appeals in the process patent area had been consistent with that

Scholars have been critical of the work of both tribunals. Some of that criticism may stem from a conviction about the merits of the broad underlying policy question; such criticism may be put to one side. Other criticism, however, identifies two concerns to which federal judges have a duty to respond. First, the cases considering the patentability of program-related inventions do not establish rules that enable a conscientious patent lawyer to determine with a fair degree of accuracy which, if any, program-related inventions will be patentable. Second, the inclusion of the ambiguous concept of an "algorithm" within the "law of nature" category of unpatentable subject matter has given rise to the concern that almost any process might be so described and therefore held unpatentable.

In my judgment, today's decision will aggravate the first concern and will not adequately allay the second. I believe both concerns would be better addressed by (1) an unequivocal holding that no program-related invention is a patentable process under § 101 unless it makes a contribution to the art that is not dependent entirely on the utilization of a computer, and (2) an unequivocal explanation that the term "algorithm" as used in this case, as in *Benson* and *Flook*, is synonymous with the term "computer program." [47] Because

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of the Commissioner of Patents and Trademarks for decades prior to 1968. As discussed in Part I, *supra*, in that year the court rejected two longstanding doctrines that would have foreclosed patentability for most computer programs under § 101.

[47] A number of authorities have drawn the conclusion that the terms are in fact synonymous. See, *e. g.*, Novick & Wallenstein, *supra* n. 5, at 333, n. 172; Anderson, Algorithm, 1 Encyclopedia of Computer Science & Technology 364, 369 (J. Belzer, A. Holzman & A. Kent eds. 1975); E. Horowitz & S. Sahni, Fundamentals of Computer Algorithms 2 (1978); A. Tanenbaum, Structured Computer Organization 10 (1976). Cf. Blumenthal & Riter, *supra* n. 15, at 455–456; Gemignani, *supra* n. 1, at 271–273, 276, n. 37.

the invention claimed in the patent application at issue in this case makes no contribution to the art that is not entirely dependent upon the utilization of a computer in a familiar process, I would reverse the decision of the Court of Customs and Patent Appeals.

Syllabus

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WILSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 79–1380. Argued December 2, 1980—Decided March 4, 1981

The Supplemental Security Income (SSI) program, which is part of the Social Security Act, provides a subsistence allowance to needy aged, blind, and disabled persons. Inmates of public institutions are generally excluded from this program, except that under § 1611 (e) (1) (B) of the Act a reduced amount of SSI benefits are provided to otherwise eligible persons in a hospital, extended care facility, nursing home, or intermediate care facility receiving Medicaid funds for their care. Appellees, aged 21 through 64 and residing in public mental institutions that do not receive Medicaid funds for their care, brought a class action in Federal District Court challenging their exclusion from the reduced SSI benefits. The District Court held such exclusion unconstitutional as violative of the equal protection guarantees of the Due Process Clause of the Fifth Amendment on the ground that the "mental health" classification could not withstand judicial scrutiny because it did not have a "substantial relation" to the object of the legislation in light of its "primary purpose."

Held: Appellees' rights to equal protection were not violated by denying them SSI benefits. Pp. 230–239.

(a) In § 1611 (e) (1) (B), Congress made a distinction not between the mentally ill and a group composed of nonmentally ill, but between residents in public institutions receiving Medicaid funds for their care and residents in such institutions not receiving such funds. To the extent that the statute has an indirect impact upon the mentally ill as a subset of publicly institutionalized persons, the record in this case presents no statistical support for a contention that the mentally ill as a class are burdened disproportionately to any other class affected by the classification. The indirect deprivation worked by this legislation upon appellees' class, whether or not the class is considered "suspect," does not, in the absence of any evidence that Congress deliberately intended to discriminate against the mentally ill, move this Court to regard it with a heightened scrutiny. Pp. 230–234.

(b) The classification employed in § 1611 (e) (1) (B) is to be judged under the rational-basis standard, which does not allow this Court to

substitute its personal notions of good public policy for those of Congress. Under this standard, and based on the legislative history, it was not irrational for Congress to elect, in view of budgetary constraints, to shoulder only part of the burden of supplying a "comfort money" allowance, leaving the States with the primary responsibility for making such an allowance available to those residents in state-run institutions, and to decide that it is the Medicaid recipients in public institutions who are the most needy and deserving of the SSI benefits. Pp. 234–239.

478 F. Supp. 1046, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 239.

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

James D. Weill argued the cause for appellees. With him on the brief were *Robert E. Lehrer, Marianne R. Smigelskis,* and *Thomas J. Grippando.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether Congress constitutionally may decline to grant Supplemental Security Income benefits to a class of otherwise eligible individuals who are excluded because they are aged 21 through 64 and are institutionalized in public mental institutions that do not receive Medicaid funds for their care. The United States District Court for the Northern District of Illinois held unconstitutional, under

*Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams,* Attorney General of New York, *Shirley Adelson Siegel,* Solicitor General, *Alan W. Rubinstein,* Assistant Attorney General, and *Harvey Bartel III,* Attorney General of Pennsylvania, for the State of New York et al.; by *Judy Greenwood, Margaret F. Ewing,* and *Paul R. Friedman* for the National Association for Mental Health et al.; and by *William A. Carnahan* for the New York, Pennsylvania, and California Associations of Private Psychiatric Hospitals.

the Due Process Clause of the Fifth Amendment, that portion of the Social Security Act, as amended, that excludes these otherwise eligible persons from the supplemental benefits. The Secretary of Health and Human Services has taken a direct appeal to this Court under 28 U. S. C. § 1252.

I

In October 1972, Congress amended the Social Security Act (Act) to create the federal Supplemental Security Income (SSI) program, effective January 1, 1974. 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* This program was intended "[t]o assist those who cannot work because of age, blindness, or disability," S. Rep. No. 92–1230, p. 4 (1972), by "set[ting] a Federal guaranteed minimum income level for aged, blind, and disabled persons," *id.*, at 12.[1]

The SSI program provides a subsistence allowance, under federal standards, to the Nation's needy aged, blind, and disabled.[2] Included within the category of "disabled" under the program are all those "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to

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[1] The SSI program, Title XVI of the Social Security Act, largely replaced the prior system of federal grants to state-run assistance programs for the aged, blind, and disabled contained in Titles I, X, XIV, and XVI of the Act, that is, Old Age Assistance, 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.;* Aid to the Blind, 49 Stat. 645, as amended, 42 U. S. C. § 1201 *et seq.;* Aid to the Permanently and Totally Disabled, 64 Stat. 555, as amended, 42 U. S. C. § 1351 *et seq.;* and Aid to the Aged, Blind, or Disabled, 76 Stat. 197, 42 U. S. C. § 1381 *et seq.* (1970 ed.). See *Califano* v. *Aznavorian,* 439 U. S. 170, 171 (1978); *Califano* v. *Torres,* 435 U. S. 1, 2 (1978).

[2] To be eligible for SSI benefits, a person must be "aged," that is, 65 or older, or "blind," or "disabled," as those terms are defined in § 1614 of the Act, as amended, 42 U. S. C. § 1382c, and his income and resources must be below the levels specified in § 1611 (a), as amended, 42 U. S. C. § 1382 (a).

all relevant facts ha[d] been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.'" *Policy Statement,* 60 F. C. C. 2d 858, 865 (1976). It did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission.

Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. See, *e. g.,* *FCC* v. *National Citizens Committee for Broadcasting, supra; FCC* v. *WOKO, Inc.,* 329 U. S. 223, 229 (1946). Furthermore, diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC* v. *National Citizens Committee for Broadcasting, supra,* at 810. The Commission's position on review of format changes reflects a reasonable accommodation of the

result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." § 1614 (a)(3)(A) of the Act, 42 U. S. C. § 1382c (a)(3)(A).

Although the SSI program is broad in its reach, its coverage is not complete. From its very inception, the program has excluded from eligibility anyone who is an "inmate of a public institution." § 1611 (e)(1)(A) of the Act, as amended, 42 U. S. C. § 1382 (e)(1)(A).[3] Also from the program's inception, Congress has made a partial *exception* to this *exclusion* by providing a small amount of money (not exceeding $300 per year) to any otherwise eligible person in "a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX [Medicaid] . . . ." § 1611 (e)(1)(B), as amended, 42 U. S. C. § 1382 (e)(1)(B).[4] Congress thus, while excluding

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[3] Section 1611 (e)(1)(A), as amended, provides:

"(e) Limitation on eligibility of certain individuals

"(1)(A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution."

[4] Section 1611 (e)(1)(B), as amended, modifying § 1611 (e)(1)(A), as amended, states:

"(B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under title XIX, the benefit under this title for such individual for such month shall be payable—

"(i) at a rate not in excess of $300 per year (reduced by the amount of any income not excluded pursuant to section 1612 (b)) in the case of an individual who does not have an eligible spouse;

"(ii) in the case of an individual who has an eligible spouse, if only one of them is in such a hospital, home or facility throughout such month, at a rate not in excess of the sum of—

"(I) the rate of $300 per year (reduced by the amount of any income,

generally any person residing in a public institution, explicitly has tied eligibility for a reduced amount of SSI benefits to residence in an institution receiving Medicaid benefits for the care of the eligible individual.

Appellees brought this suit to challenge this resulting detail of Congress' having conditioned the limited assistance grant on eligibility for Medicaid: a person between the ages of 21 through 64 who resides in a public mental institution is not eligible to receive this small stipend, even though that person meets the other eligibility requirements for SSI benefits, because treatment in a public mental institution for a person in this age bracket is not funded under Medicaid.[5]

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not excluded pursuant to section 1612 (b), of the one who is in such hospital, home, or facility), and

"(II) the applicable rate specified in subsection (b)(1) (reduced by the amount of any income, not excluded pursuant to section 1612 (b), of the other); and

"(iii) at a rate not in excess of $600 per year (reduced by the amount of any income not excluded pursuant to section 1612 (b)) in the case of an individual who has an eligible spouse, if both of them are in such a hospital, home, or facility throughout such month."

Subsection (C) of § 1611 (e)(1), not implicated in this case, further modifies § 1611 (e)(1)(A), as amended, by providing:

"(C) As used in subparagraph (A), the term 'public institution' does not include a publicly operated community residence which serves no more than 16 residents."

Added in 1976 by Pub. L. 94–566, § 505 (a), 90 Stat. 2686, this subsection met objections that § 1611 (e) impeded reform efforts to de-institutionalize certain groups of handicapped individuals, such as the mentally retarded. Congress determined to encourage the establishment of state-run group homes for such people by making residents in these institutions eligible for SSI benefits. See S. Rep. No. 94–1265, p. 29 (1976); H. R. Conf. Rep. No. 94–1745, pp. 27–28 (1976).

[5] Federal funds are available under the Medicaid program to pay for the following "residential" services: "inpatient hospital services (other than services in an institution for tuberculosis or mental diseases)," § 1905 (a)(1), 42 U. S. C. § 1396d (a)(1); "skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older," § 1905 (a)(4)(A); "inpatient

Appellees attack this statutory classification as violative of the equal protection component of the Fifth Amendment's Due Process Clause.[6] Their challenge, successful in the District Court, is twofold. First, they argue that the exclusion of their class of mentally ill (and therefore disabled) persons bears no rational relationship to any legitimate objective of the SSI program. They assert, in fact, that their class was excluded inadvertently because of its political powerlessness. Brief for Appellees 6, 32. Second, they insist that because the statute classifies on the basis of mental illness, a factor that

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hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases," § 1905 (a)(14); "intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals . . . in need of such care," § 1905 (a)(15); certain "inpatient psychiatric hospital services for individuals under age 21," §§ 1905 (a)(16) and (h). Subsection (17)(B) of § 1905 (a), which provides for funding of any other medical or remedial care recognized under state law, specifically excludes "payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases."

In 1950, when it first enacted federal grants for medical assistance, Congress excluded "any individual . . . who is a patient in an institution for . . . mental diseases" from eligibility. 64 Stat 558. This exclusion was incorporated into the Medicaid statute in 1965, 79 Stat. 352, but exceptions were made for the needy aged in mental institutions, and for the care of mentally ill persons in general medical facilities. *Ibid.* In 1972, in the bill enacting the SSI program, Congress further broadened Medicaid benefits for the mentally ill to include most children in mental institutions. 86 Stat. 1461. A Senate proposal for demonstration projects to investigate the possibility of extending Medicaid benefits to the mentally ill between the ages of 21 through 64 in mental hospitals was defeated at that time. See S. Rep. No. 92–1230, p. 281 (1972); H. R. Conf. Rep. No. 92–1605, p. 65 (1972).

[6] This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment. See, *e. g., Weinberger* v. *Salfi*, 422 U. S. 749, 768–770 (1975); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971).

greatly resembles other characteristics that this Court has found inherently "suspect" as a means of legislative classification, special justification should be required for the congressional decision to exclude appellees.

II

This case has had a somewhat complex procedural history. It initially was instituted in December 1973 as a class action for injunctive and declaratory relief to challenge the federal and Illinois assistance schemes that prevailed prior to the effective date of the SSI program. See *Wilson* v. *Edelman*, 542 F. 2d 1260, 1263–1266 (CA7 1976). The then-existing state assistance program, for which federal funds were received, excluded from eligibility any person who was residing in a public mental or tuberculosis institution or who was confined in a penal institution. *Id.*, at 1263, n. 2. The plaintiffs later amended their complaint to include a challenge to the SSI exclusion, which by then had come into effect. *Id.*, at 1266. A three-judge court was convened under 28 U. S. C. §§ 2281 and 2282 (1970 ed.) (since repealed by Pub. L. 94–381, §§ 1 and 2, 90 Stat. 1119). The case was consolidated with another that challenged the exclusion from SSI benefits of any pretrial detainee. Relying on *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), the court granted the Secretary's motion to dismiss both cases for lack of subject-matter jurisdiction on the ground that the plaintiffs had failed to exhaust the administrative remedies provided for by § 1631 (c)(3) of the Act, as amended, 42 U. S. C. § 1383 (c)(3). See 542 F. 2d, at 1267–1268.[7]

On appeal, appellees abandoned their claims under the prior federal statutes. *Id.*, at 1271. The United States Court of

[7] The three-judge court also found that the state statute classified on the basis of age, not mental health, and that it was rational and constitutional. The Court of Appeals declined to review that constitutional holding on the ground that review from the three-judge court could be had only in this Court. *Wilson* v. *Edelman*, 542 F. 2d, at 1276–1282.

Appeals for the Seventh Circuit reversed the dismissal, holding that the Secretary (then Patricia Harris) had waived any requirement of exhaustion by her submission of the case to the District Court for summary disposition.[8] *Id.*, at 1272. Because the plaintiffs had dropped their request for injunctive relief, the case was remanded to the single-judge District Court. *Id.*, at 1269. That court, on remand, certified the class [9] and granted appellees' motion for summary judgment, holding that § 1382 (e)'s exclusion of the class members violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment. *Sterling* v. *Harris*, 478 F. Supp. 1046 (ND Ill. 1979).[10] The District Court reasoned that the statute "creates three classifications: (1) age, and (2) residence in a public, (3) mental health hospital." *Id.*, at 1050. It ruled that Congress' use of the first two factors need be justified only by

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[8] The Court of Appeals also held that only two of the named plaintiffs, Maudie Simmons and John Kiernan Turney, had satisfied the minimum, nonwaivable requirement of 42 U. S. C. § 405 (g) that a party may seek review only of a "final decision of the Secretary" denying, terminating, or suspending benefits under the SSI program. The other named plaintiffs, including Charles Wilson, were eligible for, or had sought and been denied, benefits only under the prior cooperative state-federal programs, and therefore they were dismissed as parties. We have retained Wilson as a named party in the caption of this case, however, as did the District Court on remand, for the sake of uniformity.

[9] The class was defined as "all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income benefits under Title XVI and have been denied such benefits, on or after January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution." App. to Juris. Statement 21a.

[10] The District Court denied, however, the claim of the pretrial detainees to the monthly stipend, applying a "rational relation" standard and finding the exclusion rational because "[t]he detainee status is necessarily temporary in nature, and the [Secretary] could legitimately wish to withhold these extra-subsistence payments while the detainee is housed in a public institution and until his future status is determined." 478 F. Supp., at 1055.

demonstration of their "rational relationship" to "a legitimate state interest." *Ibid.* Under that standard, these classifications withstood scrutiny. Congress' use, however, of a "mental health" classification was deemed to require a closer examination because "mental health classifications possess the significant indicia of the suspect classifications recognized in other cases." *Id.*, at 1052. Although recognizing that the mentally ill as a group do not demonstrate all the characteristics this Court has considered as denoting inherently suspicious classifications, such as race and national origin,[11] the District Court believed that the mentally ill were "a politically impotent, insular minority" that "have been subject to a 'history of unequal protection.' " *Ibid.* The court therefore concluded that Congress could legislatively disfavor the mentally ill, as § 1611 (e) did, only if the statutory classification passes an "intermediate level of judicial scrutiny," *id.*, at 1053, that is, only if the "classification bears a substantial relation" to the object of the legislation evaluated "in light of the primary purpose" of the scheme of which it is a part. *Ibid.* The court adjudged that the "primary purpose" of the small monthly stipend was to enable the needy to purchase comfort items not provided by the institution. Rejecting the Secretary's proposed justifications for the exclusion,[12] the District Court held that the classification could not withstand scrutiny.

[11] The District Court noted that a person's mental health problem, especially one that has led to institutionalization, is likely to " 'bear [a] relation to ability to perform or contribute to society.' " *Id.*, at 1051–1052, quoting *Frontiero* v. *Richardson*, 411 U. S. 677, 686 (1973). The court also acknowledged that "[i]t is debatable whether and to what extent the mental illness is an 'immutable characteristic determined solely by the accident of birth.' " 478 F. Supp., at 1052, again quoting *Frontiero*, 411 U. S., at 686.

[12] The Secretary argued that the statutory exclusion has three purposes: "1) the conservation of federal resources; 2) the concern that federal funds be received on behalf of residents of qualified institutions; and 3) the fact that plaintiffs are not 'similarly situated' with Medicaid patients in terms of federal interest and control." 478 F. Supp., at 1053.

The legislative history, it said, revealed no intent to exclude appellees' class; the court could conceive of no "possible unexpressed purpose for the exclusion"; and the court reasoned that "aged, blind and disabled inmates of all public institutions would have similar needs." *Ibid.* Upon the Secretary's direct appeal from this judgment, we noted probable jurisdiction. *Harris* v. *Wilson,* 446 U. S. 964 (1980).

III

A

The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious. Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. See *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973). At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives. See, *e. g., Dandridge* v. *Williams,* 397 U. S. 471 (1970); *Mathews* v. *De Castro,* 429 U. S. 181 (1976). Appellees assert that the particular grant of federal benefits under review here, however, should "be subjected to a heightened standard of review," Brief for Appellees 39, because the mentally ill "historically have been subjected to purposeful unequal treatment; they have been relegated to a position of political powerlessness; and prejudice against them curtails their participation in the pluralist political system and strips them of political protection against discriminatory legislation." (Footnote omitted.) *Id.,* at 41.

We have no occasion to reach this issue because we conclude that this statute does not classify directly on the basis of mental health.[13] The SSI program distinguishes among three groups of persons, all of whom meet the basic eligibility requirements: persons not in a "public institution" may receive full benefits; persons in a "public institution" of a certain nature ("hospital, extended care facility, nursing home, or intermediate care facility *receiving payments (with respect to such individual or spouse) . . . under [Medicaid])*" (emphasis added), § 1611 (e)(1)(B), may receive reduced benefits; and persons in any other "public institution" may not receive any benefits. The statute does not isolate the mentally ill or subject them, as a discrete group, to special or subordinate treatment. At the most, this legislation incidentally denies a small monthly comfort benefit to a certain number of persons suffering from mental illness; but in so doing it imposes equivalent deprivation on other groups who are not mentally ill, while at the same time benefiting substantial numbers of the mentally ill.

The group thus singled out for special treatment by § 1611 (e) does not entirely exclude the mentally ill. In fact, it includes, in a sizable proportion to the total population receiving SSI benefits, large numbers of mentally ill people.[14]

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[13] We therefore intimate no view as to what standard of review applies to legislation expressly classifying the mentally ill as a discrete group.

[14] Social Security Administration statistics show that 30 7% of all blind and disabled adult persons awarded SSI benefits in 1975 (109,509 persons) were deemed disabled by mental disorders, and the Administration has concluded that "[m]ental illness was the most common cause of disability in 1975." Kochhar, Blind and Disabled Persons Awarded Federally Administered SSI Payments, 1975, Social Security Bulletin 13, 15 (June 1979) Half of this number suffered from mental illness rather than mental retardation, and these statistics did not include any persons with prior entitlement to benefits. *Ibid.*

Further, as a recent study also indicates, a substantial number of mentally ill people in institutions actually receive SSI benefits. Social Security Administration, Representative Payments under the SSI Program,

Further, the group excluded is not congruent with appellees' class. Among those excluded are the inmates of any other nonmedical "public institution," such as a prison, other penal institution, and any other publicly funded residential program the State may operate; [15] persons residing in a tuberculosis institution; and residents of a medical institution not certified as a Medicaid provider.[16] Although not by the same subsection, Congress also chose to exclude from SSI eligibility persons afflicted with alcoholism or drug addiction and not undergoing treatment, § 1611 (e)(3)(A), and persons who spend more than a specified time outside the United States, § 1611 (f). See *Califano* v. *Aznavorian*, 439 U. S. 170 (1978) (upholding constitutionality of § 1611 (f)); *Califano* v. *Torres*, 435 U. S. 1 (1978) (upholding constitutionality of Congress' exclusion from SSI eligibility of residents of Puerto Rico). Thus, in § 1611 (e), Congress made a distinction not between the mentally ill and a group composed of nonmentally ill, but between residents in public institutions receiving Medicaid

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August 1977, Research and Statistics Note No. 9 (Sept. 16, 1980). This study established that 15% of the total population receiving SSI benefits (for all reasons, including age, blindness, and disability) had "representative payees" (a person "appointed to manage the benefits of an adult beneficiary" because of "the adult beneficiary's inability to manage his own funds"). *Id.*, at 1. Out of a total of 184,133 institutionalized persons who were receiving SSI benefits in August 1977 through such "representative payees," 76,494, or approximately 41%, were institutionalized because of mental disorders. *Id.*, at 7 (Table 6) and 2 (Table 1). Thus, even on this incomplete data, a sizable number of SSI recipients were persons institutionalized for mental illness.

[15] Appellees appear to concede the rationality of Congress' general exclusion of publicly institutionalized persons from full SSI benefits.

[16] An otherwise eligible person does not receive SSI benefits if he is receiving long-term treatment in a medical facility that is not certified under Medicaid standards as a provider. See § 1861 of the Act, 42 U. S. C. § 1395x. These strict standards exclude many facilities but work to the ultimate benefit of those receiving Medicaid Cf. *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773 (1980).

funds for their care and residents in such institutions not receiving Medicaid funds.

To the extent that the statute has an indirect impact upon the mentally ill as a subset of publicly institutionalized persons, this record certainly presents no statistical support for a contention that the mentally ill as a class are burdened disproportionately to any other class affected by the classification. The exclusion draws a line only between groups composed (in part) of mentally ill individuals: those in public mental hospitals and those not in public mental hospitals. These groups are shifting in population, and members of one group can, and often do, pass to the other group.[17]

We also note that appellees have failed to produce any evidence that the intent of Congress was to classify on the

[17] The average inpatient stay in public mental hospitals is short. Recently collected data for 1975 reveal a median stay in state and county mental hospitals of only 25.5 days. Witkin, Characteristics of Admissions to Selected Mental Health Facilities, 1975: An Annotated Book of Charts and Tables, National Institute of Mental Health 93, DHHS Publication No. (ADM) 80–1005 (1981). This study also showed that young and elderly patients had longer periods of stay than patients in the middle-age group *Id.*, at 95. The rapidity with which inpatients are released from public institutions has increased since the 1950's. In 1971 75% of all patients admitted to state mental hospitals were released within the first three months, while 87% were released within the first six months. Ozarin, Redick, & Taube, A Quarter Century of Psychiatric Care, 1950–1974: A Statistical Review, 27 Hospital & Community Psychiatry 515, 516 (1976). Data from the National Institute of Mental Health show that the proportion of "patient care episodes" (admissions during a year plus residents at the beginning of the year) attributable to inpatient treatment at state and county hospitals declined from 49% in 1955 to 9% in 1977. This dramatic decrease in the percentage of persons admitted to these hospitals was paralleled by a growth in treatment through outpatient and community mental health facilities; that percentage grew from 23% in 1955 to 76% in 1977. Witkin, Trends in Patient Care Episodes in Mental Health Facilities, 1955–1977, National Institute of Mental Health, Mental Health Statistical Note No. 154, p. 3 (Sept 1980). At the same time, the total number of "patient care episodes" increased fourfold, from approximately 1.7 million in 1955 to 6.9 million in 1977. *Id.*, at 1.

basis of mental health. Appellees admit that no such evidence exists; indeed, they rely on the absence of explicit intent as proof of Congress' "inattention" to their needs and, therefore, its prejudice against them. Brief for Appellees 39. As in *Jefferson* v. *Hackney,* 406 U. S. 535 (1972), the indirect deprivation worked by this legislation upon appellees' class, whether or not the class is considered "suspect," does not without more move us to regard it with a heightened scrutiny. Cf. *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256 (1979).

B

Thus, the pertinent inquiry is whether the classification employed in § 1611 (e)(1)(B) advances legitimate legislative goals in a rational fashion. The Court has said that, although this rational-basis standard is "not a toothless one," *Mathews* v. *Lucas,* 427 U. S. 495, 510 (1976), it does not allow us to substitute our personal notions of good public policy for those of Congress:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78." *Dandridge* v. *Williams,* 397 U. S., at 485.

The Court also has said: "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307,

314 (1976). See also *United States Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166 (1980). As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

We believe that the decision to incorporate the Medicaid eligibility standards into the SSI scheme must be considered Congress' deliberate, considered choice. The legislative record, although sparse, appears to be unequivocal. Both House and Senate Reports on the initial SSI bill noted the exclusion in no uncertain terms. The House Report stated:

> "People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution. No assistance benefits will be paid to an individual in a penal institution." H. R. Rep. No. 92–231, p. 150 (1971).

The Senate Report followed the House's language almost identically. See S. Rep. No. 92–1230, p. 386 (1972). We find these passages, at the very least, to be a clear expression of Congress' understanding that the stipend grant was to be limited to a group smaller than the total population of otherwise eligible, institutionalized people. That the bill's section-by-section analysis contained in the House Report laid out the terms of the exclusion precisely supports the conclusion that Congress was aware of who was included in that limited group. See H. R. Rep. No. 92–231, at 334.

The limited nature of Medicaid eligibility did not pass unnoticed by the enacting Congress. In the same bill that established the SSI program, Congress considered, and passed,

an amendment to Medicaid, providing coverage of inpatient services to a large number of the juvenile needy in public mental institutions.[18] See § 1905 (h) of the Act, 42 U. S. C. § 1396d (h); S. Rep. No. 92–1230, at 280–281; H. R. Conf. Rep. No. 92–1605, p. 65 (1972). Also, a Senate proposal for demonstration projects on the feasibility of extending Medicaid to cover all inpatient services provided in public mental institutions was simultaneously defeated. See S. Rep. No. 92–1230, at 281; H. R. Conf. Rep. No. 92–1605, at 65. Congress was in the process of considering the wisdom of these limitations at the time it chose to incorporate them into the SSI provisions. The decision to do so did not escape controversy. The Committee hearings contained testimony advocating extension of both Medicaid and SSI benefits to all needy residents in public mental institutions. See Social Security Amendments of 1971, Hearings on H. R. 1 before the Senate Committee on Finance, 92d Cong., 1st and 2d Sess., 2180, 2408–2410, 2479–2485, 3257, 3319 (1972). This legislative history shows that Congress was aware, when it added § 1611 (e) to the Act, of the limitations in the Medicaid program that would restrict eligibility for the reduced SSI benefits; we decline to regard such deliberate action as the result of inadvertence or ignorance. See *Maine* v. *Thiboutot*, 448 U. S. 1, 8 (1980).

Having found the adoption of the Medicaid standards intentional, we deem it logical to infer from Congress' deliberate action an intent to further the same subsidiary purpose that lies behind the Medicaid exclusion, which, as no party denies, was adopted because Congress believed the States to have a "traditional" responsibility to care for those institutionalized

[18] To be eligible for Medicaid reimbursement for inpatient services, mentally ill persons under the age of 21 being treated in mental institutions must be receiving "active treatment" that meets standards prescribed by the Secretary and that "can reasonably be expected to improve the condition, by reason of which such services are necessary, to the extent that eventually such services will no longer be necessary." § 1905 (h) (1) (B) of the Act, 42 U. S. C. § 1396d (h) (1) (B).

in public mental institutions.[19] The Secretary, emphasizing the then-existing congressional desire to economize in the disbursement of federal funds, argues that the decision to limit distribution of the monthly stipend to inmates of public institutions who are receiving Medicaid funds "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units" and "may be said to implement a congressional policy choice to provide supplemental financial assistance for only those residents of public institutions who already receive significant federal support in the form of Medicaid coverage." Brief for Appellant 27–28. We cannot say that the belief that the States should continue to have the primary responsibility for making this small "comfort money" allowance available to those residing in state-run institutions is an irrational basis for withholding from them federal general welfare funds.[20]

[19] The Medicaid limitation was based on Congress' assumption that the care of persons in public mental institutions was properly a responsibility of the States. See H. R Rep. No. 1300, 81st Cong., 1st Sess., 42 (1949) (enacting federal funding for services to the needy aged, blind, and disabled provided in public medical institutions, but excluding assistance to those in "public or private institutions for mental illness and tuberculosis, since the States have generally provided for medical care of such cases"); S Rep No. 404, 89th Cong., 1st Sess., pt. 1, pp. 144–147 (1965) (enactment of Medicaid providing coverage only to the aged needy in mental or tuberculosis institutions; noting that "[t]he reason for this exclusion was that long-term care in such hospitals had traditionally been accepted as a responsibility of the States," *id.*, at 144). This exclusion was upheld in *Legion* v. *Richardson*, 354 F. Supp. 456 (SDNY), summarily aff'd *sub nom. Legion* v. *Weinberger*, 414 U. S. 1058 (1973), and *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (DC 1974), aff'd, 174 U. S. App. D. C. 182, 530 F. 2d 1034, cert. denied, 429 U. S 819 (1976), and appellees disavow any intention to dispute that holding. Brief for Appellees 26–27; Tr. of Oral Arg. 19.

[20] Whether a State chooses to elect or not to elect to provide an equivalent monthly stipend to institutionalized mental patients does not alter the rationality of Congress' decision.

Although we understand and are inclined to be sympathetic with appellees' and their supporting *amici*'s assertions as to the beneficial effects of a patient's receiving the reduced stipend, we find this a legislative, and not a legal, argument. Congress rationally may elect to shoulder only part of the burden of supplying this allowance, and may rationally limit the grant to Medicaid recipients, for whose care the Federal Government already has assumed the major portion of the expense.[21] The limited gratuity represents a partial solution to a far more general problem,[22] and Congress legitimately may assume that the States would, or should, provide an equivalent, either in funds or in basic care. See *Baur* v. *Mathews*, 578 F. 2d 228, 233 (CA9 1978). This Court has granted a "strong presumption of constitutionality" to legislation conferring monetary benefits, *Mathews* v. *De Castro*, 429 U. S., at 185, because it believes that Congress should have discretion in deciding how to expend necessarily limited resources. Awarding this type of benefits inevitably involves the kind of line-drawing that will leave some comparably needy person outside the favored circle.[23] We cannot say

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[21] The Secretary has interpreted § 1611 (e)(1)(B) to require that at least 50% of the cost of services be reimbursed by Medicaid before the reduction of benefits becomes effective 20 CFR § 416.231 (b)(5)(1980).

[22] Congress continues to investigate other more general solutions and to propose alterations in § 1611 (e). See H. R. Rep. No. 96–451, pt. 1, p. 153 (1979); 125 Cong. Rec. 31349–31350, 31354–31355, 31356 (1979) (remarks of Rep. Corman, Rep. Pepper, and Rep. Bingham) (proposing amendment to § 1611 (e) to forestall reduction of benefits until after eligible individual has been institutionalized in a Medicaid institution for three months); Staff of the Senate Committee on Finance, The Supplemental Security Income Program, 95th Cong., 1st Sess., 109–115 (Comm. Print 1977) (advocating legislative amendments standardizing the monthly stipend to institutionalized persons).

[23] "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually

that it was irrational of Congress, in view of budgetary constraints,[24] to decide that it is the Medicaid recipients in public institutions that are the most needy and the most deserving of the small monthly supplement. See, *e. g.*, *Califano* v. *Boles*, 443 U. S. 282, 296 (1979); *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977); *Weinberger* v. *Salfi*, 422 U. S. 749, 768–770 (1975); *Richardson* v. *Belcher*, 404 U. S. 78, 83–84 (1971).

We conclude that Congress did not violate appellees' rights to equal protection by denying them the supplementary benefit. The judgment of the District Court is reversed.

It is so ordered.

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

The Court holds that Congress rationally has denied a small monthly "comfort allowance" to otherwise eligible people solely because previously it rationally denied them Medicaid benefits. In my view, Congress thoughtlessly has applied

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picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (1928) (Holmes, J., dissenting).

[24] The amount of money, and the number of people potentially involved, are not inconsiderable. Although the appellees do not agree, the Secretary estimates that the annual cost of implementing the District Court's order nationwide would approximate $30 million. Reply Memorandum for Appellant 3. In 1979, a total of almost 2.2 million people were receiving SSI benefits for disabilities, an increase of over 900,000 from January 1974. See Social Security Bulletin 49 (Table M–24) (June 1979). Further, of all the disabled adults who applied for benefits between January 1974 and July 1975, 1.1% were denied eligibility by reason of their residence in a public institution. See S. Rep. No. 95–1312, p. 7 (table) (1978).

a statutory classification developed to further legitimate goals of one welfare program to another welfare program serving entirely different needs. The result is an exclusion of wholly dependent people from minimal benefits, serving no Government interest. This irrational classification violates the equal protection component of the Due Process Clause of the Fifth Amendment.

I

The Supplemental Security Income (SSI) program is a comprehensive federal program of minimal cash welfare benefits for the indigent blind, aged, and disabled. 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* See generally *Califano* v. *Aznavorian,* 439 U. S. 170, 171 (1978). Section 1611 (e)(1)(A) of the Act, 42 U. S. C. § 1382 (e)(1)(A), operates to reduce substantially, to $25 per month, the SSI benefits available to otherwise eligible persons who reside in public institutions. The reason for this reduction of benefit is understandable:

> "For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution." H. R. Rep. No. 92–231, p. 150 (1971).

See also S. Rep. No. 92–1230, p. 386 (1972). This comfort allowance is provided to institution residents only if the qualified person resides in a public hospital or institution that receives Medicaid funds on his behalf. 42 U. S. C. § 1382 (e)(1)(B). Thus, no comfort allowance will be paid to an individual unless the form of institutionalized treatment he receives is compensable under the separate Medicaid program.

Appellees are indigent people disabled by mental illness, and thus otherwise are eligible for SSI payments under 42 U. S. C. §§ 1382c (a)(3)(A), (C). As residents of public mental institutions between the ages of 21 and 65, however, they are ineligible to receive Medicaid benefits for their

treatment. § 1396a (a)(17)(B).[1] For this reason, and none other, appellees may not receive the reduced monthly SSI payments available to inmates of other medical institutions, including patients in public medical hospitals and private mental institutions.[2]

The refusal to pay for treatment in public mental institutions has a lengthy history in the development of the federal medical assistance programs. See *Legion* v. *Richardson,* 354 F. Supp. 456 (SDNY), summarily aff'd *sub nom. Legion* v. *Weinberger,* 414 U. S. 1058 (1973). Initially, Congress broadly refused federal aid to individuals diagnosed as mentally ill, ch. 809, §§ 303 (a), 343 (a), 351, 64 Stat. 549, 554, 557–558. Subsequent enactments, however, have extended Medicaid coverage to treatment of mental illness in public or private medical hospitals or nursing homes, 42 U. S. C. §§ 1396d (a)(1), (4) (1976 ed. and Supp. III), and to treatment of mental illness of those under 21 and 65 or over in public mental institutions, §§ 1396d (a)(14), (16). Moreover, Congress has defined "public institution" not to include a publicly operated community residence center serving no more than 16 residents. § 1382 (e)(1)(C). Thus, federal medical benefits have been extended to the mentally ill for

[1] Other classes of institutionalized people denied the reduced SSI allowance include patients in tubercular institutions and prison inmates.

[2] The Court too quickly dispatches the argument that § 1611 (e) classifies on the basis of mental illness. While it is true that not all mentally ill people are denied the benefit, and that some people denied the benefit are not mentally ill, it is inescapable that appellees are denied the benefit because they are patients in mental institutions. Only the mentally ill are treated in mental institutions. While I would agree that there is no indication that Congress intended to punish or slight the mentally ill, the history of Medicaid demonstrates Congress' disinclination to involve the Federal Government in state treatment of mental illness in public institutions. See *infra,* at this page and 242. Because I find the classification irrational, I do not reach the question whether classifications drawn in part on the basis of mental health require heightened scrutiny as appellees suggest.

treatment in various contexts. The residual exclusion of large state institutions for the mentally ill from federal financial assistance rests on two related principles: States traditionally have assumed the burdens of administering this form of care, and the Federal Government has long distrusted the economic and therapeutic efficiency of large mental institutions. See S. Rep. No. 404, 89th Cong., 1st Sess., 20 (1965). See also 42 U. S. C. § 1396d (h)(1)(B) (persons under 21 receive Medicaid benefits for treatment in mental institutions only when standards of utility are met).

The legislative history of § 1611 (e) sheds no light on why Congress made the exclusion from reduced SSI benefits coextensive with the exclusion from Medicaid payments.[3] The Secretary argues that Congress might rationally have concluded that the States have the primary responsibility for making payments of comfort allowances to appellees, because they already bear the responsibility for paying for their treatment. Brief for Appellant 27. In accepting this justification, the Court adds that whether the States do, ever have, or ever will provide this benefit to residents of large mental institutions is irrelevant to the rationality of Congress' supposed judgment. *Ante,* at 237, n. 20.

II

A

Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights must be upheld under the equal protection component of the Fifth Amendment when the legislative means are rationally related to a legitimate Government purpose. *U. S. Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166 (1980). See *San Antonio In-*

[3] The only indication of congressional intent states: "No assistance benefits will be paid to an individual in a penal institution." H. R. Rep. No. 92–231, p. 150 (1971). A mental hospital is not a penal institution. Neither the Secretary nor the Court argues that the exclusion of appellees from the comfort allowance rationally furthers this purpose.

pendent School District v. *Rodriguez,* 411 U. S. 1, 17 (1973); *Dandridge* v. *Williams,* 397 U. S. 471 (1970). This simply stated test holds two firmly established principles in tension. The Court must not substitute its view of wise or fair legislative policy for that of the duly elected representatives of the people, *Vance* v. *Bradley,* 440 U. S. 93, 109 (1979); *Dandridge, supra,* at 485–486, but the equal protection requirement does place a substantive limit on legislative power. At a minimum, the legislature cannot arbitrarily discriminate among citizens. *E. g., Johnson* v. *Robison,* 415 U. S. 361, 374–375 (1974); *James* v. *Strange,* 407 U. S. 128, 140 (1972); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 175 (1972). Enforcing this prohibition while avoiding unwarranted incursions on the legislative power presents a difficult task. No bright line divides the merely foolish from the arbitrary law.[4] Given this difficulty, legislation properly enjoys a presumption of rationality, which is particularly strong for welfare legislation where the apportionment of scarce benefits in accordance with complex criteria requires painful but unavoidable line-drawing. *Mathews* v. *De Castro,* 429 U. S. 181, 185 (1976).

The deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people. Accordingly, an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature in-

[4] The Court has employed numerous formulations for the "rational basis" test. *U. S. Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 176–177, n. 10 (1980). Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear, see *id.,* at 180–181 (STEVENS, J., concurring in judgment); *id.,* at 187–188 (BRENNAN, J., dissenting), and about the degree of deference afforded the legislature in suiting means to ends, compare *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911), with *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920).

tended to serve. See, *e. g., U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 536–538 (1973); *McGinnis* v. *Royster*, 410 U. S. 263, 270 (1973). When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernible purpose receive the most respectful deference. See *Harris* v. *McRae*, 448 U. S. 297 (1980); *Maher* v. *Roe*, 432 U. S. 464, 479 (1977); *Weinberger* v. *Salfi*, 422 U. S. 749 (1975). Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.[5]

In my view, the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history.[6] When no indication of legislative

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[5] Congress' failure to make policy judgments can distort our system of separation of powers by encouraging other branches to make essentially legislative decisions. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 743 (1979) (POWELL, J., dissenting).

[6] Some of our cases suggest that the actual purpose of a statute is irrelevant, *Flemming* v. *Nestor*, 363 U. S. 603, 612 (1960), and that the statute must be upheld "if any state of facts reasonably may be conceived to justify" its discrimination, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). Although these cases preserve an important caution, they do not describe the importance of actual legislative purpose in our analysis. We recognize that a legislative body rarely acts with a single mind and that compromises blur purpose. Therefore, it is appropriate to accord some deference to the executive's view of legislative intent, as similarly we accord deference to the consistent construction of a statute by the administrative agency charged with its enforcement. *E. g., Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Ascertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection.

purpose appears other than the current position of the Secretary, the Court should require that the classification bear a "fair and substantial relation" to the asserted purpose. See *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920). This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than "a mere tautological recognition of the fact that Congress did what it intended to do." *Fritz, supra,* at 180 (STEVENS, J., concurring in judgment).

B

Neither the structure of § 1611 nor its legislative history identifies or even suggests any policy plausibly intended to be served by denying appellees the small SSI allowance. As noted above, the only purpose identified in the House and Senate Reports is the irrelevant goal of depriving inmates of penal institutions of all benefits. See n. 3, *supra.* The structure of the statute offers no guidance as to purpose because § 1611 (e) is drawn in reference to the policies of Medicaid rather than to the policies of SSI. By mechanically applying the criteria developed for Medicaid, Congress appears to have avoided considering what criteria would be appropriate for deciding in which public institutions a person can reside and still be eligible for some SSI payment. The importation of eligibility criteria from one statute to another creates significant risks that irrational distinctions will be made between equally needy people. See *U. S. Dept. of Agriculture* v. *Murry,* 413 U. S. 508, 514 (1973); *Medora* v. *Colautti,* 602 F. 2d 1149 (CA3 1979).

The Secretary argues, and the Court agrees, that the exclusion "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units." Brief for Appellant 27. The Secretary does not argue that appellees are not

in present need of the comfort allowance; indeed, he concedes that "the statutory classification does not exclude [appellees] because they were thought to be less needy." *Id.*, at 32.[7] Nor does the Secretary suggest that because a State provides health care and the necessities of life to inmates of mental hospitals, the State also will provide the inmate with a comfort allowance. Indeed, the probability that a State will pay a patient a comfort allowance does not increase when the Federal Government refuses to relieve it of part of the cost of the patient's medical care. The Court apparently recognizes this, as it states that whether or not a State actually provides a comfort allowance is irrelevant. *Ante,* at 237, n. 20. Appellees simply are denied a benefit provided to other institutionalized, disabled patients.

But, it is argued, Congress rationally could make the judgment that the States should bear the responsibility for any comfort allowance, because they already have the responsibility for providing treatment and minimal care. There is no logical link, however, between these two responsibilities. See *U. S. Dept. of Agriculture* v. *Murry, supra.* Residence in a public mental hospital is rationally related to whether the Congress should pay for the patient's treatment. *Legion* v. *Richardson,* 354 F. Supp. 456 (SDNY), summarily aff'd *sub nom. Legion* v. *Weinberger,* 414 U. S. 1058 (1973). The judgment whether the Federal Government should subsidize care for the mentally ill in large public institutions involves difficult questions of medical and economic policy. *Supra,* at 241–242. But residence in a *public mental* institution, as opposed to residence in a state *medical* hospital or a *private* mental hospital, bears no relation to any policy of the SSI program. The monthly $25 allowance pays for small personal expenses, beyond the minimal care and treatment pro-

[7] This concession makes it difficult to accept the Court's conclusion that Congress rationally could have decided that "Medicaid recipients in public institutions . . . are the most needy and the most deserving of the small monthly supplement." *Ante,* at 239.

vided by Medicaid or "other programs." H. R. Rep. No. 96–451, pt. 1, p. 153 (1979). If SSI pays a cash benefit relating to personal needs other than maintenance and medical care, it is irrelevant whether the State or the Federal Government is paying for the maintenance and medical care; the patients' need remains the same, the likelihood that the policies of SSI will be fulfilled remains the same.

I conclude that Congress had no rational reason for refusing to pay a comfort allowance to appellees, while paying it to numerous otherwise identically situated disabled indigents. This unexplained difference in treatment must have been a legislative oversight. I therefore dissent.

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE

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

No. 79–1764. Argued December 9, 1980—Decided March 4, 1981

Respondent filed suit in Federal District Court, alleging, *inter alia,* that her termination of employment with petitioner was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court found that the testimony for petitioner sufficiently had rebutted respondent's allegation of gender discrimination in the decision to terminate her employment. The Court of Appeals reversed this finding, holding that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate, nondiscriminatory reasons for the employment action and also must prove by objective evidence that those hired were better qualified than the plaintiff, and that the testimony for petitioner did not carry either of these burdens.

Held: When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. Pp. 252–260.

(a) As set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, the basic allocation of burdens and order of presentation of proof in a Title VII case, is as follows. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.,* at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The defendant need not persuade the court that it was actually motivated by the proffered reasons, but it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. Pp. 252–256.

(b) The Court of Appeals erred by requiring petitioner to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating respondent. By doing this, the court required much more than is required by *McDonnell Douglas, supra,* and its progency: it placed on petitioner the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the respondent Limiting the defendant's evidentiary obligation to a burden of production will not unduly hinder the plaintiff Pp. 256–258.

(c) The Court of Appeals also erred in requiring petitioner to prove by objective evidence that the person hired was more qualified than respondent. It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally, but the Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected, and if it cannot, a court would, in effect, conclude that it has discriminated. The Court of Appeals' views can also be read as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. Pp. 258–259.

608 F. 2d 563, vacated and remanded.

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

Gregory Wilson, Assistant Attorney General of Texas, argued the cause *pro hac vice* for petitioner. With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, *Lonny F. Zwiener,* Assistant Attorney General, and *Paul R. Gavia.*

Hubert L. Gill argued the cause and filed a brief for respondent.*

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an em-

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

ployment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

PSC was funded completely by the United States Department of Labor. The Department was seriously concerned about inefficiencies at PSC.[1] In February 1973, the Department notified the Executive Director of TDCA, B. R. Fuller, that it would terminate PSC the following month. TDCA officials, assisted by respondent, persuaded the Department to continue funding the program, conditioned upon PSC's reforming its operations. Among the agreed conditions were the appointment of a permanent Project Director and a complete reorganization of the PSC staff.[2]

After consulting with personnel within TDCA, Fuller hired

[1] Among the problems identified were overstaffing, lack of fiscal control, poor bookkeeping, lack of communication among PSC staff, and the lack of a full-time Project Director. Letter of March 20, 1973, from Charles Johnson to B. R. Fuller, reprinted in App. 38–40.

[2] See *id.*, at 39.

a male from another division of the agency as Project Director. In reducing the PSC staff, he fired respondent along with two other employees, and retained another male, Walz, as the only professional employee in the division. It is undisputed that respondent had maintained her application for the position of Project Director and had requested to remain with TDCA. Respondent soon was rehired by TDCA and assigned to another division of the agency. She received the exact salary paid to the Project Director at PSC, and the subsequent promotions she has received have kept her salary and responsibility commensurate with what she would have received had she been appointed Project Director.

Respondent filed this suit in the United States District Court for the Western District of Texas. She alleged that the failure to promote and the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII. After a bench trial, the District Court held that neither decision was based on gender discrimination. The court relied on the testimony of Fuller that the employment decisions necessitated by the commands of the Department of Labor were based on consultation among trusted advisers and a nondiscriminatory evaluation of the relative qualifications of the individuals involved. He testified that the three individuals terminated did not work well together, and that TDCA thought that eliminating this problem would improve PSC's efficiency. The court accepted this explanation as rational and, in effect, found no evidence that the decisions not to promote and to terminate respondent were prompted by gender discrimination.

The Court of Appeals for the Fifth Circuit reversed in part. 608 F. 2d 563 (1979). The court held that the District Court's "implicit evidentiary finding" that the male hired as Project Director was better qualified for that position than respondent was not clearly erroneous. Accordingly, the court affirmed the District Court's finding that respondent was not discriminated against when she was not promoted. The

Court of Appeals, however, reversed the District Court's finding that Fuller's testimony sufficiently had rebutted respondent's prima facie case of gender discrimination in the decision to terminate her employment at PSC. The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff. The court found that Fuller's testimony did not carry either of these evidentiary burdens. It, therefore, reversed the judgment of the District Court and remanded the case for computation of backpay.[3] Because the decision of the Court of Appeals as to the burden of proof borne by the defendant conflicts with interpretations of our precedents adopted by other Courts of Appeals,[4] we granted certiorari. 447 U. S. 920 (1980). We now vacate the Fifth Circuit's decision and remand for application of the correct standard.

II

In *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.[5] First, the plaintiff has the burden of proving by

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[3] The Court of Appeals also vacated the District Court's judgment that petitioner did not violate Title VII's equal pay provision, 42 U. S. C. § 2000e–2 (h), but that decision is not challenged here.

[4] See, *e. g., Lieberman* v. *Gant,* 630 F. 2d 60 (CA2 1980); *Jackson* v. *U. S. Steel Corp.,* 624 F. 2d 436 (CA3 1980); *Ambush* v. *Montgomery County Government,* 22 FEP Cases 1101 (CA4 1980); *Loeb* v. *Textron, Inc.,* 600 F. 2d 1003 (CA1 1979). But see *Vaughn* v. *Westinghouse Elec. Corp.,* 620 F. 2d 655 (CA8 1980), cert. pending, No. 80–276.

[5] We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. See *McDonnell Douglas,* 411 U. S., at 802, n. 14; *Teamsters* v. *United States,* 431 U. S. 324, 335–336, and n. 15 (1977).

the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. See *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25, n. 2 (1978); *id.*, at 29 (STEVENS, J., dissenting). See generally 9 J. Wigmore, Evidence § 2489 (3d ed. 1940) (the burden of persuasion "never shifts"). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a proponderence of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.[6] The prima facie case serves an important

[6] In *McDonnell Douglas, supra*, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff must show:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

We added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above

function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters* v. *United States,* 431 U. S. 324, 358, and n. 44 (1977). As the Court explained in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[7]

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra,* at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plain-

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of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.,* at 802, n. 13.

In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision.

[7] The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

tiff.[8] To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[9] The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the

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[8] This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. "The word 'presumption' properly used refers only to a device for allocating the production burden." F. James & G. Hazard, Civil Procedure § 7.9, p. 255 (2d ed. 1977) (footnote omitted). See Fed. Rule Evid. 301. See generally 9 J. Wigmore, Evidence § 2491 (3d ed. 1940). Cf. J. Maguire, Evidence, Common Sense and Common Law 185–186 (1947). Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

[9] An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

[10] See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas,* 411 U. S., at 804–805.

III

In reversing the judgment of the District Court that the discharge of respondent from PSC was unrelated to her sex, the Court of Appeals adhered to two rules it had developed to elaborate the defendant's burden of proof. First, the defendant must prove by a preponderence of the evidence that legitimate, nondiscriminatory reasons for the discharge existed. 608 F. 2d, at 567. See *Turner* v. *Texas Instruments, Inc.,* 555 F. 2d 1251, 1255 (CA5 1977). Second, to satisfy this burden, the defendant "must prove that those he hired . . . were somehow *better* qualified than was plaintiff; in other words, comparative evidence is needed." 608 F. 2d, at 567 (emphasis in original). See *East* v. *Romine, Inc.,* 518 F. 2d 332, 339–340 (CA5 1975).

A

The Court of Appeals has misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on the defendant. See Part II, *supra.* We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" 439 U. S., at 25, n. 2, quoting *id.,* at 28, 29 (STEVENS, J., dissenting). It is plain that the Court

of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff.[11]

The Court of Appeals distinguished *Sweeney* on the ground that the case held only that the defendant did not have the burden of proving the absence of discriminatory intent. But this distinction slights the rationale of *Sweeney* and of our other cases. We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.

The court placed the burden of persuasion on the defendant apparently because it feared that "[i]f an employer need

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[11] The court reviewed the defendant's evidence and explained its deficiency:

"Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *East* found such unsubstantiated assertions of 'qualification' and 'prior work record' insufficient absent data that will allow a true *comparison* of the individuals hired and rejected." 608 F. 2d, at 568.

only *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." *Turner* v. *Texas Instruments, Inc., supra,* at 1255 (emphasis in original). We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. *Supra,* at 255. See *Loeb* v. *Textron, Inc.,* 600 F. 2d 1003, 1011–1012, n. 5 (CA1 1979). This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. See *EEOC* v. *Associated Dry Goods Corp.,* 449 U. S. 590 (1981). Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

B

The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U. S., at 804. The Court of Appeals' rule would require

the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex, and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas, supra,* at 801. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U. S. C. § 2000e–2 (j). See *Steelworkers* v. *Weber,* 443 U. S. 193, 205–206 (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.,* at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 577–578 (1978).

The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb* v. *Textron, Inc., supra,* at 1012, n. 6; see *Lieberman* v. *Gant,* 630 F. 2d 60, 65 (CA2 1980).

IV

In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the

existence of nondiscriminatory reasons for terminating the respondent and that the person retained in her stead had superior objective qualifications for the position.[12] When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. 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.

[12] Because the Court of Appeals applied the wrong legal standard to the evidence, we have no occasion to decide whether it erred in not reviewing the District Court's finding of no intentional discrimination under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a). Addressing this issue in this case would be inappropriate because the District Court made no findings on the intermediate questions posed by *McDonnell Douglas*.

Syllabus

WOOD ET AL. v. GEORGIA

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 79–6027. Argued November 4, 1980—Decided March 4, 1981

Petitioners, former employees of an "adult" movie theater and bookstore, were convicted of distributing obscene materials in violation of a Georgia statute and received fines and jail sentences but were placed on probation on the condition that they make monthly installment payments toward the satisfaction of the fines. When petitioners failed to make the payments, a probation revocation hearing was held. Petitioners, who had by that time left their jobs in the "adult" establishments, offered evidence of their inability to make the payments and stated that they had expected their former employer to pay the fines for them. When petitioners were unable to make up their arrearages, the Georgia trial court denied their motion to modify the probation conditions and ordered petitioners to serve the remaining portions of their jail sentences. After the Georgia Court of Appeals affirmed, this Court granted a writ of certiorari to decide whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines.

Held: This is an inappropriate case in which to decide the equal protection question. Since the record suggests that petitioners may be in their present predicament because of their counsel's divided loyalties, a possible due process violation is apparent, and the case is remanded for further findings concerning such possible violation. Pp 264–274.

(a) The transcript of the revocation hearing shows that petitioners understood that their former employer would provide legal assistance if they should face legal trouble as a result of their employment, would pay any fines, and would post any necessary bonds. Petitioners have been represented since the time of their arrest by a single lawyer, who was paid by the employer and who posted bonds in this case and paid other fines when each of the petitioners was arrested a second time If petitioners' counsel was serving the employer's interest in obtaining an equal protection ruling that offenders cannot be jailed for failure to pay fines that are beyond their means, which could only occur if petitioners received fines beyond their own means and then risked jail by failing to pay, this conflict in goals may have influenced the trial court's decisions to impose large fines and to revoke the probations rather than modify the conditions thereof. Pp. 264–268.

(b) If counsel was influenced in his basic strategic decisions by the employer's interest, petitioners' due process right to representation free from conflicts of interest was not respected at the revocation hearing, or at earlier stages of the proceedings. The *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further. If on remand the court finds that an actual conflict of interest existed at the time of the probation revocation or earlier, and that there was no valid waiver of the right to independent counsel, it must hold a new revocation hearing untainted by a legal representative serving conflicting interests. Pp. 268–274.

150 Ga. App. 582, 258 S. E. 2d 171, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 274. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 274. STEWART, J., filed an opinion concurring in part and dissenting in part, *post*, p. 275. WHITE, J., filed a dissenting opinion, *post*, p. 275.

Glenn Zell argued the cause and filed a brief for petitioners.

John W. Dunsmore, Jr., Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, and *John C. Walden*, Senior Assistant Attorney General.

JUSTICE POWELL delivered the opinion of the Court.

Petitioners in this case are three persons who were convicted of distributing obscene materials and sentenced to periods of probation on the condition that they make regular installment payments toward the satisfaction of substantial fines. Because they failed to make these payments, their probations were revoked by the Georgia court, and they are now claiming that these revocations discriminated against them on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment. Since the record in this case

suggests that petitioners may be in their present predicament because of the divided loyalties of their counsel, we have concluded that it is inappropriate to reach the merits of this difficult equal protection issue. Instead, we remand this case for further findings concerning a possible due process violation.

I

Petitioners Tante and Allen were working, respectively, as the projectionist and ticket taker at the Plaza Theatre in Atlanta when they were arrested and charged with two counts of distributing obscene materials in violation of Ga. Code § 26–2101 (1978). About four months later, petitioner Wood was arrested and charged with two violations of the same provision after he sold two magazines to a policeman while working at the Plaza Adult Bookstore. There is no evidence that any of these employees owned an interest in the businesses they served or had any managerial responsibilities.

Tante and Allen were tried together and found guilty on both counts by a jury. A separate jury convicted Wood on both counts. All three were then sentenced by the same judge. Tante and Allen each received a fine of $5,000 and two concurrent jail sentences of 12 months, but they were allowed immediate probation. Wood received two $5,000 fines and two consecutive jail sentences of 12 months; he also was placed on probation immediately.

After these convictions were affirmed on appeal,[1] the trial court issued orders specifying the terms of probation. These required all three petitioners to make installment payments on their fines of $500 per month during the course of their periods of probation. After three months had elapsed, none of the petitioners had made any of the required payments, and the county probation officers therefore moved for revoca-

[1] *Allen* v. *State*, 144 Ga. App. 233, 240 S E. 2d 754 (1977), cert. denied, 439 U. S. 899 (1978); *Wood* v. *State*, 144 Ga. App. 236, 240 S. E. 2d 743 (1977), cert. denied, 439 U. S. 899 (1978).

tion of their probations. At a hearing on January 26, 1979, petitioners admitted that they had failed to make the installment payments, but offered convincing evidence of their inability to make these payments out of their own earnings.[2] They also stated that they had expected their employer[3] to pay the fines for them. Faced with petitioners' complete failure to satisfy a condition of their probations, the court decided to revoke these probations unless petitioners made up their arrearages within five days. Unable to do so, petitioners moved for a modification of the conditions of their probations. This motion was denied, and the court ordered petitioners to serve the remaining portions of their jail sentences.

II

After this revocation decision was affirmed by the Georgia Court of Appeals,[4] we granted a writ of certiorari to decide a question presented by the facts just summarized: whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines. 446 U. S. 951. On closer inspection, however, the record reveals other facts that make this an inappropriate case in which to decide the constitutional question. Where, as here, a possible due process violation is

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[2] According to their testimony, all of the petitioners had by that time left their jobs in the "adult" establishments. Allen testified that her only income was $250 per month from unemployment insurance. See Transcript of Revocation Hearing, State Court of Fulton County, Criminal Division (Jan. 26, 1979) (hereinafter Tr.), at 7. Tante testified that his income as a correction officer was $540 per month. *Id.*, at 35. He had been unemployed for eight months before obtaining that job. *Id.*, at 39–40. Wood testified that he was trying to support a family and earning $120 per week working at a truck and trailer rental yard. *Id.*, at 53–54.

[3] The record suggests that the Plaza Theatre, which employed Tante and Allen, and the Plaza Adult Bookstore, which employed Wood, were under common ownership.

[4] 150 Ga. App. 582, 258 S. E. 2d 171 (1979).

apparent on the particular facts of a case, we are empowered to consider the due process issue.[5] Moreover, for prudential reasons, it is preferable for us to remand for consideration of this issue, rather than decide a novel constitutional question that may be avoided. Cf. *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105 (1944) (broad constitutional

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[5] JUSTICE WHITE's dissenting opinion argues that this Court lacks jurisdiction to remand this case on due process grounds because, in his view, the conflict-of-interest issue has not been properly presented. To be sure, it was not raised on appeal below or included as a question in the petition for certiorari. These facts merely emphasize, however, why it *is* appropriate for us to consider the issue. The party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused. It is unlikely that he would concede that he had continued improperly to act as counsel. And certainly the State's Solicitor, whose duty it was to support the judgment below, could not be expected to do more than call the problem to the attention of the courts, as he did. Petitioners were low-level employees, and now appear to be indigent. See n. 2, *supra.* We cannot assume that they, on their own initiative, were capable of protecting their interests.

As indicated, *post,* at 277–278, n. 1; see also n. 20, *infra,* it is abundantly clear that the possibility of a conflict of interest was pointed out to the trial court at the revocation hearing. The State's Solicitor raised the issue repeatedly. The State's Brief in Opposition 4, n. 2, again identified the apparent conflict. See n. 20, *infra.* Accordingly, counsel for petitioners cannot be heard to complain of any lack of notice.

In this context, it is appropriate to treat the due process issue as one "raised" below, and proceed to consider it here. See *Boynton* v. *Virginia,* 364 U. S. 454, 457 (1960) (deciding a case on a statutory issue raised below but not raised in this Court). Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U. S. C. § 2106 (authorizing this Court to "require such further proceedings to be had as may be just under the circumstances"); R. Stern & E. Gressman, Supreme Court Practice § 6.27, p. 460 (5th ed. 1978) (in review of state cases, "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings"). See also *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974).

questions should be avoided where a case may be decided on narrower, statutory grounds on remand).

Petitioners have been represented since the time of their arrests by a single lawyer. The testimony of each petitioner at the probation revocation hearing makes it clear that none of them ever paid—or was expected to pay—the lawyer for his services.[6] They understood that this legal assistance was provided to them by their employer.[7] In fact, the transcript of this hearing reveals that legal representation was only one aspect of the assistance that was promised to petitioners if they should face legal trouble as a result of their employment. They were told that their employer also would pay any fines and post any necessary bonds,[8] and these promises were kept for the most part. In this case itself, as petitioners' lawyer stated at oral argument, bonds were posted with funds he provided.[9] In addition, when each of the petitioners was arrested a second time, he paid the resulting fines.[10] All aspects of this arrangement were revealed to the court at the revocation hearing.

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[6] See Tr. 26 (Allen); *id.*, at 43 (Tante); *id.*, at 63 (Wood).

[7] *E. g.*, *id.*, at 42–43 (Tante).

[8] As petitioners' lawyer himself put it: "I want to bring this before the Solicitor and the Court that I believe Mrs. Allen told me and she told the Probation Officer that she—they were told, given information that their fine would be paid. The bond would be paid and a lawyer would be representing them." *Id.*, at 14. See also *id.*, at 62–63 (Wood). During oral argument in this Court, the lawyer conceded that he had been paid by the employer during petitioners' trials. Tr. of Oral Arg. 15–16. He indicated that these payments stopped when petitioners went on probation and left their jobs with this employer, but he has never dispelled the implication that he has an ongoing employment arrangement with the employer.

[9] *Id.*, at 8. The fact that the employer provided appeal bonds for petitioners *after* the probation revocation hearing suggests that his involvement with the case did not end when petitioners quit work in these "adult" establishments.

[10] Tr. 12, 41, 56–57. These payments took place while the instant cases were still on direct appeal.

For some reason, however, the employer declined to provide money to pay the fines in the cases presently under review.[11] Since it was this decision by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident. The fact that the employer chose to refuse payment of these fines, even as it [12] paid other fines and paid the sums necessary to keep petitioners free on bond in this case, suggests the possibility that it was seeking—in its own interest—a resolution of the equal protection claim raised here. If offenders cannot be jailed for failure to pay fines that are beyond their own means, then this operator of "adult" establishments may escape the burden of paying the fines imposed on its employees when they are arrested for conducting its business. To obtain such a ruling, however, it was necessary for petitioners to receive fines that were beyond their own means and then risk jail by failing to pay.

Although we cannot be sure that the employer and petitioners' attorney were seeking to create a test case, there is a clear possibility of conflict of interest on these facts. Indications of this apparent conflict of interest may be found at various stages of the proceedings below. It was conceded at oral argument here that petitioners raised no protest about the

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[11] Counsel suggested at oral argument that the reason for this decision not to pay the fines was a change of ownership. It might also be explained by the fact that petitioners were no longer working for the "adult" establishments. Neither of these facts suggests, however, that the employer had lost interest in the case, since appeal bonds were provided for petitioners. Indeed, the providing of these appeal bonds suggests that the decision not to pay the fines themselves was a conscious one. And the fact that petitioners had left their jobs may have allowed the employer to pursue his goals without any concern about losing petitioners' services in the event of a probation revocation.

[12] The record does not make clear whether the employer was an individual or a corporation, or indeed even identify the employer.

size of the fines imposed at the time of sentencing. During the three months leading up to the probation revocation hearing they failed to pay even small amounts toward their fines to indicate their good faith. In fact, throughout this period, petitioners apparently remained under the impression that—as promised—the fines would be paid by the employer. Even at the revocation hearing itself, petitioners attempted to prove their inability to make the required payments but failed to make a motion for a modification of those requirements. That motion was not made until one day before petitioners were due to be incarcerated.[13] A review of these facts demonstrates that, if petitioners' counsel was serving the employer's interest in setting a precedent, this conflict in goals may well have influenced the decision of the trial court to impose such large fines, as well as the decision to revoke petitioners' probations rather than to modify the conditions.[14]

III

Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a

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[13] Petitioners' counsel states that he did attempt to alert the court to the problem of petitioners' inability to pay by letter, soon after their probations began. But no motion was made.

[14] There is also a danger that petitioners' lawyer was influenced in his strategic decisions by other improper considerations. Rather than relying solely on the equal protection claims, he could have sought leniency at the probation hearing by arguing that the stiff sentences imposed on petitioners should be modified in light of the employer's unanticipated refusal to pay the fines. But this would have required him to dwell on the apparent bad faith of his own employer, and to emphasize the possibly improper arrangement by which he came to represent petitioners. Thus it is not correct, as JUSTICE WHITE argues, *post*, at 281, that the "conflict of interests . . . only emerges by assuming that the employer . . . set out to construct a constitutional test case." Even if the employer's motives were unrelated to its interest in establishing a precedent, its refusal to pay the fines put the attorney in a position of conflicting obligations.

lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise.[15] One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest.[16] Another kind of risk is

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[15] As one court has stated:

"A conflict of interest inheres in every such situation. . . . It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *In re Abrams,* 56 N. J. 271, 276, 266 A. 2d 275, 278 (1970).

See also *In re Investigation Before April 1975 Grand Jury,* 174 U. S. App. D. C. 268, 274, n. 11, 531 F. 2d 600, 606, n. 11 (1976); *Pirillo* v. *Takiff,* 462 Pa. 511, 341 A. 2d 896 (1975), appeal dism'd and cert. denied, 423 U. S. 1083 (1976); ABA Model Code of Professional Responsibility DR 5–107 (A), (B) (1980); ABA Standards for Criminal Justice 4–3.5 (c) (2d ed. 1980); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 960–961 (1978).

[16] There are indications in the transcript of the revocation hearing that the State had been unable to learn the name of petitioners' employer, and that petitioners were concealing its identity. At one point, the Solicitor stated: "Mrs. Allen, is it not true each time you were arrested that we sought to get your cooperation to find out who is operating these places?" Tr. 28. Later, during the Solicitor's cross-examination of Tante, the following colloquy took place:

"Q Mr. Tante, who did you call when you said you called and told them to get someone else out there?

"A I called the secretary of the union first.

"Q And what about the company? Did you call them?

"A And the company, I gave notice to—whatever his name was. Mister—what was his name?

"MR. ZELL [petitioners' attorney] I'm sorry, I wasn't listening.

"A The manager of the theatre, Mister—I think it was you I told first. I said, 'I want to get out of the theatre as soon as possible. In fact, I'd

present where, as here, the party paying the fees may have had a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed.[17] As suggested above, the factual setting of this case requires the Court to take note of the potential unfairness resulting from this particular third-party fee arrangement. Petitioners were mere employees, performing the most routine duties, yet they received heavy fines on the apparent assumption that their employer would pay them. They now face prison terms solely because of the employer's failure to pay the fines, having been represented throughout

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like to leave now.' And I said, 'As far as I'm concerned, I'm out, and that's it.'

"Q You called Mr. Zell to tell him to get someone else out there to operate the theatre?

"A No, sir. I called my business secretary at the union, told them I wanted out; to find me another job. If they wanted to put a man in there send them out. And they informed me to get on out of there that they would not send another union man out there.

"Q But you also talked to someone with the company, you said?

"A At the time, I did not, sir. I told Mister—Mrs. Allen, I said—

"MR. ZELL Hold it. Hold it, Mr. Tante. It's now ten-thirty, Your Honor. We're getting into areas that—the only question here is violation or failure to pay as directed." *Id.*, at 45–46.

[17] The ABA Model Code of Professional Responsibility EC 5–23 (1980) states:

"A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. *Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client.* . . . Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom." (Emphasis added.)

by a lawyer hired by that employer. The potential for injustice in this situation is sufficiently serious to require us to consider whether petitioners have been deprived of federal rights under the Due Process Clause of the Fourteenth Amendment.

We have held that due process protections apply to parole and probation revocations. *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973); *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). In *Scarpelli* we adopted a standard for deciding when due process requires appointment of counsel for indigent offenders during revocation hearings. Recognizing that the "need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases," 411 U. S., at 789, we left it to the state tribunals to identify, on a case-by-case basis, the situations in which fundamental fairness requires appointed counsel.

In the present case, petitioners appeared at the hearing with retained counsel, as was their right under Ga. Code § 27–2713 (1978). But, significantly, petitioners would have had a right to appointed counsel if they had made the showing of indigence on which they now rely. *Scarpelli* established a presumption in favor of appointment of counsel in cases where the probation or parole violation is a matter of record but "there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and . . . the reasons are complex or otherwise difficult to develop or present." 411 U. S., at 790. This case, where there were assurances that the fines would be paid by an unnamed employer, falls into that category.

Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. *E. g., Cuyler* v. *Sullivan,* 446 U. S. 335 (1980); *Holloway* v. *Arkansas,* 435 U. S. 475, 481 (1978). Here, petitioners were represented by their employer's lawyer, who may not have pursued

their interests single-mindedly. It was his duty originally at sentencing and later at the revocation hearing, to seek to convince the court to be lenient. On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the proceedings below.

It is, however, difficult for this Court to determine whether an actual conflict of interest was present, especially without the benefit of briefing and argument on this issue. Nevertheless, the record does demonstrate that the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further.[18] The facts outlined above were all made known at that time. The court must have known that it had imposed disproportionately large fines—penalties that almost certainly were increased because of an assumption that the employer would pay the fines.[19] The court did know that petitioners' counsel had been provided by that employer and was pressing a constitutional attack rather than making the arguments for leniency that might well have resulted in substantial reductions in, or deferrals of, the fines. These facts demonstrate convincingly the duty of the court to recognize the possibility of a disqualifying conflict of interest. Any doubt as to whether the court should have been aware of the problem is dispelled

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[18] JUSTICE WHITE's dissent states that we have gone beyond the recent decision in *Cuyler* v *Sullivan,* 446 U. S. 335 (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists." *Id.,* at 347.

[19] Both counsel agreed that, in light of the size of the fines imposed on petitioners—relatively minor and impecunious participants in the criminal enterprises—the judge must have assumed that the employer would pay. Tr. of Oral Arg. 13, 40.

by the fact that the State raised the conflict problem explicitly and requested that the court look into it.[20]

For these reasons, we base our decision in this case on due process grounds. The judgment below is vacated and the case remanded with instructions that it be returned to the State Court of Fulton County. That court should hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier. If the court finds that an actual conflict of interest existed at that time, and that there

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[20] At one point during the discussion of Allen's case, the Solicitor, Mr Rhodes, put it this way:

"MR RHODES: What I'm trying to show is, Your Honor, that she in fact—that Mr. Zell [the attorney] was hired by someone else. She did not make the choice. That they sent Mr. Zell down here to represent her. And she may have acquiesced in it, but that she did not employ Mr. Zell to represent her.

"THE COURT: All right. How is that relevant to this issue?

"MR. RHODES: To what I say, *there's a conflict of interest in this case.*

"Mr. Zell is representing her employer, and there's two different interests there.

"They had promised this woman that they would pay her fine and they would take care of all these expenses. *There's a conflict.*

"Mr. Zell's, as I said, his first duty is to the persons that pay him. And that's what he's doing. He's trying to take care of them." Tr. 26–27 (emphasis added).

See also *id.*, at 14–15.

As noted in n. 5, *supra,* the State raised this problem here as an argument against a grant of certiorari. The State's Brief in Opposition 4, n. 2, stated:

"During the probation revocation hearing there were several discussions between the Court, the Petitioner's [*sic*] lawyer and the Solicitor concerning the fact that the Petitioner's [*sic*] lawyer also represents the Plaza Theater, the theater in which Petitioners Allen and Tante were employed. The argument of the Solicitor was that the employer had agreed to pay the fines, and now was attempting to get out of paying the fines by arguing that there was no agreement, and that Petitioners were now indigents . . . ."

was no valid waiver of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests.[21]

Vacated and remanded.

JUSTICE STEVENS, concurring.

Although I join the Court's opinion, my view that the potential conflict of interest disclosed by the record requires that the judgment be vacated does not rest on the hypothesis that the petitioners' employer may have contrived a test case. See *ante,* at 267–268, 269–270. It rests instead on the likelihood that the state trial court would have imposed a significantly different sentence if it had not been led to believe that the employer would pay the fines.

Independent counsel for these individuals surely would not have permitted the trial judge to impose fines that were manifestly beyond their ability to pay without obtaining an enforceable commitment from the employer. But a lawyer faithfully representing the interest of the employer surely would not make any such commitment gratuitously. The net result of the conflicting interests represented by one lawyer is a manifestly unfair prison sentence imposed on employees of the person who is probably the principal wrongdoer.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

While I agree with the Court that "there is a clear possibility of conflict of interest" shown on this record, *ante,* at 267,

[21] Because we are presented here only with the question of petitioners' probation revocations, we do not order more sweeping relief, such as vacating petitioners' sentences or reversing their convictions. Such actions do, however, remain within the discretion of the trial court upon appropriate motion.

There also is the possibility that this relief may be available in habeas corpus proceedings, if petitioners can show an actual conflict of interest during the trials or at the time of sentencing.

and that the Court has the option to remand on this issue, I would nevertheless finally dispose of this case. That can be done, as JUSTICE WHITE concludes, by reversing the judgment of the Georgia Court of Appeals, for the reason that *Tate* v. *Short,* 401 U. S. 395 (1971), compels that conclusion. I would, however, reverse the conviction for distributing obscene materials in violation of Ga. Code § 26–2101 (1978) under the view I have frequently expressed, and to which I adhere, that such an obscenity statute is facially unconstitutional. See *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73, 113 (1973) (BRENNAN, J., dissenting); *McKinney* v. *Alabama,* 424 U. S. 669, 678 (1976) (separate opinion of BRENNAN, J.).

JUSTICE STEWART, concurring in part and dissenting in part.

In my view the Court is correct in remanding because of the "clear possibility of conflict of interest" shown on the record in this case. I would, however, go further and reverse the convictions themselves, which were for violations of an obscenity statute. I believe that that statute, Ga. Code § 26–2101 (1978), is facially unconstitutional.

JUSTICE WHITE, dissenting.

The Court's disposition of this case is twice flawed: first, there is no jurisdiction to vacate the judgment on the federal constitutional ground upon which the Court rests; second, the record does not sustain the factual inferences required to support the Court's judgment.

I

The petition for certiorari presented a single federal question: Does the Equal Protection Clause of the Fourteenth Amendment permit a State to revoke an indigent's probation because he has failed to make regular payments toward the satisfaction of a fine? This issue was properly presented to and ruled upon by the Georgia courts. No other federal con-

stitutional issue was presented there or brought here. The Court, however, disposes of this case on another ground, but a ground that also involves a constitutional issue: the possibly divided loyalties of petitioners' counsel may have deprived petitioners of due process and their constitutional right to counsel. Thus, we are to avoid one constitutional issue in favor of another, which was not raised by petitioners either here or below. I do not believe that this Court has jurisdiction even to reach this question, nor do I see why we should prefer one constitutional issue to another, even if we had the jurisdiction.

The Court, *ante,* at 273, n. 20, suggests that the conflict-of-interest issue was presented here by respondent, the State of Georgia. But the State merely argued that petitioners' attorney was also the attorney for petitioners' employer who had agreed to pay the fine and who was now seeking to avoid payment by arguing petitioners' indigency. Neither here nor in the trial court has the State ever suggested that petitioners were deprived of due process or raised any other federal constitutional issue. The State has surely not confessed error or given any other indication that it is seeking anything but an affirmance of the decision below—hardly an appropriate disposition if the State is suggesting that petitioners were denied their constitutional right to counsel. Moreover, nowhere in the passage of the response cited by the Court are the terms "conflict of interest" used, nor is there even a clear suggestion made that counsel was acting other than in the interests of petitioners in arguing that an indigent's probation cannot be revoked for failure to pay a fine.

However the State's argument here is to be characterized, this case comes to us on writ of certiorari to a state court. Our jurisdiction, therefore, arises under 28 U. S. C. § 1257 (3) and is limited here to federal rights and privileges that have been "specially set up or claimed," and upon which there has been a final decision by the highest state court in which a

decision could be had. The right-to-counsel claim was never raised in the state court, nor did the state court ever render a decision on the issue: There is, thus, a jurisdictional bar to our reaching the issue. *Moore* v. *Illinois,* 408 U. S. 786, 799 (1972); *Hill* v. *California,* 401 U. S. 797, 805 (1971); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969), and cases cited there.

It is as clear as could be that no federal constitutional claim of any kind was made in the state courts with respect to a conflict of interest and the adequacy of petitioners' counsel. At the revocation hearing, petitioners testified that they were without funds to pay the fines, and their counsel urged that to incarcerate them would violate the Equal Protection Clause of the Fourteenth Amendment. On cross-examination, petitioners indicated that they had been assured by their employer that the employer would pay employee fines if they were convicted in cases such as this. The State's attorney then asserted several times that there was a conflict of interest because petitioners' counsel also represented petitioners' corporate employer and was being paid by that concern to represent petitioners.[1] But far from suggesting that the

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[1] The following colloquy, similar to others, took place at one point in the revocation hearing:

"MR. RHODES: Your Honor, I submit that actually what we have here is a conflict of interest on Mr. Zell's part. He's representing the company and he's trying to get out of paying this money that these people expect that company to pay that money. Mr. Zell is here purporting to represent her while he legally represents a company that has promised to pay all these expenses and fines for these people. And I would ask the Court to look into that and make a determination of that, and if necessary, see that these people have Counsel to enforce that agreement between that company and these people.

"THE COURT: State that again now.

"MR. RHODES: Mr. Zell is here representing Mrs. Allen. Now, Mrs. Allen contends that that company promised to pay all this so that she wouldn't have to go through all of this.

"Now they have not done it.

[*Footnote 1 is continued on p. 278*]

alleged conflict was a ground of relief for petitioners, the State suggested that petitioners and their counsel had misled the court into thinking that the employer would pay the fines, and that the employer's undertaking should be enforced by sending petitioners "out to the jail for a while," [2] rather than permit the employer to renege and free petitioners on equal protection grounds. This would convince the employer to pay because it would not want other employees to know that they would not be taken care of in the event trouble arose.[3]

"And I submit that Mr. Zell represents that company. That he is, his first allegiance is to that company, and not to Mrs. Allen.

"And that there's a conflict of interest, and that this ought to be looked into by this Court.

"THE COURT: You wish to respond?

"MR. ZELL: I don't think it makes any sense what he's saying but I will if the Court wants me to. I don't think I'm required to.

"THE COURT: I don't know whether there's anything the Court could look into. What specifically do you want the Court to look into?

"MR. RHODES: Mr. Zell is here supposedly representing Mrs. Allen He at the same time represents the people who promised to take care of these things and to pay these fines.

"Now those people are not doing it. And they apparently have reneged on it at this point. I think if you sent these people out to the jail for a while I think they would pay it because they don't want the other employees to know that they are not taking care of these things when they come up." Transcript of Revocation Hearing (Tr.) 14–15. The transcript is an appendix to the response of respondent.

Other discussions appear in *id.*, at 25–28.

[2] *Id.*, at 15.

[3] The State's position in this regard is clear from its response to the petition for certiorari:

"In fact, Respondent believes that the Petitioners have no intention whatsoever in paying these fines, as their testimony indicates that they are of the opinion that their employers should have paid these fines. The Petitioners are thus holding the enforcement of fines as a recognized sentencing tool a hostage because of their beliefs that others should pay their fines for them. By arguing at this time that they are indigent they are using this as a shield to hide behind their responsibility to pay a fine, which they earlier agreed to pay by virtue of their silence which led the

In the course of these arguments, the State never mentioned the Federal Constitution.

Petitioners' attorney in turn responded that although there had been an advance arrangement between petitioners and their employer that fines would be paid by the latter, the employer had not paid, and the only issue was whether petitioners should go to jail when they were without funds themselves to pay the fines. He urged that jailing them would violate the Equal Protection Clause.[4] He also suggested that if the asserted conflict of interest raised an ethical problem in the mind of the State's attorney, a complaint should be filed with the State Bar.[5]

The judge, apparently rejecting the equal protection claim, revoked petitioners' probation, although petitioners have remained free on bond pending appeal. The sole issue in the Georgia Court of Appeals was whether petitioners had been denied the equal protection of the laws. That claim was rejected, the judgment of revocation was affirmed, and the Georgia Supreme Court denied further review. The equal protection issue, as I have said, is the only federal constitutional issue that has been presented here.

The Court asserts that "it is appropriate to treat the due process issue as one 'raised' below, and proceed to consider it here." *Ante,* at 265, n. 5. However, the Court fails to cite any passage from the record in which the alleged conflict of interest was presented to the state courts as a problem of constitutional dimension. The Court relies on 28 U. S. C. § 2106,

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sentencing court to conclude that they were able to pay these fines." Brief in Opposition 10.

Elsewhere, the State suggested "that they be put out there in jail and start serving . . . that's the only way really I know, to enforce this sentence at this point." Tr. 74.

[4] *Id.,* at 16–20.

[5] *Id.,* at 27: "I would suggest Mr. Rhodes report this to the State Bar of Georgia and be glad at a hearing to testify if there is any impropriety and submit to any questions before the State Bar."

but that section does not purport to expand the statutory limits on the Court's jurisdiction; rather, it relates only to the disposition of the case once jurisdiction exists. What JUSTICE REHNQUIST wrote in *Vachon* v. *New Hampshire,* 414 U. S. 478, 482 (1974) (dissenting opinion), is equally applicable here:

> "A litigant seeking to preserve a constitutional claim for review in this Court must not only make clear to the lower courts the nature of his claim, but he must also make it clear that the claim is constitutionally grounded. *Bailey* v. *Anderson,* 326 U. S. 203 (1945)."

Petitioners have done neither; nor has respondent done it for them.

The Court apparently believes that under *Cuyler* v. *Sullivan,* 446 U. S. 335 (1980), the possibility of a conflict of interest of constitutional dimensions should have prompted further inquiry by the trial judge. But *Cuyler* v. *Sullivan* did not purport to give this Court jurisdiction over a claim otherwise beyond its reach. *Cuyler* held only that if a trial court "reasonably should know that a particular conflict exists," *id.,* at 347, then a failure to initiate an inquiry may constitute a Sixth Amendment violation. If this is the case here, then petitioners remain free to seek collateral relief in the lower courts.[6]

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[6] This Court's Rule 34.1 (a), the plain-error rule, does not purport to authorize the Court to vacate state-court judgments on the ground of a "possible" due process or other constitutional violation which the Court, *sua sponte,* has discovered in the record but which was neither raised nor decided in the state courts. Where an issue has been properly raised and decided in state litigation but not raised here, Rule 34.1 (a) would permit us to reach that issue though not presented by the parties. Cf. *Boynton* v. *Virginia,* 364 U. S. 454, 457 (1960).

In *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974), the Court relied on our "plain error" rule to reach an issue not presented in the jurisdictional statement. However, appellant there had unsuccessfully argued the issue—sufficiency of the evidence—below and the issue had been addressed

A majority of the Court, however, proceeds on the basis that it has jurisdiction to address the due process/adequacy-of-counsel issue. Accordingly, I proceed on that assumption.

II

As I see it, the Court's disposition of the case rests upon critical factual assumptions that are not supported by the record. Certainly the mere fact that petitioners' counsel was paid by their employer does not in itself constitute a conflict of interest of constitutional dimension.[7] Indeed, one would expect that in the normal course of things the interests of petitioners and of their employer would have corresponded throughout the proceedings. It would have been just as much in the employer's as in the employees' interest to have had the employees adjudged innocent. Similarly, assuming that the employer had promised to pay whatever fines might be levied against the employees, it was in the employer's interest, just as it was in their interest, to have these fines set at the lowest possible amount. The conflict of interests, therefore, only emerges by assuming that the employer, the owner of an adult bookstore and a movie theater, set out to construct a constitutional test case and the petitioners' counsel represented the employer in this regard. Not even a decision to pursue a test case, however, would in itself create a conflict of interest. One must assume further that it was for the sake of this interest that the employer decided not to pay the fines and for the sake of this interest of the employer

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by the State Supreme Court. The dissent in *Vachon* did not contend that appellant had failed to raise the issue below; rather, it argued that although raised, the issue had not been presented to the state courts as a "federal constitutional claim." The majority, evidently, thought that it had.

[7] Although petitioners' counsel admitted at oral argument that he had been paid by petitioners' employer at the time of trial, he indicated that the payments from the employer ended at the time petitioners were put on probation. Tr. 13–16.

that petitioners' attorney did not object to the size of the fines or move in timely fashion for a modification of the conditions of probation.

I recognize that the Court's conclusion relies only upon the "possibility" of this scenario, but I find these assumptions implausible and would require a much stronger showing than this record reveals before I would speculate on the likelihood of such a motive of the employer and the knowing cooperation of counsel to this end, let alone dispose of the case on that basis.[8] First, since the only submission of petitioners was that they should not go to jail for failure to pay their fines, even if the court sustained their position, their liability on the fine would remain—as would that of the employer if it had an enforceable obligation to pay. It is, therefore, difficult to find any interest that the employer might have in litigating a test case on this issue through the Georgia courts and to this Court. Second, the record suggests two much more plausible explanations of the employer's failure to pay the fines, neither of which implies a conflict of interest: The employer may have reneged on its promise to pay fines because petitioners were no longer working for the employer, or it may have reneged because ownership of the establishments changed

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[8] Petitioners' attorney also said: "I want the court to know, and Mr. Rhodes to know that I've attempted at least was asked, to get the fines paid. And of course, you can see the result of it.

"I told the three defendants I would represent them to the best of my ability, and I've explained this to the defendants, and I would like to make an explanation to the court." *Id.*, at 68.

Interesting also is the following exhange from the cross-examination of one of the petitioners:

"Q Did you select Mr. Zell as your attorney?

"A Yes, sir. I've known him a long time and I trust him. And he's the only lawyer I've ever had to have in my life, and yes, sir, I selected him." *Id.*, at 42.

As far as this record reveals, none of the petitioners to this date has complained about the legal representation.

hands.[9] The fact that the employer may have continued to meet some of the expenses, but did not pay the substantial fines, does not indicate to me that the employer manipulated the situation to create a test case; more likely, the employer reneged on his promise because, given the change in circumstances of both the employer and the petitioners, the expense was simply greater than that which the employer was willing to bear at this point.

If the employer was simply unwilling to pay the fines, then the arguments advanced by the attorney may very well have been the best and only arguments available to petitioners.[10] Indeed, the employer having failed to pay, counsel would have been derelict not to press the equal protection claim on behalf of his indigent clients. Obviously, success on this ground would have advantaged petitioners; and I fail to see, as apparently the trial court failed to see, Tr. 15, 28, how petitioners will be constitutionally deprived by assertion of the equal protection claim. The fact that petitioners did move, although belatedly, for a modification of the conditions of parole[11] further indicates that the employer was more in-

[9] There is no indication in the record that the employer owned other adult establishments. If, as counsel suggested at oral argument, ownership has in fact changed hands, then it seems unlikely that the ex-employer would continue to be interested in creating and litigating a test case in a matter with which he is no longer concerned.

[10] I note that petitioners argue in their response that the trial court was fully aware of their financial situation. Response for Petitioners 2. This is amply supported by the record. The Court, therefore, creates an artificial issue when it argues that counsel's conflicting loyalties may have prevented him from arguing for leniency in light of the employer's failure to pay the fines. The point was made repeatedly that these petitioners were indigent and could not themselves pay. Petitioners' attorney conceded that a defendant who has been fined and who himself could pay the fine could not hide behind the promise of another that the latter would pay. Tr. 69.

[11] The fact that this motion was made and rejected indicates that a remand to the trial court to reconsider this issue is not likely to lead to a different result. It also suggests that the inadequacy of counsel sug-

terested in cutting his costs than creating a test case.[12] On this record, therefore, I believe it necessary to reach the substantive question that we granted certiorari to resolve.

III

Although I think that there are circumstances in which a State may impose a suitable jail term in lieu of a fine when the defendant cannot or will not pay the fine, there are constitutional limits on those circumstances, and the State of Georgia has exceeded the limits in this case.

In *Williams* v. *Illinois*, 399 U. S. 235 (1970), Williams, convicted of petty theft, received the maximum sentence of one year's imprisonment and a $500 fine (plus $5 in court costs). As permitted by Illinois statute, the judgment provided that if, when the one-year sentence expired, Williams did not immediately pay the fine and court costs, he was to remain in jail a length of time sufficient to satisfy the total debt, calculated at the rate of $5 per day. We held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.*, at 244. Therefore, the Illinois statute as applied to Williams, who was too poor to pay the fine, violated the Equal Protection Clause.

Tate v. *Short*, 401 U. S. 395 (1971), involved an indigent defendant incarcerated for nonpayment of fines imposed for

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gested by the Court amounts to nothing more than his late filing of this motion, not a failure to ask for leniency.

[12] Even this statement asserts more than the evidence of record supports: other than the assertions of the State's attorney in a colloquy with the judge at the revocation hearing, there is no suggestion in this record that the employer directed this litigation in any way. The fact that counsel was paid for some period by the employer does not support an inference that counsel was representing the interests of the employer rather than those of petitioners. See ABA Model Code of Professional Responsibility, DR 5–107 (B) (1980).

violating traffic ordinances. Under Texas law, traffic offenses were punishable only by fines, not imprisonment. When Tate could not pay $425 in fines imposed for nine traffic convictions, he was jailed pursuant to the provisions of another Texas statute and a municipal ordinance that required him to remain in jail a sufficient time to satisfy the fines, again calculated at the rate of $5 per day. We reversed on the authority of *Williams* v. *Illinois*, saying: "Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." 401 U. S., at 399. The Court, however, was careful to repeat what it had said in *Williams:* " 'The state is not powerless to enforce judgments against those financially unable to pay a fine' " and is free to choose other means to effectuate this end. 401 U. S., at 399.

In *Williams* v. *Illinois, supra,* at 243, the Court emphasized that its holding "does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of $30 or 30 days." In neither *Williams* nor *Tate* did it appear that "jail [was] a rational and necessary trade-off to punish the individual who possesses no accumulated assets . . . since the substitute sentence provision, phrased in terms of a judgment collection statute, [did] not impose a discretionary jail term as an alternative sentence, but rather equate[d] days in jail with a fixed sum." *Williams* v. *Illinois, supra,* at 265 (Harlan, J., concurring in result). As both the Court and Justice Harlan implied, if the Court had confronted a legislative scheme that imposed alternative sentences, the analysis would have been different.

Indigency does not insulate those who have violated the criminal law from any punishment whatsoever. As I see it, if an indigent cannot pay a fine, even in installments, the

Equal Protection Clause does not bar the State from specifying other punishment, even a jail term, in lieu of the fine.[13] To comply with the Equal Protection Clause, however, the State must make clear that the specified jail term in such circumstances is essentially a substitute for the fine and serves the same purpose of enforcing the particular statute that the defendant violated. In both *Williams* and *Tate* the State violated this principle by speaking inconsistently: In each case, the legislature declared its interest in penalizing a particular offense to be satisfied by a specified jail term (in *Tate,* no jail term at all) and at the same time subjected the indigent offender to a greater term of punishment.

The incarceration of the petitioners in this case cannot be distinguished from that which we found to be unconstitutional in *Williams* and *Tate.* Here, the State imposed probated prison terms and fines, but made installment payment of the fines a condition of probation: Had the fines been paid in full and other conditions of probation satisfied, there would have been no time in jail at all. Thus, the ends of the State's criminal justice system did not call for any loss of liberty except that incident to probation.

Under these circumstances, the State's only interest in incarcerating these petitioners for not paying their fines was to impose a loss of liberty that would be as efficacious as the fines in satisfying the State's interests in enforcing the criminal law involved. However, no calculation like that was made here. Upon nonpayment, probation was automatically revoked and petitioners were sentenced to their full prison

[13] In imposing an alternative sentence the State focuses on the penalty appropriate for the particular offense and structures two punishments, each tailored to meet the State's ends in responding to the offense committed. Such tailoring may consider the financial situation of the defendant, *Williams* v. *New York,* 337 U. S. 241, 246–250 (1949), but it does so only in the context of structuring a penalty appropriate to the offense committed.

terms.[14] There was no attempt to provide, in addition to the jail terms for which they were given probation, a term of imprisonment that would be a proper substitute for the fines. In fact, even at the conclusion of their prison terms, petitioners will apparently be liable for the unpaid fines. This is little more than imprisonment for failure to pay a fine, without regard to the goals of the criminal justice system. As in *Williams* and *Tate,* the State is speaking inconsistently concerning the necessity of imprisonment to meet its penal objectives; imprisonment of an indigent under these circumstances is constitutionally impermissible.

This case falls well within the limits of what we meant to prohibit when we announced in *Tate* v. *Short, supra,* at 398, quoting *Morris* v. *Schoonfield,* 399 U. S. 508, 509 (1970), that the " 'Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent.' "

Accordingly, I would reverse the judgment.

[14] As the majority opinion makes clear, the fines were quite heavy, perhaps in anticipation of payment by the employer. There was no expectation that these defendants, if they performed well on probation, would serve any time in jail, let alone a long term.

CARTER *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 80–5060 Argued January 14, 1981—Decided March 9, 1981

At petitioner's criminal trial in a Kentucky court in which no testimony was introduced on behalf of the defense, the trial judge refused petitioner's requested jury instruction that "[t]he [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." On appeal from petitioner's conviction, the Kentucky Supreme Court rejected his argument that the Fifth and Fourteenth Amendments require the trial judge to give the requested instruction, holding that such instruction would have required the judge to "comment upon" the petitioner's failure to testify in violation of a Kentucky statute prohibiting such a comment.

Held: Petitioner had a right to the requested instruction under the privilege against compulsory self-incrimination of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment, a state trial judge having a constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. Pp. 295–305.

(a) The penalty imposed upon a defendant for the exercise of his constitutional privilege not to testify is severe when there is an adverse comment on his silence, *Griffin* v *California,* 380 U. S. 609, but even without adverse comment, a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence. Instructions to the jury on the law are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination. While no judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. Pp. 299–303.

(b) Kentucky's interest in protecting the defendant is insufficient justification for refusing the requested instruction, since "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect." *Lakeside* v. *Oregon,* 435 U. S. 333, 339. The fact that the jury was instructed to determine petitioner's guilt "from the evidence alone" does not excuse

the refusal to give the requested instruction, since a jury, not knowing the technical meaning of "evidence," can be expected to notice a defendant's failure to testify, and, without limiting instructions, to speculate about incriminating inferences from a defendant's silence. Nor was an instruction that the law presumes a defendant to be innocent a substitute for the requested instruction, since it is doubtful that it contributed significantly to the jury's proper understanding of petitioner's failure to testify. And defense counsel's own argument that petitioner did not have to take the stand could not have had the purging effect that the requested instruction would have had. Pp. 303–304.

598 S. W. 2d 763, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 305. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post,* p. 307. REHNQUIST, J., filed a dissenting opinion, *post,* p. 307.

Kevin Michael McNally argued the cause and filed a brief for petitioner.

Robert V. Bullock, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *Steven L. Beshear,* Attorney General, and *Richard O. Wyatt,* Assistant Attorney General.

JUSTICE STEWART delivered the opinion of the Court.

In this case a Kentucky criminal trial judge refused a defendant's request to give the following jury instruction: "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The Supreme Court of Kentucky found no error.[1] We granted certiorari to consider the petitioner's contention that a defendant, upon request,

[1] The *per curiam* memorandum opinion of the Supreme Court of Kentucky, *Carter* v. *Commonwealth,* No. 79–SC–452–MR, May 13, 1980, is unreported. But the court's affirmance order is reported in 598 S. W. 2d 763.

has a right to such an instruction under the Fifth and Fourteenth Amendments of the Constitution. 449 U. S. 819.[2]

I

A

In the early morning of December 22, 1978, Officer Deborah Ellison of the Hopkinsville, Kentucky, Police Department, on routine patrol in downtown Hopkinsville, noticed something in the alley between Young's Hardware Store and Edna's Furniture Store. She backed her car up, flashed her spotlight down the alley, and saw two men stooped alongside one of the buildings. The men ran off. Officer Ellison drove her squad car down the alley and found a hole in the side of Young's Hardware Store. She radioed Officer Leroy Davis, whom she knew to be in the area, informing him that two men had fled from the alley.

Soon after receiving Ellison's call, Officer Davis saw two men run across a street near where he had been patrolling. The two ran in opposite directions, and Davis proceeded after one of them. Following a chase, during which he twice lost sight of the man he was pursuing, Davis was finally able to stop him. The man was later identified as the petitioner, Lonnie Joe Carter. During the course of the chase, Davis

[2] Kentucky is one of at least five States that prohibit giving such an instruction to the jury. Others are Minnesota, see *State* v. *Sandve*, 279 Minn. 229, 232–234, 156 N. W. 2d 230, 233–234, but see *State* v. *Grey*, 256 N. W. 2d 74, 77–78 (the instruction may be necessary in some cases to prevent manifest injustice); Nevada, see *Jackson* v. *State*, 84 Nev. 203, 208, 438 P. 2d 795, 798, Nev. Rev. Stat. § 175.181 (1979); Oklahoma, see *Brannin* v. *State*, 375 P. 2d 276, 279–280 (Crim. App.), *Hanf* v. *State*, 560 P. 2d 207, 212 (Crim. App); and Wyoming, see *Kinney* v. *State*, 36 Wyo. 466, 472, 256 P. 1040, 1042. A few States have a statutory requirement that such an instruction be given to the jury unless the defendant objects. See, *e. g.*, Conn Gen. Stat. § 54–84 (1958). The majority of the States, by judicial pronouncement, require that a defense request for such a jury instruction be honored. See, *e. g.*, *Woodward* v. *State*, 234 Ga. 901, 218 S. E. 2d 629.

saw the petitioner drop two objects: a gym bag and a radio tuned to a police band. When apprehended, the petitioner was wearing gloves but no jacket. While Davis was pursuing the petitioner, Officer Ellison inspected the alley near the hole in the building wall. She found two jackets, along with some merchandise that had apparently been removed from the hardware store.

After arresting the petitioner, Davis brought him to Officer Ellison to see if she could identify him as one of the men she had seen in the alley. Ellison noted that he was of similar height and weight to one of the men in the alley, and that he wore similar clothing, but because it had been too dark to get a good view of the men's faces, she could not make a more positive identification. The petitioner was then taken to police headquarters.

B

The petitioner was subsequently indicted for third-degree burglary of Young's Hardware Store. The indictment also charged him with being a persistent felony offender, in violation of Ky. Rev. Stat. § 532.080 (Supp. 1980), on the basis of previous felony convictions. At the trial, the *voir dire* examination of prospective jurors was conducted solely by the judge.[3] The prosecutor's opening statement recounted the

[3] After reading the indictment, and inquiring about possible sources of prejudice, the judge told the venire:

"The fact that this man is under a charge or has been indicted has no weight against him as evidence. It is not evidence of his guilt and is not to be considered by you as evidence of his guilt. It is simply a part of the court process which starts, as I have said, the wheels turning to get the case started to be tried It means nothing more than that. He sits there before you today presumed by the law to be as innocent as anyone else in this courtroom. I want you to fully understand that. Sometimes it is not easy to do, but you are to put out of your mind the fact that he is accused of this crime to the point where you will consider him in any way guilty until and unless the Commonwealth meets its burden and

evidence expected to be introduced against the petitioner. The opening statement of defense counsel began as follows:

> "Let me tell you a little bit about how this system works. If you listened to Mr. Ruff [the prosecutor] you are probably ready to put Lonnie Joe in the penitentiary. He read you a bill, a true bill that was issued by the Grand Jury. Now, the Grand Jury is a group of people that meet back here in a room and the defendant is not able or not allowed to present any of his testimony before this group of people. The only thing that the Grand Jury hears is the prosecution's proof and I would say approximately what Mr. Ruff has said to you. I suppose that most of you would issue a true bill if Mr. Ruff told you what he has just told you and you didn't have a chance to hear what the defendant had to say for himself.
>
> "Now, that is just completely contrary to our system of law. A man, as the Judge has already told you, . . . is innocent until . . . proved guilty . . . ."

The prosecution rested after calling Officers Ellison, Davis, another officer, and the owner of Young's Hardware Store. The trial judge then held a conference, outside of the hearing of the jury, to determine whether the petitioner would testify, and whether the prosecutor would be permitted to impeach the petitioner with his prior felony convictions. Defense counsel stated:

> "Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses that he is aware of and has told me about. I would like to explain to him in front of you what this all means."

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by that I mean the Commonwealth must prove his guilt to your satisfaction beyond a reasonable doubt and if they fail to do that, you should find him not guilty. . . ."

Counsel then explained to the petitioner that if he testified the Commonwealth could "use the fact that you have several offenses on your record . . . [to] impeach your . . . propensity to tell the truth . . . ." Counsel added that in his experience this was "a heavy thing; it is very serious, and I think juries take it very seriously . . . ." The judge indicated that under Kentucky law he had "discretionary control" over the use of prior felony convictions for impeachment, and cautioned the prosecutor that he might be inviting a reversal if he introduced more than three prior felony convictions, strongly suggesting that the prosecutor rely on the most recent convictions only. The judge then addressed the petitioner:

> "THE COURT: . . . You can sit there and say nothing and it cannot be mentioned if you don't testify but if you do these other convictions can be shown to indicate to the jury that maybe you are not telling the truth.
>
> . . . . . .
>
> "THE COURT: . . . [Y]ou talk to Mr. Rogers [defense counsel] and then tell us what you want to do.
>
> . . . . . .
>
> "THE COURT: Now, Lonnie, you have come back after a private conference with your lawyer, Mr. Rogers[,] and you have told me you have decided not to take the stand?
>
> "LONNIE JOE CARTER: Yes, Sir." [4]

Upon returning to open court, the petitioner's counsel advised the court that there would be no testimony introduced

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[4] Defense counsel summarized his private conversation with his client for the record, observing that "the advice of counsel to Mr. Carter was that in plain terms he was between a rock and hard place . . . ." If the petitioner testified he would be impeached and "if he didn't testify the jury[,] whether Mr. Ruff comment[ed] on it or not would probably use that against him."

on behalf of the defense. He then requested that the following instruction be given to the jury:

> "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."

The trial court refused the request.

The prosecutor began his summation by stating that he intended to review the evidence "that we were privileged to hear," and cautioned the jury to "[c]onsider only what you have heard up here as evidence in this case and not something that you might speculate happened or could have happened . . . ." After mentioning admissions that the petitioner had allegedly made at police headquarters,[5] the prosecutor argued:

> "Now that is not controverted whatsoever. It is not controverted that Lonnie Joe is the man that Miss Ellison saw here. It is not controverted that Lonnie Joe is the man that Davis caught up here (again pointing to blackboard sketch). It is not controverted that Lonnie Joe had that bag (pointing to bag on reporter's desk) and that radio (pointing to radio) with him. It is not controverted that both of those jackets belong to Lonnie Joe. At least, that is what he told the police department. But, at any rate, that is all we have to go on . . . ."

The prosecutor continued that if there was a reasonable explanation why the petitioner ran when he saw the police, it was "not in the record."[6]

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[5] These included the alleged admission that both jackets found in the alley belonged to him.

[6] Defense counsel began his closing argument as follows:

"Ladies and Gentlemen of the jury, I am sure you all right now are wondering well what has happened? Why didn't Mr. Carter take the stand and testify? Let me tell you. The judge just read to you that the man is presumed innocent and that it is up to the prosecution to prove him

The jury found the petitioner guilty, recommending a sentence of two years. The recidivist phase of the trial followed. The prosecutor presented evidence of the previous felony convictions that had been listed in the indictment. The defense presented no evidence, and the jury found the petitioner guilty as a persistent offender, sentencing him to the maximum term of 20 years in prison.

Upon appeal, the Kentucky Supreme Court rejected the argument that the Fifth and Fourteenth Amendments to the United States Constitution require that a criminal trial judge give the jury an instruction such as was requested here. In concluding that the trial judge did not commit error by refusing to give the requested instruction, the court pointed to Ky. Rev. Stat. § 421.225 (Supp. 1980), which provides:

> "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

Holding that the jury instruction requested by counsel would have required the trial judge to "comment upon" the defendant's failure to testify, the court cited its previous decision in *Green* v. *Commonwealth,* 488 S. W. 2d 339, as controlling.

II

A

The constitutional question presented by this case is one the Court has specifically anticipated and reserved, first in *Griffin* v. *California,* 380 U. S. 609, 615, n. 6, and more recently in *Lakeside* v. *Oregon,* 435 U. S. 333, 337. But, as a question of federal statutory law, it was resolved by a unanimous Court over 40 years ago in *Bruno* v. *United States,* 308 U. S. 287. The petitioner in *Bruno* was a defendant in a federal criminal

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guilty beyond a reasonable doubt. He doesn't have to take the stand in his own behalf. He doesn't have to do anything."

trial who had requested a jury instruction similar to the one requested by the petitioner in this case.[7] The Court, addressing the question whether Bruno "had the indefeasible right" that his proffered instruction be given to the jury, decided that a federal statute,[8] which prohibits the creation of any presumption from a defendant's failure to testify, required that the "substance of the denied request should have been granted . . . ." *Id.*, at 294.[9]

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[7] Bruno asked the trial judge to instruct the jury as follows:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." 308 U. S., at 292.

[8] Act of Mar. 16, 1878, ch. 37, 20 Stat. 30, now 18 U. S. C. § 3481, which states in pertinent part:

"In a trial of all persons . . . [the defendant] shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him."

[9] At common law, defendants in criminal trials could not be compelled to furnish evidence against themselves, but they were also not permitted to testify. In the context of the original enactment of the federal statute found dispositive in the *Bruno* case, this Court commented on the alteration of this common-law rule: "This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining [incriminating] circumstances . . . . To relieve him from this embarrassment the law was passed. . . . [He] is by the act in question permitted . . . to testify . . . ." *Wilson* v. *United States*, 149 U. S. 60, 65–66. Following enactment of the federal statute, the States followed suit with similar laws. See Dills, The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings, 3 Wash. L. Rev. 161, 164–165 (1928); 8 J. Wigmore, Evidence § 2272, p. 427 (J. McNaughton rev. 1961).

The issue in *Wilson, supra,* was whether it was error for the prosecutor to comment adversely on the defendant's failure to testify. The Court unanimously held that it was, observing that "[n]othing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled . . . ." 149 U. S., at 66. As later in *Bruno,* however, the Court did not reach any Fifth Amendment issue.

The *Griffin* case came here shortly after the Court had held that the Fifth Amendment command that no person "shall be compelled in any criminal case to be a witness against himself" is applicable against the States through the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1.[10] In *Griffin,* the Court considered the question whether it is a violation of the Fifth and Fourteenth Amendments to invite a jury in a state criminal trial to draw an unfavorable inference from a defendant's failure to testify. The trial judge had there instructed the jury that "a defendant has a constitutional right not to testify," and that the defendant's exercise of that right "does not create a presumption of guilt nor by itself warrant an inference of guilt" nor "relieve the prosecution of any of its burden of proof." But the instruction additionally permitted the jury to "take that failure into consideration as tending to indicate the truth of [the State's] evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." 380 U. S., at 610.

This Court set aside Griffin's conviction because "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.,* at 615.[11] It condemned adverse comment on a defendant's failure to testify as reminiscent of the " 'inquisitorial system of criminal jus-

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[10] The *Malloy* case overruled *Twining* v. *New Jersey,* 211 U. S. 78, and *Adamson* v. *California,* 332 U. S. 46, both of which had "adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination" *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 412. *Malloy* established that the same standards determine the validity of claims of Fifth Amendment privilege "whether . . . in a state or federal court." 378 U. S., at 11.

[11] The Court in the *Griffin* case expressly reserved decision "on whether an accused can require . . . that the jury be instructed that his silence must be disregarded." 380 U. S., at 615, n. 6.

tice,' " *id.*, at 614, quoting *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, and concluded that such comment effected a court-imposed penalty upon the defendant that was unacceptable because "[i]t cuts down on the privilege by making its assertion costly." 380 U. S., at 614.[12]

The Court returned to a consideration of the Fifth Amendment and jury instructions in *Lakeside* v. *Oregon*, 435 U. S. 333, where the question was whether the giving of a "no-inference" instruction over defense objection violates the Constitution. Despite trial counsel's complaint that his strategy was to avoid any mention of his client's failure to testify, a no-inference instruction [13] was given by the trial judge. The petitioner contended that when a trial judge in any way draws the jury's attention to a defendant's failure to testify, unless the defendant acquiesces, the court invades the defendant's privilege against compulsory self-incrimination. This argument was rejected.

The *Lakeside* Court reasoned that the Fifth and Fourteenth Amendments bar only *adverse* comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw *no* adverse inferences of any kind from the defendant's exercise of his privilege not to testify is 'comment' of an entirely different order." *Id.*, at 339. The purpose of such an instruction, the Court stated, "is to remove from the jury's deliberations any influence of unspoken adverse inferences," and "cannot provide the pressure on a defendant found impermissible in *Griffin*." *Ibid.*

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[12] In *Tehan* v. *United States ex rel. Shott*, *supra*, it was decided that *Griffin* was not to be given retroactive application.

[13] The *Lakeside* trial judge gave the following instruction to the jury: "Under the laws of this State a defendant has the option to take the witness stand in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence." 435 U. S., at 335.

The Court observed in *Lakeside* that the petitioner's argument there rested on "two very doubtful assumptions:"

> "First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own. Second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on speculative assumptions so dubious as these." *Id.*, at 340 (footnote omitted).

Finally, the Court stressed that "[t]he very purpose" of a jury instruction is to direct the jurors' attention to important legal concepts "that must not be misunderstood, such as reasonable doubt and burden of proof," and emphasized that instruction "in the meaning of the privilege against compulsory self-incrimination is no different." *Ibid.*

B

The inclusion of the privilege against compulsory self-incrimination [14] in the Fifth Amendment

> "reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . , in its contest with the individual to shoulder the entire load,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes

[14] For the history and development of the privilege, which has its roots in English and American revulsion against the inquisitorial practices of the Star Chamber and High Commission, see L. Levy, Origins of the Fifth Amendment (1968); E. Cleary, McCormick on Evidence § 114 (2d ed. 1972); 8 J. Wigmore, Evidence § 2250 (J. McNaughton rev. 1961).

'a shelter to the guilty,' is often 'a protection to the innocent.'" *Murphy* v. *Waterfront Comm'n, supra,* at 55.[15]

The principles enunciated in our cases construing this privilege, against both statutory and constitutional backdrops, lead unmistakably to the conclusion that the Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so.

In *Bruno,* the Court declared that the failure to instruct as requested was not a mere "technical erro[r] . . . which do[es] not affect . . . substantial rights . . . ." It stated that the "right of an accused to insist on" the privilege to remain silent is "[o]f a very different order of importance . . ." from the "mere etiquette of trials and . . . the formalities and minutiae of procedure." 308 U. S., at 293–294. Thus, while the *Bruno* Court relied on the authority of a federal statute, it is plain that its opinion was influenced by the absolute constitutional guarantee against compulsory self-incrimination.[16]

[15] The Court has recognized that there are many reasons unrelated to guilt or innocence for declining to testify:

"It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand." *Wilson* v. *United States,* 149 U. S., at 66.

Other reasons include the fear of impeachment by prior convictions (the petitioner's fear in the present case), or by other damaging information not necessarily relevant to the charge being tried, *Griffin,* 380 U. S., at 615, and reluctance to "incriminate others whom [defendants] either love or fear," *Lakeside,* 435 U. S., at 344, n. 2 (dissenting opinion).

[16] In *Griffin,* the Court relied on the statutory opinion in *Wilson,* replacing the words "act" and "statute" with the words "Fifth Amendment." 380 U. S., at 613. The same can be done here with respect to the Court's opinion in *Bruno:* when "Congress" is replaced with "the Fifth Amend-

The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.[17]

The significance of a cautionary instruction was forcefully acknowledged in *Lakeside,* where the Court found no constitutional error even when a no-inference instruction was given over a defendant's objection. The salutary purpose of the instruction, "to remove from the jury's deliberations any influence of unspoken adverse inferences," was deemed so important that it there outweighed the defendant's own preferred tactics.[18]

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ment," "the spirit of the Self-Incrimination Clause is reflected." *Griffin,* 380 U. S., at 613–614.

[17] Indeed, the dissenting opinion in *Griffin* suggested that more harm may flow from the lack of guidance to the jury on the meaning of the Fifth Amendment privilege than from reasonable comment upon the exercise of that privilege With specific reference to decisions from Kentucky and one other State, the dissenters observed that "[w]ithout limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad." *Id.,* at 623. The Court in *Griffin* indicated no disagreement with this view.

[18] It has been almost universally thought that juries notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned. . . . [It is] a fact inescapably impressed on the jury's consciousness." *Griffin, supra,* at 621, 622 (dissenting opinion). In *Lakeside* the Court cited an acknowledged authority's statement that " '[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime' " 435 U. S., at 340, n. 10, quoting 8 J. Wigmore, Evidence § 2272, p. 426 (J. McNaughton rev. 1961).

We have repeatedly recognized that "instructing a jury in the basic constitutional principles that govern the administration of criminal justice," *Lakeside*, 435 U. S., at 342, is often necessary.[19] Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . ." *Ullman* v. *United States*, 350 U. S. 422, 426. And, as the Court has stated, "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court . . . ." *Bruno*, 308 U. S., at 294.[20]

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[19] In *Taylor* v. *Kentucky*, 436 U. S. 478, the Court held that the Due Process Clause requires that instructions be given on the presumption of innocence and the lack of evidentiary significance of an indictment. The Court recognized that an instruction on the presumption of innocence has a "salutary effect upon lay jurors," and that "the ordinary citizen well may draw significant additional guidance" from such an instruction. *Id*, at 484. The Court stressed the "purging" effect of the instruction and the need to protect "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Id.*, at 486. The same can be said, of course, with respect to the privilege of remaining silent. Indeed, the claim is even more compelling here than in *Taylor*, where the dissenting opinion noted that "the omission [in Taylor's trial] did not violate a specific constitutional guarantee, such as the privilege against compulsory self-incrimination." *Id*, at 492 (STEVENS, J.) (footnote omitted).

[20] "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U. S. 614, 626. For modern empirical support of this longstanding assumption, see Reed, Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking, 71 J. Crim. L. & C. 68 (1980); Bridgeman & Mar-

A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.[21]

C

The only state interest advanced by Kentucky in refusing a request for such a jury instruction is protection of the defendant: "the requested 'no inference' instruction . . . would have been a direct 'comment' by the court and would have emphasized the fact that the accused had not testified in his own behalf." *Green* v. *Commonwealth*, 488 S. W. 2d, at 341. This purported justification was specifically rejected in the *Lakeside* case, where the Court noted that "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect." 435 U. S., at 339.

Kentucky also argues that in the circumstances of this case the jurors knew they could not make adverse inferences from the petitioner's election to remain silent because they were instructed to determine guilt "from the evidence alone," and because failure to testify is not evidence. The Commonwealth's argument is unpersuasive. Jurors are not lawyers; they do not know the technical meaning of "evidence."

lowe, 64 J. Applied Psychology 91 (1979); Cornish & Sealy, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208, 217–218, 222; Forston, Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension, 18 Today's Speech No. 4, p. 34 (1970).

[21] The importance of a no-inference instruction is underscored by a recent national public opinion survey conducted for the National Center for State Courts, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence. 64 A. B. A. J. 653 (1978).

They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence.

The other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial of this case were no substitute for the explicit instruction that the petitioner's lawyer requested. Although the jury was instructed that "[t]he law presumes a defendant to be innocent," it may be doubted that this instruction contributed in a significant way to the jurors' proper understanding of the petitioner's failure to testify. Without question, the Fifth Amendment privilege and the presumption of innocence are closely aligned. But these principles serve different functions, and we cannot say that the jury would not have derived "significant additional guidance," *Taylor* v. *Kentucky,* 436 U. S. 478, 484, from the instruction requested. See *United States* v. *Bain,* 596 F. 2d 120 (CA5); *United States* v. *English,* 409 F. 2d 200, 201 (CA3). And most certainly, defense counsel's own argument that the petitioner "doesn't have to take the stand . . . [and] doesn't have to do anything" cannot have had the purging effect that an instruction from the judge would have had. "[A]rguments of counsel cannot substitute for instructions by the court." *Taylor* v. *Kentucky, supra,* at 489.[22]

Finally, Kentucky argues that because the evidence of petitioner's guilt was "overwhelming and could not be explained," any constitutional error committed by the state courts was harmless. *Chapman* v. *California,* 386 U. S. 18. While it is arguable that a refusal to give an instruction similar to the one that was requested here can never be harmless, cf. *Bruno, supra,* at 293, we decline to reach the issue, because it was not presented to or considered by the Supreme Court of Kentucky. See *Sandstrom* v. *Montana,* 442 U. S. 510, 527.

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[22] See n. 20, *supra.*

III

The freedom of a defendant in a criminal trial to remain silent "unless he chooses to speak in the unfettered exercise of his own will" is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. *Malloy* v. *Hogan,* 378 U. S., at 8. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. *Griffin* v. *California,* 380 U. S. 609. Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," *id.,* at 614, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

For the reasons stated, the judgment is reversed, and the case is remanded to the Supreme Court of Kentucky for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in *Griffin* v. *California,* 380 U. S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences.

A defendant who *chooses not to testify* hardly can claim that he was *compelled to testify.* The Court also held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614.

JUSTICE STEWART's dissenting opinion in *Griffin,* in which JUSTICE WHITE joined, responded persuasively to this departure from the language and purpose of the Self-Incrimination Clause. JUSTICE STEWART wrote:

> "We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. . . .
>
> "I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. . . . [T]he jury will, of course, realize th[e] quite evident fact [that the defendant has chosen not to testify], even though the choice goes unmentioned." *Id.*, at 620–621.

The one person who usually knows most about the critical facts is the accused. For reasons deeply rooted in the history we share with England, the Bill of Rights included the Self-Incrimination Clause, which enables a defendant in a criminal trial to elect to make no contribution to the fact-finding process. But nothing in the Clause requires that jurors not draw logical inferences when a defendant chooses not to explain incriminating circumstances. Jurors have been instructed that the defendant is presumed to be innocent and that this presumption can be overridden only by

evidence beyond a reasonable doubt. California Chief Justice Traynor commented that judges and prosecutors should be able to explain that "a jury [may] draw unfavorable inferences from the defendant's failure to explain or refute evidence when he could reasonably be expected to do so. Such comment would not be evidence and would do no more than make clear to the jury the extent of its freedom in drawing inferences." Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 677 (1966); accord, Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U. L. Rev. 506, 520 (1966).

I therefore would have joined JUSTICES STEWART and WHITE in dissent in *Griffin*. But *Griffin* is now the law, and based on that case the present petitioner was entitled to the jury instruction that he requested. I therefore join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

While I join the Court's opinion, I add this comment to emphasize that today's holding is limited to cases in which the defendant has requested that the jury be instructed not to draw an inference of guilt from the defendant's failure to testify. I remain convinced that the question whether such an instruction should be given in any specific case—like the question whether the defendant should testify on his own behalf—should be answered by the defendant and his lawyer, not by the State. See *Lakeside* v. *Oregon*, 435 U. S. 333, 343–348 (1978) (STEVENS, J., dissenting).

JUSTICE REHNQUIST, dissenting.

The Court has reached its conclusion in this case by a series of steps only the first of which is traceable to the United States Constitution. Yet since the result of the Court's decision is to reverse the judgment of the Supreme

Court of Kentucky, the decision must obviously rest upon the fact that the decision of that court is inconsistent with the United States Constitution.

As the Court points out, the constitutional question presented by this case is one the Court has specifically anticipated and reserved, first in *Griffin* v. *California,* 380 U. S. 609, 615, n. 6 (1965), and more recently in *Lakeside* v. *Oregon,* 435 U. S. 333 (1978).

But the Court, with a singular paucity of reasoning, points to the fact that in a case arising in the federal system, a defendant requesting a charge similar to that which petitioner requested here was held by this Court to be entitled to it. The differences, of course, are obvious: In the first place, the case of *Bruno* v. *United States,* 308 U. S. 287 (1939), was governed by the federal statute there cited:

> "The accused could 'at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him.' Such was the command of the law-makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. . . . Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it." *Id.,* at 292–293.

Here, of course, the Act of March 16, 1878, does not attempt to govern the procedures or instructions which shall be given in the trial courts of Kentucky. Therefore the Act of Congress which, in *Bruno,* was stated to entitle a defendant to a charge that no presumption should arise from his refusal to take the stand, is of no relevance whatever to the Court's decision in this case.

If we begin with the relevant provisions of the Constitu-

tion, which is where an unsophisticated lawyer or layman would probably think we should begin, we find the provision in the Fifth Amendment stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Until the mysterious process of transmogrification by which this Amendment was held to be "incorporated" and made applicable to the States by the Fourteenth Amendment in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), the provision itself would not have regulated the conduct of criminal trials in Kentucky. But even if it did, no one here claims that the defendant was forced to take the stand against his will or to testify against himself inconsistently with the provisions of the Fifth Amendment. The claim is rather that in *Griffin* v. *California, supra,* the Court, building on the language of the Constitution itself and on *Malloy, supra,* held that a charge to the effect that any evidence or facts adduced against the defendant which he could be reasonably expected to deny or explain could be taken into consideration by the jury violated the constitutional privilege against compulsory self-incrimination. The author of the present opinion dissented from that holding, stating:

> "The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the Constitution's commands." 380 U. S., at 623.

But even *Griffin, supra,* did not go as far as the present opinion, for as that opinion makes clear it left open the question of whether a state-court defendant was entitled as a matter of right to a charge that his refusal to take the stand should not be taken into consideration against him by the jury. The Court now decides that he is entitled to such a charge, and, I believe, in doing so, wholly retreats from the statement in the *Griffin* dissent that "[t]he formulation of

procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern."

The Court's opinion states, *ante*, at 301, that "[t]he *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." Such Thomistic reasoning is now carried from the constitutional provision itself, to the *Griffin* case, to the present case, and where it will stop no one can know. The concept of "burdens" and "penalties" is such a vague one that the Court's decision allows a criminal defendant in a state proceeding virtually to take from the trial judge any control over the instructions to be given to the jury in the case being tried. I can find no more apt words with which to conclude this dissent than those stated by Justice Harlan, concurring in the Court's opinion in *Griffin:*

> "Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history." 380 U. S., at 617.

Syllabus

CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* KALO BRICK & TILE CO.

CERTIORARI TO THE COURT OF APPEALS OF IOWA

No. 79–1336. Argued December 9, 1980—Decided March 9, 1981

The Interstate Commerce Act authorizes the Interstate Commerce Commission (ICC) to regulate interstate rail carriers' abandonment of railroad lines, including branch lines. Under the Act, no such carrier may abandon a line unless it first obtains a certificate from the ICC that the present or future public convenience and necessity permit such an abandonment. After petitioner interstate rail carrier's branch line in Iowa had been damaged by mud slides, it ultimately decided not to repair, and to stop using, the line, so notified respondent brick manufacturer, which had shipped its products over the line, and applied to the ICC for a certificate permitting it to abandon the line. The ICC granted the application, finding that petitioner had abandoned the line due to conditions beyond its control, that further repairs would not have been sufficient to insure continuous operation, that the abandonment was not "willful," that respondent had no right to insist that the line be maintained solely for its use, and that continued operation would be an unnecessary burden on petitioner and on interstate commerce. Respondent had appeared to oppose the application but never perfected its filing before the ICC and did not seek judicial review of the ICC's decision, but, instead, brought a damages action in an Iowa state court while the abandonment application was still pending. It alleged that petitioner had violated an Iowa statute and state common law by refusing to provide cars on the branch line, by negligently failing to maintain the roadbed, and by tortiously interfering with respondent's contractual relations with its customers. The state trial court dismissed the action on the ground that the Interstate Commerce Act pre-empted state law as to the matters in contention. The Iowa Court of Appeals reversed, ruling that the state abandonment law was not pre-empted and that the state and federal schemes complemented one another.

Held: The Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated rail carrier when, as here, the ICC, in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court. Pp. 317–332.

(a) "[T]here can be no divided authority over interstate commerce, and . the acts of Congress on that subject are supreme and exclusive" *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408. Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity. Pp. 317–319.

(b) The ICC's authority under the Interstate Commerce Act to regulate railroad line abandonments is exclusive and plenary. This authority is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. The Act's structure makes it clear that Congress intended that an aggrieved shipper should seek relief in the first instance from the ICC. Pp. 319–323

(c) Both the letter and spirit of the Interstate Commerce Act are inconsistent with Iowa law as construed by the Iowa Court of Appeals. That court's decision amounts to a holding that a State can impose sanctions upon a regulated carrier for doing that which only the ICC has the power to declare unlawful or unreasonable. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act. Even though the abandonment approval did not come here until after respondent filed its civil suit, it would be contrary to the language of the statute to permit litigation challenging the lawfulness of the carrier's actions to go forward when the ICC has expressly found them to be reasonable. Accordingly, Iowa's statutory cause of action for failure to furnish cars cannot be asserted against an interstate rail carrier on the facts of this case. The same reasoning applies to respondent's asserted common-law causes of action, because they, too, are essentially attempts to litigate the issues underlying petitioner's abandonment of the branch line in issue. The questions respondent seeks to raise in the state court—whether roadbed maintenance was negligent or reasonable and whether petitioner abandoned its line with some tortious motive—are precisely the sorts of concerns that Congress intended the ICC to address in weighing abandonment requests. Consequently, on the facts of this case, the Interstate Commerce Act also pre-empts Iowa's common-law causes of action when the judgments of fact and of reasonableness necessary to the decision have already been made by the ICC. Pp. 324–331.

295 N. W. 2d 467, reversed and remanded.

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

Bruce E. Johnson argued the cause for petitioner. With him on the briefs were *Louis T. Duerinck, James P. Daley, Stuart F. Gassner,* and *Frank W. Davis, Jr.*

M. Gene Blackburn argued the cause for respondent. With him on the brief was *Ned Alan Stockdale.*

Henri F. Rush argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Geller, Edwin S. Kneedler, Richard A. Allen,* and *Charles A. Stark.*

JUSTICE MARSHALL delivered the opinion of the Court.

Through the Interstate Commerce Act and its amendments, Congress has granted to the Interstate Commerce Commission authority to regulate various activities of interstate rail carriers, including their decisions to cease service on their branch lines. Under Iowa state law, a shipper by rail who is injured as the result of a common carrier's failure to provide adequate rail service has available several causes of action for damages. In this case we are called upon to decide whether these state-law actions may be asserted against a regulated carrier when the Commission has approved its decision to abandon the line in question.

I

Petitioner, an interstate common carrier by rail, is subject to the jurisdiction of the Interstate Commerce Commission. For some time prior to April 1973, petitioner operated a 5.6-mile railroad branch line between the towns of Kalo and Fort Dodge in Iowa. Respondent operated a brick manufacturing plant near Kalo, and used petitioner's railroad cars and branch line to transport its products to Fort Dodge and outward in interstate commerce.[1]

[1] Respondent used petitioner's branch line only for the shipment of bricks that were traveling in interstate commerce. All of the bricks that respondent shipped intrastate traveled by truck.

During the 1960's, the tracks on the Kalo-Fort Dodge branch line were damaged by three mud slides. Petitioner made repairs after the first two slides, but following the last slide in 1967, when portions of the embankment wholly vanished under the waters of the Des Moines River, petitioner decided to stop using the branch line. Petitioner instead leased part of another railroad's parallel branch line to connect Kalo with Fort Dodge. In April 1973, the leased line was also damaged by a mud slide. By that time, respondent was the only shipper using the Kalo-Fort Dodge line. After inspecting the damage to the leased line, petitioner decided not to repair it. Petitioner then notified respondent that it would no longer provide service on the Kalo-Fort Dodge line, although it would continue to make cars available at Fort Dodge if respondent would ship its goods there by truck. Respondent determined that shipment by truck was not economically feasible, and notified its customers that it would complete existing contracts and then go out of business.[2]

In November 1973, petitioner filed with the Commission an application for a certificate declaring that the public convenience and necessity permitted it to abandon the Kalo-Fort Dodge branch line. The United States Government intervened in support of petitioner's application. Respondent was the sole party appearing in opposition to the request, but failed to perfect its filing before the Commission.[3] In a

[2] It is undisputed that at this time, petitioner had not made a decision whether to abandon the Kalo-Fort Dodge branch line. An abandonment "is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *ICC* v. *Chicago & N. W. Transp. Co.*, 533 F. 2d 1025, 1028 (CA8 1976). See *ICC* v. *Chicago, R. I. & P. R. Co.*, 501 F. 2d 908, 911 (CA8 1974), cert. denied, 420 U. S. 972 (1975). An embargo, by contrast, is a temporary emergency suspension of service initiated by filing of a notice with the Commission. *ICC* v. *Chicago & N. W. Transp. Co., supra,* at 1027, n. 2.

[3] In particular, respondent "did not file a verified statement in opposition as required," and was therefore "deemed to be in default and en-

decision issued in April 1976, the Commission found that petitioner had abandoned the line due to conditions beyond its control and granted the request for a certificate. *Chicago & N. W. Transp. Co. Abandonment,* AB1, Sub. No. 24 (Jan. 11, 1976), App. to Pet. for Cert. 34a. Respondent made no attempt to comply with the provisions of the Interstate Commerce Act regarding judicial review of the Commission's decision.[4] Instead, while the abandonment request was still pending before the Commission, respondent filed this damages action against petitioner in state court. The complaint alleged that petitioner had violated Iowa Code §§ 479.3, 479.122 (1971) and state common law by refusing to provide cars on the branch line, by negligently failing to maintain the roadbed, and by tortiously interfering with respondent's contractual relations with its customers.[5] The state trial

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titled to no further formal proceedings." *Chicago & N. W. Transp. Co. Abandonment,* AB1, Sub. No. 24 (Jan. 11, 1976), App. to Pet. for Cert. 34a–35a. The reason for this default, according to respondent, was that it had gone out of business and therefore had no continuing interest in forcing petitioner to continue its service on the branch line.

[4] See 28 U. S. C. §§ 2321 (a), 2342 (5), 2343, 2344.

[5] Iowa Code § 479.3 (1971) provides in relevant part:

"Every railway corporation shall upon reasonable notice, and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch . . . ."

Iowa Code § 479.122 (1971) provides:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers, or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The conclusion that these statutes create a state-court damages action for failure to provide proper service is not a new one under Iowa law. See,

court, holding that the Interstate Commerce Act wholly pre-empted state law as to the matters in contention, dismissed the action. The Iowa Court of Appeals reversed, ruling that state abandonment law was not pre-empted and that the state and federal schemes represented "complimentary [*sic*], alternative means of relief for injured parties." [6] 295 N. W.

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e. g., Baird Bros. v. *Minneapolis & St. L. R.*, 181 Iowa 1104, 165 N. W. 412 (1917).

After respondent filed its state-court action, petitioner sought to remove the case to federal court, but the federal court, finding that diversity of citizenship was lacking, remanded the case to state court. The Iowa Court of Appeals correctly held that this federal-court ruling had no relevance to its inquiry into whether the pre-emption doctrine barred the state courts from exercising their jurisdiction. 295 N. W. 2d 467, 468–469 (1979). See *Brancadora* v. *Federal Nat. Mortgage Assn.*, 344 F. 2d 933, 935 (CA9 1965); *Alaska* v. *K & L Distributors, Inc.*, 318 F. 2d 498, (CA9 1963).

[6] The Iowa court also held the doctrine of primary jurisdiction, in the sense of initial deferral to the expertise of the Commission, had no application to this litigation. 295 N. W. 2d, at 471–472. Petitioner, as well as the United States and the Commission as *amici curiae*, argues that the primary-jurisdiction doctrine precludes respondent's suit on the facts of this case, but we have no occasion to address that question. Although we agree with petitioner and *amici* that the Commission has special expertise in the matters respondent wishes to raise in state court, see *infra*, at 326–327, and n. 14, we do not rely on the primary-jurisdiction doctrine. As we have stated in interpreting another provision of the Interstate Commerce Act: "[T]he survival of a judicial remedy . . . cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 89 (1962). Even if the primary-jurisdiction doctrine were applicable here, it would at best require the state courts to postpone any action until the Commission had an opportunity to address the administrative questions raised in the civil damages action. But here, the Commission has actually ruled, and the state trial on liability and damages has not yet taken place. Consequently, the requirements of the doctrine have been complied with in spirit, even if not through any intent of respondent. We save for a later case a decision on the proper application of the primary-jurisdiction doctrine when the Commission has not yet ruled.

2d 467, 469 (1979). After the Supreme Court of Iowa denied petitioner's application for review, we granted certiorari, 446 U. S. 951 (1980). We reverse.

II

Pre-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 142 (1963). See *De Canas* v. *Bica,* 424 U. S. 351, 356 (1976). The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that "interfere with or are contrary to, the laws of congress . . . ." *Gibbons* v. *Ogden,* 9 Wheat. 1, 211 (1824). The doctrine does not and could not in our federal system withdraw from the States either the "power to regulate where the activity regulated [is] a merely peripheral concern" of federal law, *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 243 (1959), or the authority to legislate when Congress could have regulated "a distinctive part of a subject which is peculiarly adapted to local regulation, . . . but did not," *Hines* v. *Davidowitz,* 312 U. S. 52, 68, n. 22 (1941). But when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Perez* v. *Campbell,* 402 U. S. 637, 649 (1971), quoting *Hines* v. *Davidowitz, supra,* at 67. Making this determination "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez* v. *Campbell, supra,* at 644. And in deciding whether any conflict is present, a court's concern is necessarily with "the nature of the activities

which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council* v. *Garmon, supra,* at 243.

The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act. These state regulations have taken many forms. For example, as early as 1907, the Court struck down a State's common-law cause of action to challenge as unreasonable a rail common carrier's rates because rate regulation was within the exclusive jurisdiction of the Commission, and a state-court action "would be absolutely inconsistent with the provisions of the act." *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 446. Similarly, in *Transit Comm'n* v. *United States,* 289 U. S. 121, 129 (1933), we held that the Interstate Commerce Commission's statutory authority to regulate extensions of service was exclusive and therefore stripped a similar state commission of all power to act in the same area. More recently, in *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77 (1958), we held that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers, an activity also subject to regulation under the Interstate Commerce Act, was facially invalid as applied to an interstate carrier. "[I]t would be inconsistent with [federal] policy," we observed, "if local authorities retained the power to decide" whether the carriers could do what the Act authorized them to do. *Id.,* at 87. The common rationale of these cases is easily stated: "[T]here can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R. Co.* v. *Stroud,*

267 U. S. 404, 408 (1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.

III

In deciding whether respondent's state-law damages action is pre-empted, we must determine what Congress has said about a carrier's ability to abandon a line, what Iowa state law provides on the same subject, and whether the two are inconsistent. To these tasks we now turn.

A

The Interstate Commerce Commission has been endowed by Congress with broad power to regulate a carrier's permanent or temporary cessation of service over lines used for interstate commerce. Under §§ 1 (4) and 1 (11) of the Interstate Commerce Act, recodified at 49 U. S. C. §§ 11101 (a) and 11121 (a) (1976 ed., Supp. III),[7] the Commission is empowered both to pass on the reasonableness of a carrier's temporary suspension of its service and, if necessary, to order it resumed. See *ICC* v. *Chicago & N. W. Transp. Co.*, 533 F. 2d 1025, 1027, n. 2 (CA8 1976); *ICC* v. *Maine Central R. Co.*, 505 F. 2d 590, 593–594 (CA2 1974). In addition, and most relevant here, the Act endows the Commission with broad authority over abandonments, or permanent cessations of service.

The Commission's power to regulate abandonments by rail carriers stems from the Transportation Act of 1920, ch. 91,

[7] Under Pub. L. 95–473, 92 Stat. 1337, the Interstate Commerce Act and its various amendments have been completely recodified as Subtitle IV of Title 49 of the United States Code. In the main, this recodification is without substantive change. In this opinion, we cite to the original Act for ease in referring to the decision below and to our precedents. Where appropriate, we also give parallel cites to the Act as recodified.

41 Stat. 477–478, which added to the Interstate Commerce Act a new § 1 (18), recodified at 49 U. S. C. § 10903 (a) (1976 ed., Supp. III). That section stated in pertinent part:

> "[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

This section, we have said, must be "construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." *Transit Comm'n* v. *United States, supra,* at 128. Among those evils is "[m]ultiple control in respect of matters affecting [interstate railroad] transportation," because such control, in the judgment of Congress, has proved "detrimental to the public interest." 289 U. S., at 127. See *Chicago* v. *Atchison, T. & S. F. R. Co., supra,* at 87. Consequently, we have in the past concluded that the authority of the Commission to regulate abandonments is exclusive. *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341, 346, n. 7 (1951). See *Colorado* v. *United States,* 271 U. S. 153, 164–166 (1926). The Commission's authority over abandonments is also plenary. So broad is this power that it extends even to approval of abandonment of purely local lines operated by regulated carriers when, in the Commission's judgment, "the over-riding interests of interstate commerce requir[e] it." *Palmer* v. *Massachusetts,* 308 U. S. 79, 85 (1939). The broad scope of the Commission's authority under § 1 (18) has been clear since the Court first interpreted that provision in *Colorado* v. *United States, supra.* There, the Court rejected a challenge by the State of Colorado to the power of the Commission to grant a certificate permitting an abandonment of a wholly intrastate

branch line operated by an interstate carrier. Justice Brandeis wrote for the Court:

> "Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." 271 U. S., at 165–166.

The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. In deciding whether to permit an abandonment, the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other." *Purcell* v. *United States,* 315 U. S. 381, 384 (1942). Once the Commission has struck that balance, its conclusion is entitled to considerable deference. "The weight to be given to cost of a relocated line as against the adverse effects upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And, under the statute, it is not a matter for judicial redecision." *Id.,* at 385.

The breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial interference with the agency's work. The Act in fact spells out with considerable precision the remedies available to a shipper who is

injured either by the Commission's approval of an abandonment or by a carrier's abandoning a line without securing Commission approval. A shipper objecting to an abandonment may ask the Commission to investigate the carrier's action. § 13 (1), recodified at 49 U. S. C. § 11701 (b) (1976 ed., Supp. III). A shipper may also oppose any request for abandonment filed before the Commission. 49 CFR § 1121.36 (1980).[8] If ultimately dissatisfied with the Commission's action, a shipper may seek review of its action in the appropriate court of appeals, 28 U. S. C. §§ 2321 (a), 2342 (5). In addition, at the time that this action was filed in state court, § 1 (20) of the Act expressly provided that a shipper believing a carrier's abandonment was unlawful could seek an injunction against it.[9] There is no provision in the Act for a civil damages action against a carrier for an abandonment

[8] A carrier who files an application for a certificate permitting abandonment must make reasonable efforts to give notice to all shippers who have used the line in the past 12 months. 49 U. S. C. § 10904 (a) (3) (D) (1976 ed., Supp. III). See *In re Chicago, M., St. P. & P. R. Co.*, 611 F. 2d 662, 668 (CA7 1979).

[9] Section 1 (20), which was, like § 1 (18), added by the Transportation Act of 1920, provided that "any court of competent jurisdiction" could enjoin a carrier's abandonment of a line when application for approval has not been made to the Commission. The right of a private party to seek an injunction was repealed by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94–210, 90 Stat. 127–130. Under the Act as amended and recodified, only the United States, the government of a State, or the Commission itself may sue to enjoin most illegal abandonments. See 49 U. S. C. §§ 11505 (action by state), 11702 (action by the Commission), 11703 (action by the United States) (1976 ed., Supp. III). A private person may seek injunctive relief only to prevent illegal abandonment of a freight-forwarding service. See 49 U. S. C. § 11704 (1976 ed., Supp. III). The fact that shippers in the position of respondent no longer have available the remedy of injunction does not affect our decision, because numerous other remedies for improper cessations of service still exist. "[T]he absence of *any* judicial remedy [would] plac[e] the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act." *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U. S., at 88 (emphasis added).

that has been approved by the Commission.[10] The structure of the Act thus makes plain that Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission.

In sum, the construction of the applicable federal law is straightforward and unambiguous. Congress granted to the Commission plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive.

Equally clear are the meanings of the state statutory and common-law obligations that petitioner seeks to challenge. The Iowa Court of Appeals held that Iowa Code §§ 479.3 and 479.122 (1971) "impos[e] on the railroads the unqualified and unconditional duty to furnish car service and transportation to all persons who apply," and that this state-law duty was not pre-empted by the provisions of the Interstate Commerce Act imposing a similar duty. 295 N. W. 2d, at 469. According to respondent's complaint in the state court, petitioner's failure to carry out these "duties of a common carrier" injured it in the amount of $350,000. App. 78. The state court also held that respondent could maintain its causes of action for common-law negligence based on petitioner's alleged failure to maintain the roadbed and for common-law tort for purported interference with contractual relations

[10] Although §§ 8 and 9, recodified at 49 U. S. C. § 11705 (1976 ed., Supp. III), provide a general right to seek damages when injured by a carrier's violation of the Act, this Court stated in *Powell* v. *United States*, 300 U. S. 276, 287 (1937), that the injunctive remedy, see n. 9, *supra*, was "the only method for enforcing" what was then § 1 (18) of the Act. Because the carrier's actions here have been approved by the Commission, there has been no violation of the Act, and this damages remedy could have no application to this case. We therefore need not decide whether the language of *Powell* means that a damages action can *never* be brought for an illegal abandonment, or if such an action can be brought, whether Congress might have intended that state and federal courts have concurrent jurisdiction. We thus reserve those questions for a proper case.

with respondent's customers. 295 N. W. 2d, at 471–472. The negligence count as outlined in respondent's complaint claimed $150,000 in damages based on petitioner's alleged failure "to maintain the track in a proper manner" and "to properly maintain the railroad right-of-way." App. 79–80. The tort count alleged that "at all times material hereto, it was the avowed and publicized purpose of [petitioner] to close all unproductive lines under its control," and that this plan interfered with respondent's contracts and damaged it in the amount of $100,000. *Id.*, at 81. These, then, are the claims that the Iowa Court of Appeals held properly cognizable in the state courts.

B

Armed with these authoritative constructions of both the federal regulatory scheme and the state law, we must next determine whether they conflict. The Iowa Court of Appeals held that the two remedies for abandonment merely complemented one another. We disagree. Both the letter and the spirit of the Interstate Commerce Act are inconsistent with Iowa law as construed by that court. The decision below amounts to a holding that a State can impose sanctions upon a regulated carrier for doing that which only the Commission, acting pursuant to the will of Congress, has the power to declare unlawful or unreasonable. Cf. *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S., at 87. It is true that not one of the three counts of respondent's state-court complaint mentions the word "abandonment," but compliance with the intent of Congress cannot be avoided by mere artful pleading. It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission.[11]

[11] The fact that respondent did not perfect its filing before the Commission, see n. 3, *supra*, does not affect either the validity or the finality of

Respondent's main cause of action alleges an improper failure to furnish cars on the Kalo-Fort Dodge branch line. In *Missouri Pacific R. Co.* v. *Stroud,* 267 U. S. 404 (1925), this Court confronted the precise question whether a state-court damages action would lie for a carrier's failure to furnish cars to carry a shipper's goods in interstate commerce.[12] The Court held that because the lumber shipped by the carrier moved in interstate, rather than intrastate, commerce, "[t]he state law has no application . . . ." *Id.,* at 408. In the instant case, the bricks that respondent here shipped in petitioner's cars, like the lumber in *Missouri Pacific,* were moving in interstate commerce.[13] Respondent in essence seeks to use state law to compel petitioner to furnish cars in spite of the congressional decision to leave regulation of car service to the Commission. But "[t]he duty to provide cars is not absolute," and the law " 'exacts only what is reasonable of the railroads under the existing circumstances.' " *Milmine Grain Co.* v. *Norfolk & Western R. Co.,* 352 I. C. C. 575, 585 (1976), citing *Elgin Coal Co.* v. *Louisville & Nashville R. Co.,* 277 F. Supp. 247, 250 (ED Tenn. 1967). See *Midland Valley R. Co.* v. *Barkley,* 276 U. S. 482, 484 (1928). The judgment as to what constitutes reasonableness belongs exclusively to the Commission. Cf. *Purcell* v. *United States,* 315 U. S., at 384–385. It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system," *ICC* v.

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the Commission's findings with respect to the reasonableness of petitioner's actions. These findings remain valid if supported by substantial evidence, see *Illinois Central R. Co. v. Norfolk & Western R. Co.,* 385 U. S. 57, 66 (1966), and in any case are not ordinarily subject to revision via collateral attack in a civil action.

[12] The Commission's authority over furnishing cars was reflected in §§ 1 (4) and 1 (11) of the Act, recodified at 49 U. S. C. §§ 11101 (a) and 11121 (a) (1976 ed., Supp. III).

[13] See n. 1, *supra.*

Railway Labor Executives Assn., 315 U. S. 373, 376 (1942), to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.

The conclusion that a suit under state law conflicts with the purposes of the Act is merely bolstered when, as here, the Commission has actually approved the abandonment. In reaching its decision, the Commission expressly found that "the cessation of service occurred because of conditions over which [petitioner] had no control." App. to Pet. for Cert. 35a. Because Congress granted the exclusive discretion to make such judgments to the Commission, there is no further role that the state court could play. Even though the approval did not come until after respondent filed its civil suit, it would be contrary to the language of the statute to permit litigation challenging the lawfulness of the carrier's actions to go forward when the Commission has expressly found them to be reasonable. See 49 U. S. C. § 1 (17)(a), recodified at 49 U. S. C. § 10501 (c) (1976 ed., Supp. III). We therefore hold that Iowa's statutory cause of action for failure to furnish cars cannot be asserted against an interstate rail carrier on the facts of this case.

The same reasoning applies to respondent's other asserted causes of action, because they, too, are essentially attempts to litigate the issues underlying petitioner's abandonment of the Kalo-Fort Dodge line. The questions respondent seeks to raise in the state court—whether roadbed maintenance was negligent or reasonable and whether petitioner abandoned its line with some tortious motive—are precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers

subject to its regulation.[14] See *Purcell* v. *United States, supra,* at 385; *Chesapeake & Ohio R. Co.* v. *United States,* 283 U. S. 35, 42 (1931). That alone might be enough to prohibit respondent from raising them in a state court. Cf. *Pennsylvania R. Co.* v. *Clark Bros. Coal Mining Co.,* 238 U. S. 456, 469 (1915) (no damages action may be brought for car distribution practices until Commission has ruled them unlawful).

But we need not decide whether a state-court suit is barred when the Commission is empowered to rule on the underlying issues, because here the Commission has actually addressed the matters respondent wishes to raise in state court. The Commission's order approving the abandonment application found that after the first two landslides, petitioner "made necessary repairs to enable continuation of service," that further repairs after the 1967 slide would not have been "sufficient to insure continuous operations," that the abandonment was not "willful," that respondent has no right to "insist that a burdensome line be maintained solely for its own use," and that "continued operation of the line would be an unnecessary burden on [petitioner] and on interstate commerce." App. to Pet. for Cert. 35a–36a. These findings by the Commission, made pursuant to the authority delegated by Congress, simply leave no room for further litigation over the matters respondent seeks to raise in state court. Consequently, we hold that on the facts of this case, the Interstate Commerce Act also pre-empts Iowa's common-law causes of action for damages stemming from a carrier's negligence and tort when the judgments of fact and of reasonableness necessary to the decision have already been made by the Commission.

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[14] Most of the Commission's abandonment decisions turn in part on factors such as those respondent wishes the state court to decide. See, *e. g., Chicago & N. W. Transp. Co. Abandonment,* 354 I. C. C. 121, 125–126 (1977); *Baltimore & Annapolis R. Co. Abandonment,* 348 I. C. C. 678, 700–703 (1976); *Missouri Pacific R. Co. Abandonment,* 342 I. C. C. 643, 644 (1972).

Nothing in our decision in *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915), compels a contrary result. But because both respondents and the Iowa Court of Appeals rely heavily on its language, we discuss the case in some detail. In *Puritan*, this Court was called upon for the first time to interpret what was then § 22 of the Interstate Commerce Act as it related to a carrier's duty to furnish cars. That section, which survives without substantive change in the Act as recodified,[15] provided that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Relying on this language, this Court held that a shipper could pursue its state common-law remedies for failure to provide cars when the carrier had previously agreed to provide them, as long as "there is no administrative question involved." *Id.*, at 131–132. Without this provision, the opinion explained, "it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts," so § 22 was added to make plain that the Act "was not intended to deprive the state courts of their general and concurrent jurisdiction." *Id.*, at 130. The Iowa Court of Appeals relied on this broad-sounding language in concluding that respondent's causes of action survived the enactment of and the various amendments to the Interstate Commerce Act. Respondent urges essentially the same point in this Court.

This analysis fails to take into account the fact that the Commission's exclusive jurisdiction over abandonments arises from the Transportation Act of 1920, and its authority over car service from the Esch Car Service Act, ch. 23, 40 Stat. 101. Our decision in *Puritan* preceded these amendments to the Interstate Commerce Act, so it can hardly be viewed as

[15] See 49 U. S. C. § 10103 (1976 ed., Supp. III).

an authoritative construction of the Act as amended.[16] And even assuming for the sake of argument the continuing validity of that opinion's reasoning, it does not control the disposition of the instant case. The Court in *Puritan* expressly noted that the matters presented to the state courts for decision involved no questions of law or questions calling for an administrative judgment, and, in particular, no issue as to the reasonableness of the carrier's policies. 237 U. S., at 131–132. Instead, the state court was called upon to decide only the factual question whether the railroad had carried out the duties that it had agreed to undertake. The Court's opinion in *Puritan* recognized the importance of this distinction:

> "[I]t must be borne in mind that there are two forms of discrimination,—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. . . . Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. . . .
>
> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is

[16] The Transportation Act of 1920, moreover, also added to the Interstate Commerce Act a new § 1 (17) (a), recodified at 49 U. S. C. § 10501 (c) (1976 ed., Supp. III), which expressly invalidates state remedies when they are "inconsistent with an order of the Commission" or prohibited under any provision of the Act. See *supra*, at 326. The *Puritan* Court obviously could not have considered this provision when deciding that a shipper could in some circumstances bring a state-court action for failure to furnish cars.

no administrative question involved, the courts being called upon to decide a mere question of fact." *Ibid.*

Here, we face the reverse of the situation that gave rise to the *Puritan* case. The questions presented to the state court in the instant litigation all involve evaluations of the reasonableness of petitioner's abandonment of the branch line. These issues call for the type of administrative evaluations and conclusions that Congress has entrusted to the informed discretion of the Commission. See *Midland Valley R. Co.*, v. *Barkley*, 276 U. S., at 484–486; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291 (1922). Under the *Puritan* analysis, "no court has jurisdiction" of a suit such as respondent's until the Commission "has declared the practice to be . . . unjust." 237 U. S., at 131. And the Commission, in an exercise of its discretion, has done precisely the opposite; it has decided that the abandonment was proper.[17] Respondent has chosen not to seek judicial review of the Commission's judgment through the means provided by Congress.[18] For all of these reasons, to the extent that

[17] The court below apparently recognized the distinction for jurisdictional purposes between state-court actions raising strictly factual claims and those calling for an exercise of administrative discretion. See 295 N. W. 2d, at 472. If it is assumed that *Puritan* remains good law, then the state court erred only in concluding that a suit such as respondent's raises only questions of fact that do not call for any expertise. Respondent itself concedes that even under its theory of the case, "the *sole issue* for determination is whether or not the service was terminated by compelling circumstances beyond the control of the carrier." Brief for Respondent 6 (emphasis in original). That is exactly the kind of question Congress intended that the Commission decide, and in the case before us, the Commission has of course already decided it.

[18] Respondent's reliance on *ICC* v. *Chicago & N. W. Transp. Co.*, 533 F. 2d 1025 (CA8 1976), is also misplaced. That case held only that a federal-court suit seeking injunctive relief on behalf of the Commission, which is among the express remedies enumerated in the Act, could go forward without awaiting the Commission's decision on a pending request for an abandonment. We express no opinion as to the merits of

the *Puritan* analysis has any application here, it supports petitioner's and the Commission's arguments that the Iowa courts lack jurisdiction to entertain respondent's suit for damages arising from petitioner's abandonment of the Kalo-Fort Dodge branch line.

Our decision today does not leave a shipper in respondent's position without a remedy if it is truly harmed. On the contrary, an aggrieved shipper is still free to pursue the avenues for relief set forth in the statute. Respondent could have gone to the Commission and challenged petitioner's refusal to provide service before any abandonment application was filed, but it did not. After petitioner filed its request for a certificate, respondent had the opportunity to present evidence to the Commission in support of its allegation, but failed to do so. Having lost its battle there, respondent could have followed the congressionally prescribed path by seeking review in the appropriate United States court of appeals. This, too, respondent failed to do. The Act creates no other express remedies for a shipper who is damaged by a carrier's abandonment of a line. In particular, nothing in the Act suggests that Congress contemplated permitting a shipper to bring a civil damages action in state court. And such a right to sue, with its implied threat of sanctions for failure to comply with what the courts of each State consider reasonable policies, is plainly contrary to the purposes of the Act. We are thus not free to assume that it has been preserved.

IV

We hold that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated carrier when the Interstate Commerce Commission, in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise

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that case, but we do note that its facts bear little relation to those before us.

in state court. We reserve for another day the question whether such a cause of action lies when no application is made to the Commission. The judgment of the Iowa Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Syllabus

ALBERNAZ ET AL. v. UNITED STATES

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

No. 79–1709. Argued January 19, 1981—Decided March 9, 1981

Petitioners, who were involved in an agreement to import marihuana and then to distribute it domestically, were convicted on separate counts of conspiracy to import marihuana, in violation of 21 U. S. C. § 963, and conspiracy to distribute marihuana, in violation of 21 U. S. C. § 846. These statutes are parts of different subchapters of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Petitioners received consecutive sentences on each count, the length of each of their combined sentences exceeding the maximum which could have been imposed either for a conviction of conspiracy to import or for a conviction of conspiracy to distribute. The Court of Appeals affirmed the convictions and sentences.

Held:

1. Congress intended to permit the imposition of consecutive sentences for violations of §§ 846 and 963 even though such violations arose from a single agreement or conspiracy having dual objectives. Pp. 336–343.

(a) In determining whether Congress intended to authorize cumulative punishments, the applicable rule, announced in *Blockburger* v. *United States,* 284 U. S. 299, 304, is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The statutory provisions involved here specify different ends as the proscribed object of the conspiracy—"distribution" and "importation"—and clearly satisfy the *Blockburger* test. Each provision requires proof of a fact that the other does not, and thus §§ 846 and 963 proscribe separate statutory offenses the violations of which can result in the imposition of consecutive sentences. *Braverman* v. *United States,* 317 U. S. 49, distinguished. Pp. 337–340.

(b) While the *Blockburger* test is not controlling where there is a clear indication of contrary legislative intent, if anything is to be assumed from the legislative history's silence on the question whether consecutive sentences can be imposed for a conspiracy to import and distribute drugs, it is that Congress was aware of the *Blockburger* rule

and legislated with it in mind. And the rule of lenity has no application in this case, since there is no statutory ambiguity. Pp. 340–343.

2. The imposition of consecutive sentences for petitioners' violations of §§ 846 and 963 does not violate the Double Jeopardy Clause of the Fifth Amendment. In determining whether punishments imposed after a conviction are unconstitutionally multiple, the dispositive question is whether Congress intended to authorize separate punishments for the crimes. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution. Pp. 343–344.

612 F. 2d 906, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 344.

Judith H. Mizner argued the cause for petitioners. With her on the briefs were *Martin G. Weinberg* and *Raymond E. LaPorte.*

Mark I. Levy argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey,* and *Mervyn Hamburg.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of conspiracy to import marihuana (Count I), in violation of 21 U. S. C. § 963, and conspiracy to distribute marihuana (Count II), in violation of 21 U. S. C. § 846. Petitioners received consecutive sentences on each count. The United States Court of Appeals for the Fifth Circuit, sitting en banc, affirmed petitioners' convictions and sentences. *United States* v. *Rodriguez,* 612 F. 2d 906 (1980). We granted certiorari to consider whether Congress intended consecutive sentences to be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy

Clause of the Fifth Amendment of the United States Constitution. 449 U. S. 818 (1980).

The facts forming the basis of petitioners' convictions are set forth in the panel opinion of the Court of Appeals, *United States* v. *Rodriguez*, 585 F. 2d 1234 (1978), and need not be repeated in detail here. For our purposes, we need only relate that the petitioners were involved in an agreement, the objectives of which were to import marihuana and then to distribute it domestically. Petitioners were charged and convicted under two separate statutory provisions and received consecutive sentences. The length of each of their combined sentences exceeded the maximum 5-year sentence which could have been imposed either for a conviction of conspiracy to import or for a conviction of conspiracy to distribute.

The statutes involved in this case are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* Section 846 is in Subchapter I of the Act and provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

This provision proscribes conspiracy to commit any offense defined in Subchapter I, including conspiracy to distribute marihuana which is specifically prohibited in 21 U. S. C. § 841 (a)(1). Section 846 authorizes imposition of a sentence of imprisonment or a fine that does not exceed the penalty specified for the object offense.

Section 963, which is part of Subchapter II of the Act, contains a provision identical to § 846 and proscribes conspiracy to commit any offense defined in Subchapter II, including conspiracy to import marihuana which is specifically prohibited by 21 U. S. C. § 960 (a)(1). As in § 846, § 963

authorizes a sentence of imprisonment or a fine that does not exceed the penalties specified for the object offense. Thus, a conspiratorial agreement which envisages both the importation and distribution of marihuana violates both statutory provisions, each of which authorizes a separate punishment.

Petitioners do not dispute that their conspiracy to import and distribute marihuana violated both § 846 and § 963. Rather, petitioners contend it is not clear whether Congress intended to authorize multiple punishment for violation of these two statutes in a case involving only a single agreement or conspiracy, even though that isolated agreement had dual objectives. Petitioners argue that because Congress has not spoken with the clarity required for this Court to find an "unambiguous intent to impose multiple punishment," we should invoke the rule of lenity and hold that the statutory ambiguity on this issue prevents the imposition of multiple punishment. Petitioners further contend that even if cumulative punishment was authorized by Congress, such punishment is barred by the Double Jeopardy Clause of the Fifth Amendment.

In resolving petitioners' initial contention that Congress did not intend to authorize multiple punishment for violations of §§ 846 and 963, our starting point must be the language of the statutes. Absent a "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumers Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Here, we confront separate offenses with separate penalty provisions that are contained in distinct Subchapters of the Act. The provisions are unambiguous on their face and each authorizes punishment for a violation of its terms. Petitioners contend, however, that the question presented is not whether the statutes are facially ambiguous, but whether consecutive sentences may be imposed when convictions under those statutes arise from participation in a single con-

spiracy with multiple objectives—a question raised, rather than resolved, by the existence of both provisions.

The answer to petitioners' contention is found, we believe, in application of the rule announced by this Court in *Blockburger* v. *United States,* 284 U. S. 299 (1932), and most recently applied last Term in *Whalen* v. *United States,* 445 U. S. 684 (1980). In *Whalen,* the Court explained that the "rule of statutory construction" stated in *Blockburger* is to be used "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." 445 U. S., at 691. The Court then referenced the following test set forth in *Blockburger:*

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States, supra,* at 304.

Our decision in *Whalen* was not the first time this Court has looked to the *Blockburger* rule to determine whether Congress intended that two statutory offenses be punished cumulatively. We previously stated in *Brown* v. *Ohio,* 432 U. S. 161, 166 (1977), although our analysis there was of necessity based on a claim of double jeopardy since the case came to us from a state court, that "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States* . . . ." Similarly, in *Iannelli* v. *United States,* 420 U. S. 770, 785, n. 17 (1975), we explained:

> "The test articulated in *Blockburger* v. *United States,* 284 U. S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether sep-

> arate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact which the other does not.' *Id.*, at 304. As *Blockburger* and other decisions applying its principle reveal, . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

In *Gore* v. *United States,* 357 U. S. 386 (1958), the Court rejected the opportunity to abandon *Blockburger* as the test to apply in determining whether Congress intended to impose multiple punishment for a single act which violates several statutory provisions. In reaffirming *Blockburger,* the Court explained:

> "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." 357 U. S., at 389.

Finally, in *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946), defendants who had been convicted of conspiracy in restraint of trade in violation of § 1 of the Sherman Act (15 U. S. C. § 1), and conspiracy to monopolize in violation of § 2 (15 U. S. C. § 2), sought review of their convictions contending that separate sentences for these offenses were impermissible because there was "but one conspiracy, namely, a conspiracy to fix prices." 328 U. S., at 788. In rejecting this claim, the Court noted the presence of separate statutory offenses and then, relying on *Blockburger,* upheld the sentences on the ground that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each

other although the objects of the conspiracies may partially overlap." 328 U. S., at 788.

The statutory provisions at issue here clearly satisfy the rule announced in *Blockburger* and petitioners do not seriously contend otherwise. Sections 846 and 963 specify different ends as the proscribed object of the conspiracy—distribution as opposed to importation—and it is beyond peradventure that "each provision requires proof of a fact [that] the other does not." Thus, application of the *Blockburger* rule to determine whether Congress has provided that these two statutory offenses be punished cumulatively results in the unequivocal determination that §§ 846 and 963, like §§ 1 and 2 of the Sherman Act which were at issue in *American Tobacco,* proscribe separate statutory offenses the violations of which can result in the imposition of consecutive sentences.

Our conclusion in this regard is not inconsistent with our earlier decision in *Braverman* v. *United States,* 317 U. S. 49 (1942), on which petitioners rely so heavily. Petitioners argue that *Blockburger* cannot be used for divining legislative intent when the statutes at issue are conspiracy statutes. Quoting *Braverman,* they argue that whether the objective of a single agreement is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." 317 U. S., at 53. *Braverman,* however, does not support petitioners' position. Unlike the instant case or this Court's later decision in *American Tobacco,* the conspiratorial agreement in *Braverman,* although it had many objectives, violated but a single statute. The *Braverman* Court specifically noted:

> "Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it

differs from successive acts which violate a single penal statute and *from a single act which violates two statutes.* See *Blockburger* v. *United States,* 284 U. S. 299, 301–[30]4; *Albrecht* v. *United States,* 273 U. S. 1, 11–12. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation, only the single penalty prescribed by the statute can be imposed." 317 U. S., at 54 (emphasis added).

Later in *American Tobacco,* the Court distinguished *Braverman:*

"In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general conspiracy statute, . . . we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act." 328 U. S., at 788.

See also *Pinkerton* v. *United States,* 328 U. S. 640, 642–643 (1946).

The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. Nothing, however, in the legislative history which has been brought to our attention discloses an intent contrary to the presumption which should be accorded to these statutes after application of the *Blockburger* test. In fact, the legislative history is silent on the question of whether consecutive sentences can be imposed for conspiracy to import and distribute drugs. Petitioners read this silence as an "ambiguity" over whether Congress intended to authorize

multiple punishment.[1] Petitioners, however, read much into nothing. Congress cannot be expected to specifically address each issue of statutory construction which may arise. But, as we have previously noted, Congress is "predominantly a lawyer's body," *Callanan* v. *United States*, 364 U. S. 587, 594 (1961), and it is appropriate for us "to assume that our elected representatives . . . know the law." *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979). As a result, if anything is to be assumed from the congressional

[1] Both petitioners and the Government concede that the legislative history is silent with regard to whether Congress intended to impose multiple punishment for a single conspiracy which violates both § 846 and § 963. See Brief for Petitioners 18–19 and Brief for United States 25. In support of their argument that this silence equals "ambiguity," petitioners set forth an alternative explanation for the existence of the two separate conspiracy statutes. Petitioners contend that these different statutes were enacted because two different Committees in the House of Representatives had jurisdiction over the different Subchapters of the Act. The legislation was initially referred to the House Committee on Ways and Means and, following hearings, that Committee decided to consider only the provisions relating to imports and exports of narcotic drugs, transferring the remaining provisions—relating to domestic regulation and control—to the Interstate and Foreign Commerce Committee. Petitioners argue that this background supports a conclusion that the dual structure of the Act was a result of congressional concern with committee jurisdiction and not an intent by Congress to authorize multiple punishment. The Government persuasively responds to this speculation by noting that Congress was unquestionably aware of the existence of the separate conspiracy provisions inasmuch as the enacted legislation evidences a great deal of coordination between the two House Committees. For example, Subchapter II of the Act incorporates the basic standards of Subchapter I and makes numerous express references to the provisions of that Subchapter. The Subchapters also have parallel penalty structures imposing similar penalties on similar crimes, and these penalties represent a change from both the administration's proposal and prior law. Moreover, Congressman Boggs, the sponsor of the bill, stated when introducing a floor amendment to Title III (Subchapter II of the Act) that "section 1013 [now 21 U. S. C. § 963]—relating to attempts and conspiracies— . . . will take effect at the same time as the comparable provisions of title II [Subchapter I of the Act encompassing, *inter alia*, § 846]." 116 Cong. Rec. 33665 (1970).

silence on this point, it is that Congress was aware of the *Blockburger* rule and legislated with it in mind. It is not a function of this Court to presume that "Congress was unaware of what it accomplished. . . ." *U. S. Railroad Retirement Bd.* v. *Fritz,* 449 U. S. 166, 179 (1980).[2]

Finally, petitioners contend that because the legislative history is "ambiguous" on the question of multiple punishment, we should apply the rule of lenity so as not to allow consecutive sentences in this situation. Last Term in *Bifulco* v. *United States,* 447 U. S. 381 (1980), we recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Quoting *Ladner* v. *United States,* 358 U. S. 169, 178 (1958), we stated: " 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " 447 U. S., at 387. We emphasized that the "touchstone" of the rule of lenity "is statutory ambiguity." And we stated: "Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent." *Ibid.* Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States, supra,* at 596.

[2] The petitioners also argue that in numerous instances the Government has charged a single conspiracy to import and distribute marihuana in *one* count. The inconsistency in the Government's behavior supports a finding of an absence of clear congressional intent with regard to the appropriateness of multiple punishment. The Government responds to this argument by noting that in 1977 the Justice Department advised all United States Attorneys that conspiracy to import and distribute should be charged as separate counts. We find that neither argument sheds light on the intent of Congress in this regard.

In light of these principles, the rule of lenity simply has no application in this case; we are not confronted with any statutory ambiguity. To the contrary, we are presented with statutory provisions which are unambiguous on their face and a legislative history which gives us no reason to pause over the manner in which these provisions should be interpreted.

The conclusion we reach today regarding the intent of Congress is reinforced by the fact that the two conspiracy statutes are directed to separate evils presented by drug trafficking. "Importation" and "distribution" of marihuana impose diverse societal harms, and, as the Court of Appeals observed, Congress has in effect determined that a conspiracy to import drugs and to distribute them is twice as serious as a conspiracy to do either object singly. 612 F. 2d, at 918. This result is not surprising for, as we observed many years ago, the history of the narcotics legislation in this country "reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter." *Gore* v. *United States,* 357 U. S., at 390.

Having found that Congress intended to permit the imposition of consecutive sentences for violations of § 846 and § 963, we are brought to petitioners' argument that notwithstanding this fact, the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution precludes the imposition of such punishment. While the Clause itself simply states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator. We have previously stated that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969) (footnotes omitted).

Last Term in *Whalen* v. *United States,* this Court stated that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." 445 U. S., at 688; *id.,* at 696 (WHITE, J., concurring in part and concurring in judgment); *ibid.* (BLACKMUN, J., concurring in judgment). In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional killing in the course of rape, the Court recognized that the "dispositive question" was whether Congress intended to authorize separate punishments for the two crimes. *Id.,* at 689. This is so because the "power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Ibid.* As we previously noted in *Brown* v. *Ohio,* "[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." 432 U. S., at 165. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.[3]

The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE STEWART, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in the judgment.

In *Whalen* v. *United States,* 445 U. S. 684, 688, the Court said that "the question whether punishments imposed by a

[3] Petitioners' contention that a single conspiracy which violates both § 846 and § 963 constitutes the "same offense" for double jeopardy pur-

court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."

But that is a far cry from what the Court says today: "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Consitution." *Ante,* at 344. These statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion.

No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger* v. *United States,* 284 U. S. 299.

Since Congress has created two offenses here, and since each requires proof of a fact that the other does not, I concur in the judgment.

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poses is wrong. We noted in *Brown* v. *Ohio,* that the established test for determining whether two offenses are the "same offense" is the rule set forth in *Blockburger*—the same rule on which we relied in determining congressional intent. As has been previously discussed, conspiracy to import marihuana in violation of § 963 and conspiracy to distribute marihuana in violation of § 846 clearly meet the *Blockburger* standard. It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. See, *e. g., Harris* v. *United States,* 359 U. S. 19 (1959); *Gore* v. *United States,* 357 U. S. 386 (1958). This is true even though the "single transaction" is an agreement or conspiracy. *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946).

DELTA AIR LINES, INC. *v.* AUGUST

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

No. 79–814. Argued November 12, 1980—Decided March 9, 1981

Held: Federal Rule of Civil Procedure 68—which provides that if a plaintiff rejects a defendant's formal settlement offer "to allow judgment to be taken against him," and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer"—does not apply to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror. Pp. 350–361.

(a) This interpretation is dictated by Rule 68's plain language—"judgment finally obtained by the offeree . . . not more favorable than the offer"—which confines the Rule's effect to a case in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer. Moreover, because the Rule contemplates that a "judgment taken" against a defendant is one favorable to the plaintiff, it follows that a judgment "obtained" by the plaintiff is also a favorable one. Pp. 350–352.

(b) Such interpretation of Rule 68 is also consistent with the Rule's purpose to encourage the settlement of litigation, since the Rule provides an inducement to settle those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. It could not have been reasonably intended on the one hand affirmatively to grant the district judge discretion to deny costs to the prevailing party under Rule 54 (d)—which provides that costs shall be allowed to the prevailing party unless the trial court otherwise directs—and then on the other hand to give defendants—and only defendants—the power to take away that discretion by performing a token act of making a nominal settlement offer. In both of the situations in which Rule 68 does not apply—judgments in the defendant's favor or in the plaintiff's favor for an amount greater than the settlement offer—the trial judge retains his Rule 54 (d) discretion. Rule 68's plain language makes it unnecessary to read a requirement into the Rule that only a reasonable settlement offer triggers the rule. A literal interpretation avoids the problem of sham offers, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers. Pp. 352–356.

(c) The above interpretation of Rule 68 is further compelled by its

history—the state rules upon which the Rule was modeled, the cases interpreting those rules, and the view of the commentators, including the members of the Advisory Committee. Pp. 356–361.

600 F. 2d 699, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in the result, *post*, p. 362. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 366.

E. Allan Kovar argued the cause for petitioner. With him on the briefs were *Max G. Brittain, Jr.*, *William H. Du Ross III*, and *Robert S. Harkey*.

Susan Margaret Vance argued the cause for respondent. With her on the brief was *Carole K. Bellows*.

Elinor Hadley Stillman argued for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General McCree*, *Deputy Solicitor General Wallace*, *Leroy D. Clark*, *Joseph T. Eddins*, and *Lutz Alexander Prager*.*

JUSTICE STEVENS delivered the opinion of the Court.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, if a plaintiff rejects a defendant's formal settlement offer, and if "the judgment finally obtained by the offeree is

**Robert E. Williams*, *Douglas S. McDowell*, and *Daniel R. Levinson* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *E. Richard Larson* and *Bruce J. Ennis* for the American Civil Liberties Union; by *John B. Jones, Jr.*, *Norman Redlich*, *William L. Robinson*, *Norman J. Chachkin*, and *Beatrice Rosenberg* for the Lawyers' Committee for Civil Rights Under Law; and by *Martha A. Mills* and *Sybille C. Fritzsche* for the Lawyers' Committee for Civil Rights Under Law of Chicago.

Briefs of *amici curiae* were filed by *Aldus S. Mitchell* and *Sophia H. Hall* for the National Association for the Advancement of Colored People; and by *Mary Ellen Hudgins* for the Northwest Women's Law Center et al.

not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer." [1] The narrow question presented by this case is whether the words "judgment finally obtained by the offeree" as used in that Rule should be construed to encompass a judgment *against* the offeree as well as a judgment *in favor of* the offeree.

Respondent Rosemary August (plaintiff) filed a complaint against petitioner Delta Air Lines, Inc. (defendant), alleging that she had been discharged from her position as a flight attendant solely because of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* She sought reinstatement, approximately $20,000 in backpay, attorney's fees, and costs. A few months after the complaint was filed, defendant made a formal offer of judgment to plaintiff in the amount of $450.[2] The offer was refused, the

[1] Rule 68, as amended in 1966, provides:

"At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

[2] The formal offer of judgment submitted by the defendant to the attorney for the plaintiff read as follows:

"Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the

case was tried, and plaintiff lost. The District Court entered judgment in favor of defendant and directed that each party bear its own costs. Defendant then moved for modification of the judgment, contending that under Rule 68 the plaintiff should be required to pay the costs incurred by defendant after the offer of judgment had been refused. The District Court denied the motion on the ground that the $450 offer had not been made in a good-faith attempt to settle the case and therefore did not trigger the cost-shifting provisions of Rule 68.[3] The Court of Appeals affirmed on the same ground, 600 F. 2d 699 (CA7 1979), holding that Rule 68 applied only if the defendant's settlement offer was sufficient "to justify serious consideration by the plaintiff." [4]

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amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage." App. 34.

[3] Senior District Judge Hoffman stated:

"While there is little authority on the point, this Court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.

. . . . .

"If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

. . . . .

"Finally, while the Court did ultimately find itself constrained to enter its judgment for the defendant, the Court certainly did not find the plaintiff's claim to be wholly specious. In the opinion of this Court and in the particular facts and circumstances of this case, an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant." *Id.*, at 11–12.

[4] "Against that general background, the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff. At oral argument the defendant urged that even an offer of $10 would have met the require-

In finding a reasonableness requirement in the Rule, the Court of Appeals did not confront the threshold question whether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror. Our resolution of the case, however, turns on that threshold question. The answer is dictated by the plain language, the purpose, and the history of Rule 68.

I

Rule 68 prescribes certain consequences for formal settlement offers made by "a party defending against a claim." [5] The Rule has no application to offers made by the plaintiff. The Rule applies to settlement offers made by the defendant in two situations: (a) before trial, and (b) in a bifurcated proceeding, after the liability of the defendant has been determined "by verdict or order or judgment." In either situation, if the plaintiff accepts the defendant's offer, "either party may then file the offer . . . and thereupon the clerk shall enter judgment." If, however, the offer is not accepted, it is deemed withdrawn "and evidence thereof is not admissible except in a proceeding to determine costs." The plaintiff's rejection of the defendant's offer becomes significant in such a proceeding to determine costs.[6]

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ments of Rule 68 and served the purpose of shifting cost liability. If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged. Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation." 600 F. 2d, at 701. (Footnote omitted.)

[5] In multiclaim litigation, such a party may, of course, be defending against a counterclaim or a cross-claim, but the effect of the Rule can most readily be explained by reference to cases involving a single claim by one plaintiff against one defendant. For that reason, as well as the fact that this case involves such a claim, we simply refer to the parties as "plaintiff" and "defendant."

[6] No issue is presented in this case concerning the amount or the items of costs that defendant seeks to recover.

Under Rule 54 (d) of the Federal Rules of Civil Procedure, the party prevailing after judgment recovers costs unless the trial court otherwise directs.[7] Rule 68 could conceivably alter the Rule 54 (d) presumption in favor of the prevailing party after three different kinds of judgments are entered: (1) a judgment in favor of the defendant; (2) a judgment in favor of the plaintiff but for an amount less than the defendant's settlement offer; or (3) a judgment for the plaintiff for an amount greater than the settlement offer. The question presented by this case is which of these three situations is described by the words "judgment finally obtained by the offeree . . . not more favorable than the offer."

Obviously those words do not encompass the third situation—a judgment in favor of the offeree that is *more favorable* than the offer. Those words just as clearly do encompass the second, for there can be no doubt that a judgment in favor of the plaintiff has been "obtained by the offeree." But inasmuch as the words "judgment . . . obtained by the offeree"—rather than words like "any judgment"—would not normally be read by a lawyer to describe a judgment in favor of the other party, the plain language of Rule 68 confines its effect to the second type of case—one in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer.

This reading of the plain language of the Rule is supported by other language contained in the Rule. The Rule applies when the defendant offers to have "judgment . . . taken against him." Because the Rule obviously contemplates that a "judgment taken" against a defendant is one favorable to the plaintiff, it follows that a judgment "obtained" by the plaintiff is also a favorable one.

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[7] Rule 54 (d) provides, in relevant part:

"(d) Costs

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."

In sum, if we limit our analysis to the text of the Rule itself, it is clear that it applies only to offers made by the defendant and only to judgments obtained by the plaintiff. It therefore is simply inapplicable to this case because it was the defendant that obtained the judgment.

II

Our interpretation of the Rule is consistent with its purpose. The purpose of Rule 68 is to encourage the settlement of litigation.[8] In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54 (d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.[9] Because costs are usually assessed against the losing party, liability for costs is a normal incident of defeat. Therefore, a nonsettling plaintiff does not run the risk of suffering additional burdens that do not ordinarily attend a defeat, and Rule 68 would provide little, if any, additional incentive if it were applied when the plaintiff loses.

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[8] Advisory Committee's Notes on Fed. Rule Civ. Proc. 68, 28 U. S. C. App., p. 499; 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p. 56 (1973); 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 68.02, p. 68–4 (1979).

[9] This incentive is most clearly demonstrated by the situation in which the defendant's liability has been established "by verdict or offer of judgment"—or perhaps by an admission—and the only substantial issue to be tried concerns the amount of the judgment. In that context, the opportunity to avoid the otherwise almost certain liability for costs should motivate realistic settlement offers by the defendant, and the risk of losing the right to recover costs provides the plaintiff with an additional reason for preferring settlement to further litigation.

Defendant argues that Rule 68 does provide such an incentive, because it operates to deprive the district judge of the discretion vested in him by Rule 54 (d). According to this reasoning, Rule 68 is mandatory, and a district judge must assess costs against a plaintiff who rejects a settlement offer and then either fails to obtain a judgment or recovers less than the offer. Therefore, nonsettling plaintiffs could not reject settlement offers in the expectation that the judge might exercise his discretion to deny the defendant costs if the defendant wins.[10]

If we were to accept this reasoning, it would require us to disregard the specific intent expressed in Rule 54 (d) and thereby to attribute a schizophrenic intent to the drafters. If, as defendant argues, Rule 68 applies to defeated plaintiffs, any settlement offer, no matter how small, would apparently trigger the operation of the Rule.[11] Thus any defendant, by performing the meaningless act of making a nominal settlement offer, could eliminate the trial judge's discretion under Rule 54 (d). We cannot reasonably conclude that the drafters of the Federal Rules intended on the one hand affirmatively to grant the district judge discretion to deny costs to the prevailing party under Rule 54 (d) and then on the other hand to give defendants—and only defendants—the power to take away that discretion by performing a token act.[12]

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[10] Delta argues that this additional incentive provided by Rule 68 is taking on increased importance as more district judges, like the District Judge here, are exercising the discretion granted by Rule 54 (d) to deny costs to prevailing defendants.

[11] Defendant contended at oral argument that a settlement offer of one penny should trigger the cost-shifting provision of the Rule if the defendant prevails. Tr. of Oral Arg. 5.

[12] Defendant argues that our construction of the Rule is anomalous because under Rule 68, a defendant who prevails is in a less favorable position than if he had lost the case but for an amount less than the offer. Reply Brief for Petitioner 10. The argument is applicable, however, only in a narrowly limited category of cases. First, because the prevailing defendant normally recovers costs, the argument is relevant

Moreover, if the Rule operated as defendant argues, we cannot conceive of a reason why the drafters would have given only defendants, and not plaintiffs, the power to divest the judge of his Rule 54 (d) discretion. See *Simonds* v. *Guaranty Bank & Trust Co.*, 480 F. Supp. 1257, 1261 (Mass. 1979). When Rule 68 is read literally, however, it is evenhanded in its operation. As we have already noted, it does not apply to judgments in favor of the defendant or to judgments in favor of the plaintiff for an amount greater than the settlement offer. In both of those extreme situations the trial judge retains his Rule 54 (d) discretion. In the former his discretion survives because the Rule applies only to judgments "obtained by the offeree"; in the latter, it survives because the Rule does not apply to a judgment "more favorable than the offer." [13] Thus unless we assume that the Federal Rules were intended to be biased in favor of defendants, we can conceive of no reason why defendants—and not plaintiffs—

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only in the relatively few cases in which special circumstances may persuade the district judge to exercise his discretion to deny costs to the prevailing party. And second, even within that small category, the argument is only valid if the settlement offer is for an amount less than the recoverable costs. For if the plaintiff obtains a judgment for an amount less than the offer but greater than the cost bill, the net liability of the defendant will be greater than the burden of paying his own costs after a victory on the merits. The fact that a defendant may obtain no benefit from a settlement offer for an amount less than his probable taxable costs is surely not a sufficient reason to disregard the plain language of the Rule, or to question its efficacy in motivating realistic settlement proposals in cases in which the defendant recognizes a significant risk that the plaintiff will obtain a judgment.

In sum, the effect of a literal interpretation of Rule 68 is to attach no practical consequences to a sham or token offer by the defendant. Since there is no reason to encourage such token offers, the Rule quite sensibly leaves the parties in the same position after such an offer as they would have been in if no such offer had been made. See n. 21, *infra*.

[13] Moreover, because Rule 68 has no application at all to offers made by the plaintiff, the plaintiff may not divest the district judge of his Rule 54 (d) discretion by making a sham offer.

should be given an entirely risk-free method of denying trial judges the discretion that Rule 54 (d) confers regardless of the outcome of the litigation.[14]

The Court of Appeals, perceiving the anomaly of allowing defendants to control the discretion of district judges by making sham offers, resolved the problem by holding that only reasonable offers trigger the operation of Rule 68. But the plain language of the Rule makes it unnecessary to read a reasonableness requirement into the Rule. A literal interpretation totally avoids the problem of sham offers, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers.[15] The

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[14] Defendant also argues that it should be permitted to use Rule 68 to recover costs in this manner because district judges have recently been exercising their discretion to deny prevailing defendants costs in too many cases. Reply Brief for Petitioner 8; Tr. of Oral Arg. 14. Since Rule 68 was promulgated prior to this alleged misapplication of Rule 54 (d), it surely was not intended to remedy a problem that had not yet surfaced.

Of course, there really is no reason to assume that district judges are repeatedly abusing their Rule 54 (d) discretion. If we make the more probable assumption that they are denying costs to the prevailing party only when there would be an element of injustice in a cost award, the burden of defendant's argument is not only that a special privilege should be granted to defendants but also that its primary effect will be to thwart the administration of justice.

[15] See Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L. J. 889, 895:

"An offer by a defendant of ten dollars at the beginning of a difficult and complex case, or of a case based on a novel legal theory, is not likely to produce an early settlement of the case, which is the purpose of the rule. Yet, if the rule is not limited to cases in which the plaintiff prevails, the ten dollar offer will have the effect of assuring that the defendant is awarded practically all of his costs if he prevails, even if there are good reasons why the defendant should not be awarded his costs. This is clearly not the result that the rulemakers envisioned. If interpreted to require that the plaintiff secure at least some relief, the rule would insure that token offers will not be made because nothing would be gained by them. In most cases, the defendant, as the prevailing party, will be entitled to costs under rule 54 (d). When the defendant is not so entitled,

Federal Rules are to be construed to "secure the just, speedy, and inexpensive determination of every action." Fed. Rule Civ. Proc. 1. If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered. But it is hardly fair or evenhanded to make the plaintiff's rejection of an utterly frivolous settlement offer a watershed event that transforms a prevailing defendant's right to costs in the discretion of the trial judge into an absolute right to recover the costs incurred after the offer was made.[16]

III

This interpretation of the language of the Rule and its clear purpose is further compelled by the history of Rule 68. Rule 68 is an outgrowth of the equitable practice of denying costs to a plaintiff "when he sues vexatiously after refusing an offer of settlement." [17] The 1938 Advisory Committee Notes to the original version of the Rule merely cited three state statutes as illustrations of the operation of the Rule.[18] These three statutes, from Minnesota, Montana, and New York,

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he ought not be able to employ rule 68 to override the discretion that the court would otherwise have, in order to compel the awarding of costs."

[16] Moreover, because the defendant's settlement offer is admissible at a proceeding to determine costs, a defendant could use a reasonable settlement offer as a means of influencing the judge's discretion to award costs under Rule 54 (d).

[17] 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p. 56 (1973).

[18] One of the members of the Advisory Committee, Robert G. Dodge, indicated at a symposium on the new Rules that the Rule was based on "statutes which are widely prevalent in the states . . . ." American Bar Association, Rules of Civil Procedure for the District Court of the United States with Notes as prepared under the direction of the Advisory Committee and Proceedings of the Institute on Federal Rules, Cleveland, Ohio 337 (1938) (hereinafter Institute on Federal Rules).

mandated the imposition of costs on a plaintiff who rejected settlement offers and failed to obtain a judgment more favorable than the offer.[19] All three States had other provisions, similar to Rule 54 (d), providing for the recovery of costs by

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[19] 2 Minn. Stat. § 9323 (Mason 1927) provided:

"At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor."

4 Mont. Rev. Codes Ann. § 9770 (1935) provided:

"The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer."

N. Y. Civ. Prac. Law § 177 (Cahill 1937) provided:

"Before the trial, the defendant may serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there be two or more defendants, and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serve upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance be not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time."

a prevailing party.[20] Therefore, the only purpose served by these state offer-of-judgment rules was to penalize prevailing plaintiffs who had rejected reasonable settlement offers without good cause.[21] As defendant notes, other States have or had similar rules.[22] But with one exception all of the cases cited by plaintiff, defendant, and the EEOC as *amicus* involving state cost-shifting rules were cases in which the plaintiff prevailed.[23]

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[20] See 2 Minn. Stat. §§ 9471–9473 (Mason 1927); 4 Mont. Rev. Codes Ann §§ 9787, 9788 (1935); N. Y. Civ. Prac. Law §§ 1470–1475 (Cahill 1937).

[21] In each of these States, the general statute providing for recovery of costs by prevailing defendants was, unlike Rule 54 (d), mandatory. See, *e. g.*, 4 Mont. Rev. Code Ann §§ 9787–9788 (1935); 2 Minn. Stat. § 9471 (Mason 1927); N. Y. Civ. Prac. Law §§ 1470–1475 (Cahill 1937). Inasmuch as those statutes did not give trial judges discretion to deny costs to prevailing defendants, the state antecedents of Rule 68 did not perform any cost-shifting function in cases in which the defendant prevailed. In those States—as is true under Rule 68—a sham settlement offer had no practical consequences; it left the parties in the same situation as if no offer had been made. See n. 12, *supra*. Therefore, the state offer-of-judgment statutes provide support for the view that Rule 68 applies only to prevailing plaintiffs.

[22] See, *e. g.*, Cal. Civ. Proc. Code Ann. § 998 (West 1980); *Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921); *Wordin* v. *Bemis*, 33 Conn. 216 (1866); *Prather* v. *Pritchard*, 26 Ind. 65 (1866); *West* v. *Springfield Fire & Marine Ins Co.*, 105 Kan. 414, 185 P. 12 (1919); *Wachsmuth* v. *Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935 (1896); *Herring-Hall-Marvin Safe Co.* v. *Balliet*, 44 Nev. 94, 190 P. 76 (1920); *Hammond* v. *Northern Pacific R. Co.*, 23 Ore. 157, 31 P. 299 (1892); *Sioux Falls Adjustment Co.* v. *Penn. Soo Oil Co.*, 53 S. D. 77, 220 N. W. 146 (1928); *Newton* v. *Allis*, 16 Wis. 197 (1862).

[23] See cases cited in n. 22, *supra*; see also *Miklautsch* v. *Dominick*, 452 P. 2d 438 (Alaska 1969); *Brown* v. *Nolan*, 98 Cal. App. 3d 445, 159 Cal. Rptr. 469 (1979); *Schnute Holtman Co.* v. *Sweeney*, 136 Ky. 773, 125 S. W. 180 (1910); *Watkins* v. *W. E. Neiler Co.*, 135 Minn. 343, 160 N. W. 864 (1917); *Petrosky* v. *Flanagan*, 38 Minn. 26, 35 N. W. 665 (1887); *Woolsey* v. *O'Brien*, 23 Minn. 71, 72 (1876); *Morris-Turner Live Stock Co.* v. *Director General of Railroads*, 266 F. 600 (Mont. 1920); *Margulis*

The commentators, including the members of the Advisory Committee, have agreed with our interpretation of the Rule.[24] At a symposium held shortly after the Rules were issued in

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v. *Solomon & Berck Co.*, 223 App. Div. 634, 229 N. Y. S. 157 (1928); *Smith* v. *New York, O. & W. R. Co*, 119 Misc. 506, 196 N. Y. S 521 (1922); *McNally* v. *Rowan*, 101 App. Div. 342, 92 N. Y. S. 250, aff'd, 181 N. Y. 556, 74 N. E. 1120 (1905); *Ranney* v. *Russell*, 10 N. Y. Super. 689, 690 (1854); *Benda* v. *Fana*, 10 Ohio St. 2d 259, 227 N. E. 2d 197 (1967); but see *Terry* v *Burger*, 6 Ohio App. 2d 53, 216 N. E. 383 (1966).

[24] Some commentators assume that the Rule, even when applicable, operates to deny costs to a prevailing plaintiff and not to impose liability for defendants' costs on that plaintiff. Wright and Miller's treatise indicates:

"Rule 68 is intended to encourage settlements and avoid protracted litigation. It permits a party defending against a claim to make an offer of judgment. If the offer is not accepted, and the ultimate judgment is not more favorable than what was offered, the party who made the offer is not liable for costs accruing after the date of the offer.

"This device was entirely new to the federal courts when the Federal Rules were adopted in 1938. But it was familiar in state practice. And the general principle, that a party may be denied costs when he sues vexatiously after refusing an offer of settlement, and *recovers no more than he had been previously offered,* has been held to be within the powers of an equity court regardless of the existence of a rule such as this one.

"Although the privilege of an offer of settlement is extended only to the party defending against a claim, it furnishes a just procedure to all parties concerned. It is fair to the claimant because *it does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover;* he will not free himself of the costs if the judgment recovered is more than the offer. It is certainly fair to the defending party because it allows him to free himself of the court costs by offering to make a settlement. It is of great benefit to the court because it encourages settlements and discourages vexatious suits and thus diminishes the burden of litigation." (Footnotes omitted.) (Emphasis supplied.) 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p. 56 (1973).

Moore uses similar language in his treatise, stating that an offer of judgment will "operate to *save* [the defendant] the costs from the time of that offer *if the plaintiff ultimately obtains a judgment less than the sum offered.*" 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 68.06, p. 68–13 (1979) (emphasis supplied). See also Dobie, The Federal Rules of Civil

1938, one of the members of the Advisory Committee presented the Rule as "a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance." [25] The Advisory Committee Notes to the 1946 Amendment to the Rule indicate that the Rule was designed to "save" a defendant from having to reimburse the plaintiff for costs incurred after the offer was made and not to make mandatory the court's discretionary power to tax costs against the plaintiff in the event the defendant prevails.[26] The fact that the defense bar did not develop a practice of seeking costs under Rule 68 by making nominal settlement offers is persuasive evidence that trial lawyers have interpreted the Rule in accordance with its plain language.[27] Thus the state rules upon which Rule 68

Procedure, 25 Va. L. Rev. 261, 304, n. 195 (1939) ("[I]f the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers").

[25] Mr. Dodge stated:

"This rule is based upon statutes which are widely prevalent in the states, and it affords a means for stopping the running of costs *where the defendant admits that part of the claim is good* but proposes to contest the balance. He may then make an offer of judgment of the amount which he conceives is due, and unless the plaintiff recovers more than that the plaintiff gets no costs accruing after that offer of judgment." Institute on Federal Rules 337 (emphasis supplied).

[26] The Advisory Committee's Notes state:

"It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained." 28 U. S. C. App., p. 499.

[27] It was not until 1974 that any federal court even suggested that Rule 68 could be interpreted to apply to a case in which the defendant

was modeled, the cases interpreting those rules, and the commentators' view of the Rule are all consistent with, and in fact compel, our reading of its plain language.

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prevails. See *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc*, 63 F. R. D. 607 (EDNY 1974).

Apart from the case at bar and *Mr. Hanger, Inc.*, there are only two other reported cases in which a defendant attempted to recover his own costs under Rule 68 after obtaining a judgment in his favor. In *Dual* v. *Cleland*, 79 F. R. D. 696 (DC 1978), the court followed *Mr. Hanger* and reluctantly granted defendant an award of costs under Rule 68, after stating that it would *not* have allowed costs to defendant as the prevailing party under Rule 54 (d). In *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F. R. D. 500, 503–504 (ND Cal. 1980), the court assumed that Rule 68 applied to prevailing defendants but refused to apply the Rule to impose costs on the named plaintiffs in a Title VII class action. The court noted that if Rule 68 applied in class actions, the disproportionate risk imposed on the class representatives would discourage the filing of Title VII suits.

All the other reported cases involving Rule 68 were either cases in which the plaintiff had prevailed or cases in which the court implicitly assumed that the Rule was limited to such a situation. See, *e. g.*, *Mason* v. *Belieu*, 177 U. S. App. D. C. 68, 75, 543 F. 2d 215, 222 (plaintiffs not awarded costs because they failed to file a bill of costs and defendant thus did not know which costs to object to as being incurred after the offer was made), cert. denied, 429 U. S. 852 (1976); *Home Ins. Co.* v. *Kirkevold*, 160 F. 2d 938, 941 (CA9 1947) (plaintiff still entitled to recover costs where defendant did not prove that its offer of judgment was served within 10 days of trial); *Truth Seeker Co.* v. *Durning*, 147 F. 2d 54, 56 (CA2 1945) ("[D]efendant could have stopped the running of further costs by an offer of judgment under F. R. C. P. 68"); *Cover* v. *Chicago Eye Shield Co.*, 136 F. 2d 374 (CA7) (defendant not liable for fees of master and court reporter where plaintiff recovered less than offer), cert. denied, 320 U. S. 749 (1943); *Staffend* v. *Lake Central Airlines, Inc.*, 47 F. R. D. 218, 220 (ND Ohio 1969) (a defendant may "escape the imposition of further costs where the plaintiff does not eventually secure a judgment exceeding the offer"); *Tansey* v. *Transcontinental & Western Air, Inc.*, 97 F. Supp. 458, 459 (DC 1949) (an offer that was not for a sum certain will not prevent the court from considering plaintiff's costs thereafter incurred); *Maguire* v. *Federal Crop Ins. Corp.*, 9 F. R. D. 240, 242 (WD La. 1949) (defendant cannot "escape" paying the plaintiff's costs

Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54 (d), that question was not raised in the Court of Appeals and is not properly before us. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE POWELL, concurring in the result.

I agree with most of the views expressed in the dissenting opinion of JUSTICE REHNQUIST, and do not agree with the Court's reading of Rule 68. It is anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.

I nevertheless concur in the result reached by the Court because I do not think that the terms of the offer made in this case constituted a proper offer of judgment within the scope of Rule 68.

I

Rule 68 provides, in pertinent part:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued*" (emphasis added).

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because offer was not properly formalized), aff'd in part and rev'd in part, 181 F. 2d 320 (CA5 1950); *FDIC* v. *Fruit Growers Service Co.*, 2 F. R. D. 131, 133 (ED Wash. 1941) (after taxing certain disputed costs against defendant, court noted that the costs could have been avoided by taking advantage of Rule 68); *Nabors* v. *Texas Co.*, 32 F. Supp. 91, 92 (WD La. 1940) (a defendant may "save himself in the matter of costs if the recovery does not exceed what was tendered" if he proves that he made an offer of judgment). See also *Scheriff* v. *Beck*, 452 F. Supp. 1254 (Colo. 1978); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110 (ND Cal. 1979).

In Title VII cases, the scope of "costs" is defined in the statute itself. Except in unusual circumstances, Title VII requires that a prevailing plaintiff receive "a reasonable attorney's fee as part of the costs." 42 U. S. C. § 2000e–5 (k); see *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412, 416–417 (1978); *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400, 401–402 (1968). We held last Term in *Maher* v. *Gagne,* 448 U. S. 122, 129 (1980), that a claim to an attorney's fee is not weakened if the plaintiff prevails by "settlement rather than through litigation."

A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore, that the "costs" component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer. *Scheriff* v. *Beck,* 452 F. Supp. 1254, 1260 (Colo. 1978) (offer of $2,200 together with costs, not including attorney's fees, was "fatally defective because it excludes attorney's fees then accrued").

The purposes of Title VII and Rule 68 each would be served by this plain-language construction of the relationship between the statute and the Rule. To be sure, Title VII's fee provision was designed to enable plaintiffs to vindicate their rights through litigation. *Piggie Park, supra,* at 401–402. On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.[1]

[1] Unfortunately, the cost of litigation in this country—furthered by discovery procedures susceptible to gross abuse—has reached the point where many persons and entities simply cannot afford to litigate even the most

An offer to allow judgment that does not cover accrued costs and attorney's fees is unlikely to lead to settlement. Many plaintiffs simply could not afford to accept such an offer. It may be, also, that the plaintiff's lawyer instituted the suit with no hope of compensation beyond recovery of a fee from the defendant. Such a lawyer might have a conflict of interest that would inhibit encouraging his client to accept an otherwise fair offer. It therefore seems clear that the relevant interests—of both parties and the public—will be served by construing Title VII and Rule 68 in accordance with their plain language.[2]

II

Delta's offer in this case did not comply with the terms of Rule 68.

When a plaintiff prevails in a litigated Title VII suit, the court awards a reasonable attorney's fee. The primary factors relevant to setting the fee usually are the time expended and

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meritorious claim or defense. See Amendments to the Federal Rules of Civil Procedure, 446 U. S. 995, 999–1001 (1980) (POWELL, J., with whom STEWART and REHNQUIST, JJ., joined, dissenting); *ACF Industries, Inc.* v. *EEOC*, 439 U. S. 1081, 1086–1088 (1979) (POWELL, J., dissenting from denial of certiorari); Janofsky, A. B. A. Attacks Delay and the High Cost of Litigation, 65 A. B. A. J. 1323, 1323–1324 (1979). Cf. *Herbert* v. *Lando*, 441 U. S. 153, 177 (1979).

[2] In *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752 (1980), we held that the term "costs," as it is used in 28 U. S. C. § 1927, does not incorporate by reference the definition of costs used in Title VII. Nothing in that case is inconsistent with my reasoning here. In *Roadway Express*, a party sought costs, including an attorney's fee, under § 1927 from opposing counsel who had unreasonably and vexatiously delayed an employment discrimination lawsuit. We concluded that the attorney's fee could not be recovered under § 1927, because Congress intended that section to include only those costs specified in a corresponding section, 28 U. S. C. § 1920. In this case, by contrast, the entitlement to "costs," including an attorney's fee, arises under Rule 68 of the Federal Rules of Civil Procedure. In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. Cf. Fed. Rule Civ. Proc. 54 (d).

a reasonable hourly rate for that time.[3] Thus, a court is not bound by the prevailing attorney's proposed hourly rate or by the bill submitted. The fee itself must be reasonable.

The same practice should be followed in Title VII cases in which the prevailing party is established by a Rule 68 offer of judgment. Cf. *Maher* v. *Gagne, supra.* In such a case, the offer of judgment consists of two components: (i) the substantive relief proposed, which may be a sum of money or specific relief such as reinstatement or promotion, and (ii) costs, including a reasonable attorney's fee. The offer should specify the first component with exactitude. But the amount of the fee is within the discretion of the court if the offer is accepted.[4]

Assessed by these standards, Delta's putative offer of judgment simply did not comply with the terms of Rule 68. In pertinent part, the offer provided:

> "Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, *in the amount of $450, which shall include attorney's fees,* together with costs accrued to date " (emphasis added).

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[3] In *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 540 F. 2d 102 (1976) (en banc), the Court of Appeals for the Third Circuit held that the primary determinant of a court-awarded fee—the "lodestar"—should be the amount of time reasonably expended on the matter multiplied by a reasonable hourly rate. The "lodestar" is subject to adjustment based on, *inter alia,* the quality of the work and the results obtained. *Id*, at 117–118; accord, *Furtado* v. *Bishop,* 635 F. 2d 915, 922–924 (CA1 1980); *Copeland* v. *Marshall,* 205 U. S App. D. C 390, 401–404, 641 F. 2d 880, 891–894 (1980) (en banc). Cf. *Johnson* v. *Georgia Highway Express, Inc.,* 488 F. 2d 714 (CA5 1974).

[4] It may be, of course, that the parties will settle the issue of costs and attorney's fees after the acceptance of the offer, without the need to involve the trial judge. Nothing in this opinion should be read to discourage that practice. But the terms of the offer of judgment must permit the prevailing plaintiff to request the trial judge to award a reasonable fee.

Delta's offer would have complied with Rule 68—and the company now would be entitled to the costs it seeks [5]—if the offer had specified some amount of substantive relief, plus costs and attorney's fees to be awarded by the trial court. But the offer did not so specify.

Accordingly, I concur in the result.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE STEWART join, dissenting.

Of the several remarkable aspects of the Court's opinion in this case, not the least is that, save for the docket number and the name of the case, it bears virtually no resemblance to the judgment and opinion of the Court of Appeals for the Seventh Circuit which we granted certiorari to review. The question presented by the petition for certiorari, albeit in somewhat laborious form, is best captured in the first of the three questions:

> "Whether the [C]ourt of [A]ppeals erred in nullifying the clear and unambiguous mandatory imposition of costs under Rule 68?" Pet. for Cert. 2.

The Court states that "[t]he narrow question presented by this case is whether the words 'judgment obtained by the offeree' as used in that Rule should be construed to encompass a judgment *against* the offeree as well as a judgment *in*

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[5] Contrary to the suggestion in JUSTICE REHNQUIST's dissenting opinion, *post*, at 378–379, nothing herein requires prevailing *defendants* to receive attorney's fees as part of their costs under Rule 68 when a plaintiff rejects an offer of judgment and then ultimately loses on the merits. As I have stated, it is the province of the trial judge to determine the entitlement to, and amount of, an attorney's fee. See n. 3, *supra*, and accompanying text. Prevailing plaintiffs are entitled to attorney's fees except in unusual circumstances. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401–402 (1968). A prevailing defendant, on the other hand, is entitled to attorney's fees as part of the costs only when the lawsuit is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421 (1978).

favor of the offeree." *Ante,* at 348. After reciting the procedural history of the case in the lower courts, the Court criticizes the Court of Appeals for its failure to confront "the threshold question whether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror." *Ante,* at 350. The Court's resolution of the case turns on that threshold question and it finds that the answer "is dictated by the plain language, the purpose, and the history of Rule 68." *Ibid.*

Though the ultimate result reached by the Court is the same as that of the Court of Appeals, the difference in approach of the two opinions could not be more striking. The Court of Appeals began its opinion by stating that "[t]he issue presented in this appeal is whether the awarding of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the *final judgment obtained by plaintiff* is not more favorable than the defendant's offer." 600 F. 2d 699, 699–700 (1979) (emphasis supplied). The Court of Appeals relied primarily on the ground that this was a private action under Title VII of the Civil Rights Act of 1964, and it was not willing "to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective." *Id.,* at 701. The court explained that a $450 offer in a case such as this made the semantically mandatory language of Rule 68 discretionary and permitted, but did not require, the District Court to award costs when, "viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." *Id.,* at 702. The Court of Appeals reasoned that this "liberal" not "technical" reading of Rule 68 is justified, at least in a Title VII case, and that it did not need to decide whether the same approach should be taken in other types of cases. *Ibid.*

To the Court of Appeals, the mandatory language of Rule 68, at least in a Title VII case, is only discretionary where the offer is not "reasonable" and in "good faith" (neither of which qualifications are found in Rule 68). But to this Court, the Court of Appeals was entirely in error in even reaching that question because Rule 68 has no applicability to a case in which a judgment is entered *against* the plaintiff-offeree and *in favor of* the defendent-offeror. Totally ignoring the common-sense maxim that the greater includes the lesser, the Court concludes that its answer is "dictated by the plain language, the purpose, and the history of Rule 68."

Two of the three reasons advanced by the Court of Appeals in support of its opinion permitting the District Court not to impose costs on respondent in this case are squarely negated by the reasoning of the Court's opinion. The "plain language" of the Rule refers neither to an exception for Title VII cases nor to a requirement that an offer be "reasonable" or made "in good faith."

Although Title VII provides for elaborate conciliation machinery before suit, the plaintiff who receives a "right to sue" letter from the EEOC is simply authorized to sue the employer in the appropriate United States district court. There is no intimation in the Federal Rules of Civil Procedure or Title VII that such lawsuit will not be conducted in accordance with the Federal Rules of Civil Procedure. In fact, Rule 1 of the Federal Rules specifically provides that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81." Rule 81 sets forth a list of exceptions including bankruptcy proceedings and proceedings in copyright brought under Title 17 of the United States Code, but proceedings brought under Title VII are not included. Presumably, the "plain language" of the Federal Rules and in particular Rule 68, as well as the "plain language" of the applicable provisions of Title VII, would bring the Court to

reject any special treatment with respect to costs for a Title VII lawsuit.

In my view, there is also no basis for reading into Rule 68 any additional conditions for bringing the Rule into play other than those which are specifically contained in the provisions of the Rule itself. I assume that the Court would agree with this approach in view of its fondness for the "plain meaning" canon of statutory construction. Therefore, the best and shortest response to the Court of Appeals' suggestion that a Rule 68 offer must be "reasonable" and made in "good faith" is that Rule 68 simply does not incorporate any such requirement; it deprives a district court of its traditional discretion under Rule 54 to disallow costs to the prevailing party in the strongest verb of its type known to the English language—"must":

> "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer. . . ." Fed. Rule Civ. Proc. 68. (Emphasis added.)

Over a half century ago the Court of Appeals for the Sixth Circuit said "the word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may.'" *Berg* v. *Merchant*, 15 F. 2d 990 (1926), cert. denied, 274 U. S. 738 (1927). To import into the mandatory language of Rule 68 a requirement that the tender of judgment must be "reasonable" or made in "good faith" not only rewrites Rule 68, but also puts a district court in the impossible position of having to evaluate such uncertain and nebulous concepts in the context of an "offer of judgment" that in many cases may have been made years past.

Since the Court relies on the "plain meaning" of Rule 68, it may be well to set that Rule out verbatim before analyzing its argument. Rule 68 provides in pertinent part:

> "At any time more than 10 days before the trial be-

> gins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." (Emphasis added.)

The Court asserts that the result reached by, if not the reasoning of, the Court of Appeals is correct because Rule 68, by its "plain language," applies only in cases in which a "judgment [is] finally obtained by the offeree." The Rule, therefore, does not apply in a case such as this where the defendant prevailed—*i. e.*, because no judgment was "obtained by the offeree." If Rule 68 does not apply, the determination regarding costs is governed by Federal Rule of Civil Procedure 54 (d), which grants a district court the discretion to award the defendant costs as the "prevailing party," but does not require it to do so. The Court argues that the "plain language" of Rule 68, its "history," and "policy" reasons support this interpretation of the Rule.

I read both the "plain language" of the Rule and its history quite differently than does the Court. According to it, a plaintiff—"offeree" under the terms of Rule 68—must *win* in the trial court in order to "obtain" a "judgment" within the meaning of that Rule. But we may call upon the various canons of statutory construction to pass before us in review as many times as we choose without being reduced to this anomalous conclusion.

The term "judgment" is defined in Rule 54 (a) of the Federal Rules of Civil Procedure to mean a "decree and any

order from which an appeal lies." Unquestionably, respondent "obtained" an "order from which an appeal lies" when the District Court entered its judgment in this case. Certainly, respondent did not subscribe to the Court's reasoning because she immediately sought review in the Court of Appeals of the "judgment" which had been entered against her. Rule 68, when construed to include a traditional "take nothing" judgment, see, Appendix to Fed. Rules Civ. Proc., Forms 31 and 32, 28 U. S. C. App., p. 530, as well as a judgment in favor of the plaintiff but less than the amount of the offer, thus fits with the remaining parts of the Federal Rules of Civil Procedure pertaining to judgments and orders in a manner in which the drafters of the Rule surely must have intended. To circumscribe Rule 68 in the manner in which the Court does is to virtually cut it adrift from the remaining related portions of the Federal Rules of Civil Procedure, a construction which could be justified only by the strongest considerations of history and policy. Our cases do not support the proposition that such a construction will *never* be given to a rule or statute, but they do indicate that only the strongest support in the legislative history warrants such a result. *Chemehuevi Tribe of Indians* v. *FPC,* 420 U. S. 395 (1975).

I think my reading of this part of Rule 68 is entirely consistent with the Rule's history. When the Federal Rules of Civil Procedure were adopted in 1938, the pertinent part of Rule 68 read:

> "If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. *If the adverse party fails to obtain a judgment more favorable than that offered,* he shall not recover costs in the district court from the time of the offer but shall pay costs from that time." (Emphasis supplied.)

Obviously, the event that "triggered" the operation of the original Rule 68 was the failure of the plaintiff to obtain

a judgment more favorable than that offered. Just as obviously, the plaintiff in this case did not meet her burden of obtaining a judgment more favorable than the $450 she was offered. The operation of Rule 68 was not intended to change when this part of the Rule was amended in 1948 to its present form. The Advisory Committee Notes to the 1948 amendment explain the reasons for the amendment—none of which give any indication that Congress decided to take away the benefits of the Rule to a defendant who made a Rule 68 offer but later prevailed on the merits.[1]

As noted by the Court, the 1938 Advisory Committee Notes to the original version of the Rule cite to three state statutes as illustrations of the operation of the Rule. These three statutes, like the text of the original Rule 68, all mandated imposition of costs on a plaintiff who rejected an offer of judgment and then later failed to recover a judgment more favorable than the offer.[2] This is the identical situation

[1] The 1948 amendment to Rule 68 added the following two sentences: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer The fact that an offer is made but not accepted does not preclude a subsequent offer." The Advisory Committee Notes explain that the two new sentences were added to assure "a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer." Advisory Committee Notes on Amendment to Rules of Civil Procedure, 28 U. S. C. App., pp. 499–500, 5 F. R. D. 433, 483 (1946), 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 68.01, p. 68–3 (1979). The change in the language of the Rule had nothing to do with whether or not it was intended to operate in a situation where the defendant prevailed.

[2] The Minnesota statute referred to by the 1938 Advisory Notes, 2 Minn. Stat. § 9323 (Mason 1927), provided:

"At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued If within ten days thereafter such parties shall give notice that the offer is accepted, he may file

which the plaintiff here finds herself in. Moreover, in each of these three States, the general statutes providing for recovery of costs by prevailing defendants was, unlike Rule 54 (d), mandatory. See, *e. g.*, 4 Mont. Rev. Codes Ann. §§ 9787, 9788 (1935); 2 Minn. Stat. § 9471 (Mason 1927); and N. Y. Civ. Prac. Law §§ 1470–1475 (Thompson 1939). As a result, the state cases cited by the Court do not address the situation in which a defendant has prevailed on the merits

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the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; *and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor.*" (Emphasis supplied.)

The Montana statute, 4 Mont. Rev. Codes Ann. § 9770 (1935), provided:

"The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; *and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer.*" (Emphasis supplied.)

The New York statute, N. Y. Civ. Prac. Law § 177 (Thompson 1939), provided:

"Before the trial, the defendant may serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there be two or more defendants, and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serve upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance be not thus given, the offer cannot be given in evidence upon the trial; *but, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.*" (Emphasis supplied.)

because in that situation the shifting of costs was mandatory under state law. It is, therefore, difficult for me to understand how it can be argued that Congress, seeking to pattern Rule 68 after the procedure used in these three States, could have possibly intended to immunize plaintiffs from the operation of the Rule and the concomitant costs it imposes simply because they lost their cases on the merits. It is also noteworthy that the lower court cases that have confronted the situation of a prevailing defendant seeking to recover its costs under Rule 68 have all concluded that such recovery is permissible. See *Dual* v. *Cleland,* 79 F. R. D. 696 (DC 1978); *Mr. Hanger, Inc.* v. *Cut Rate Hangers, Inc.,* 63 F. R. D. 607 (EDNY 1974); *Gay* v. *Waiters' & Dairy Lunchmen's Union, Local No. 30,* 86 F. R. D. 500 (ND Cal. 1980).[3]

Contrary to the view of the Court, I think that Rule 68 and Rule 54 (d) are entirely consistent with one another when read in a manner faithful to their actual language; indeed, the language of these Rules must be twisted virtually beyond recognition, and that of Rule 68 parsed virtually out of existence, to say that the latter Rule does not apply in a situation such as this simply because the petitioner prevailed. Rule 54 (d) itself contemplates the removal from the trial judge of the discretion of awarding costs when by its express terms it excepts situations where "express provision therefor is made . . . in these rules." It cannot be doubted that the

[3] It should be noted that the commentators on which the Court relies so heavily either do not support its position or simply fail to address it. Contrary to its suggestion, Wright and Miller's treatise assumes that Rule 68 operates in a manner that would allow a prevailing defendant the benefits of the Rule. Their treatise provides: "If the offer is not accepted, *and the ultimate judgment is not more favorable than what was offered,* the party who made the offer is not liable for costs accruing after the date of the offer." 12 C. Wright & A. Miller, Federal Practice and Procedure § 3001, p 56 (1973) (emphasis supplied). Thus, Wright and Miller envisioned that costs would be shifted unless the plaintiff recovered a judgment more favorable than the offer—a hurdle that respondent here was unable to clear.

mandatory language of Rule 68 is as clear a case of "express provision" as could be imagined.

While I do not think it necessary to address the "policy" considerations relied upon by the Court when the intent of the drafters of the Rule is as plain as it is here, I do think it appropriate to note that no policy argument will convince me that a plaintiff who has refused an offer under Rule 68 and then has a "take nothing" judgment entered against her should be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68. The construction of Rule 68 urged by the Court would place in a better position a defendant who tendered $10,000 to a plaintiff under Rule 68 in a case where the plaintiff was awarded $5,000 than where the same tender was made and the plaintiff was awarded nothing.

One final argument that has been pressed as a reason for affirmance of the Court of Appeals merits response. Rule 68 requires a party defending against a claim to serve upon the adverse party "an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued.*" A literal reading of the Rule appears to entitle a plaintiff to *all* costs accrued at the time of the offer. If the offer is accepted, the defendant must pay whatever costs the court determines were taxable at the time of the offer. Thus, a valid Rule 68 offer cannot be made if it limits or excludes any of the costs accrued on the date of the offer.

It is argued that because "costs" are nowhere defined in the Federal Rules of Civil Procedure it is necessary to look elsewhere to determine the types of costs which are assessable under Rule 68. Title VII does not contain a general definition of the term "costs," but it does specify that a court, in its discretion, shall allow the "prevailing party" a "reasonable attorney's fee as part of the costs . . . ." 42 U. S. C. § 2000e–5 (k). This Court has interpreted this provision to

mean that a prevailing plaintiff shall receive her costs "except in unusual circumstances," and we held last Term that a claim to an attorney's fee is not defeated if the plaintiff prevails by "settlement rather than through litigation." *Maher* v. *Gagne,* 448 U. S. 122, 129 (1980). Because a Rule 68 offer of judgment is a proposal which by definition stipulates that the plaintiff shall be treated as the prevailing party, as the argument runs, the cost component of Rule 68 in a Title VII case must include a component for plaintiff's reasonable attorney's fees accrued as of the date of the offer. Petitioner's offer in this case under this theory did not technically comply with Rule 68 because it limited the amount of attorney's fees to be recovered by the respondent and thus did not provide for the recovery of all costs accrued at the date of the offer.[4]

This argument, although superficially appealing, does not survive careful scrutiny. Our analysis must focus on the meaning of the word "costs" contained in Rule 68 and we are aided in this analysis by our decision only last Term in *Roadway Express, Inc.* v. *Piper,* 447 U. S. 752 (1980). There we were confronted with the question of whether the word "costs" contained in 28 U. S. C. § 1927 included attorney's fees in the context of a civil rights lawsuit. Section 1927 provides that lawyers who multiply court proceedings vexatiously may be assessed the excess "costs" they create. However, § 1927, like Rule 68, did not define the critical word—"costs." A District Court had concluded that because the civil rights statutes allow a prevailing party to recover attorney's fees as part of the costs of litigation, it was authorized to award attorney's fees as part of the sanction it imposed

[4] The actual text of the offer made by the petitioner to the respondent in this case reads in pertinent part as follows:

"Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450, which shall include attorney's fees, together with costs accrued to date."

under § 1927. We rejected this conclusion and in so doing we stated that in construing the term "costs" it was appropriate to look to the contemporaneous understanding of the term when the statute was enacted. We then assumed that Congress followed the recognized "American rule" that attorney's fees were not included within the definition of "costs" when it enacted § 1927. 447 U. S., at 759. Without any evidence that Congress wished to alter or amend the definition of "costs" by the passage of the civil rights fee-shifting statutes, 42 U. S. C. §§ 1988 and 2000e–5 (k), we were unwilling to expand its historical definition.

A conclusion similar to that reached in *Roadway Express* is equally sound here when determining whether "costs" as used in Rule 68 include attorney's fees in the context of a civil rights suit. Certainly, the "contemporaneous understanding" of "costs" when the Federal Rules of Civil Procedure were promulgated in 1938 did not include attorney's fees any more than it did in 1813 when the predecessor to § 1927 was enacted. The legislative history of Rule 68 indicates no intent to deviate from the common meaning of costs and this conclusion is bolstered by the fact that when the authors of the Rules intended that attorney's fees be recovered, such fees were specifically mentioned. See, *e. g.*, Fed. Rule Civ. Proc. 37, which allows "reasonable expenses . . . including attorney's fees," as a sanction for discovery abuses.

There is likewise no evidence of any congressional intent to alter the meaning of the word "costs" in Rule 68 by the passage of the civil rights statutes. Nothing in the fee-shifting provisions of these statutes or their legislative history has come to my attention which would suggest that Congress intended to amend Rule 68 by adding attorney's fees to otherwise taxable "costs" under that Rule.

It is also worth noting that the logic that would include attorney's fees as recoverable costs under Rule 68 would also allow a similar recovery of attorney's fees in other litigation under statutes which permit the award of attorney's fees.

In 1975, this Court noted in *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U. S. 240, that 29 statutes allow federal courts to award attorney's fees in certain suits. *Id.,* at 260–261, n. 33. Some of these statutes define attorney's fees as an element of costs while others separate fees from other taxable costs. To construe Rule 68 to allow attorney's fees to be recoverable as costs would create a two-tier system of cost-shifting under Rule 68. Plaintiffs in cases brought under those statutes which award attorney's fees as costs and who are later confronted with a Rule 68 offer would find themselves in a much different and more difficult position than those plaintiffs who bring actions under statutes which do not have attorney's fees provisions. No persuasive justification exists for subjecting these plaintiffs to differing penalties for failure to accept a Rule 68 offer and no persuasive justification can be offered as to how such a reading of Rule 68 would in any way further the intent of the Rule which is to encourage settlement.

Finally, if the term "costs" in Rule 68 includes attorney's fees, then Title VII plaintiffs who reject Rule 68 offers may find themselves in the unenviable position of having to absorb a defendant's attorney's fees if they fail to recover a judgment as favorable as the defendant's offer. This could seriously undermine the purposes behind the attorney's fees provisions of the Civil Rights Act, and yet there is no principled way to allow attorney's fees to be recovered as costs under Rule 68 in *some* Title VII situations while *prohibiting* such recovery in others. As we noted in *Roadway Express* in a similar context, to select on an ad hoc basis those features of § 1988 and § 2000e–5 (k) that should be read into Rule 68 would not only fundamentally alter the nature of Rule 68 but would also constitute standardless judicial lawmaking. Accordingly, in my view the offer made by the petitioner in this case fully complied with the terms of Rule 68 even though it attempted to place a limit on the ultimate amount of attorney's fees to be recovered. Because the

"costs" provision in Rule 68 does not encompass attorney's fees, those fees are just as susceptible to compromise and settlement as are other inchoate consequences of liability such as compensatory damages or backpay.[5]

In sum, I would reject the "plain meaning" basis of the Court's opinion interpreting Rule 68 because, in my view, the Rule must be read not only contrary to its "plain meaning" but also woodenly and perversely in order to reach the conclusion that a prevailing defendant who had made an offer

[5] The nearly 100 Rules of Federal Civil Procedure have numerous and often differing purposes, but it bears repeating that the purpose behind Rule 68, which this case involves, is to promote *settlement* and thereby diminish the number of trials necessary to resolve the cases which are filed in the federal courts. Were we to hold that attorney's fees were *not* subject to settlement and compromise (in the same way as the issues of liability, damages, and other remedies) as a part of a Rule 68 offer, we would frustrate the purpose of this Rule. The defendant would be put in the unenviable position of having to make an offer of judgment without knowing what his potential liability in terms of attorney's fees would be over and above the amount of the Rule 68 offer. While traditional "costs" can never be known to a certainty at the time of the making of a Rule 68 offer, knowledgeable counsel for both defendant and plaintiff can assess at least their order of magnitude. Attorney's fees, however, are a different breed of cat, not only because they can be extraordinarily extensive compared to traditional items of costs, but also because neither the plaintiff nor the defendant can know with any degree of certainty how much of the attorney's fees a prevailing plaintiff seeks will be allowed by a trial court exercising its discretion pursuant to Rule 54. Thus to hold that such fees were by definition open-ended and not subject to compromise would mean that an attorney representing a defendant and convinced that an offer pursuant to Rule 68 might well result in a settlement of the case if attorney's fees *were* subject to settlement and compromise could never confidently persuade his client that it would be in the client's best interest to make such an offer because he would of necessity have to advise the client in cases where attorney's fees are recoverable that such recovery would be over and above the amount of the Rule 68 offer. Such a caveat in the attorney's recommendation will most likely prove to deter the client from making a Rule 68 offer in the first place, with the result that fewer suits will be settled and more will be tried. Such a construction of Rule 68, therefore, hardly furthers the purposes behind the Rule.

pursuant to Rule 68 should be placed in a worse position than one who has lost to the plaintiff and had a judgment entered against him accordingly, but for an amount less than the amount tendered under Rule 68. This is "plain meaning" with a vengeance; a vengeance which neither the Rules Committee, this Court, nor Congress in their various roles in the adoption of the Rules could have contemplated.

It may be said that to read the Rule according to its plain meaning as I see it will place barriers in the way of plaintiffs' suing defendants. The short answer to this argument is that any provisions such as Rule 68 designed to promote settlement, rather than litigation, of claims is bound to make a plaintiff take a look at his "hole card." By the same token, the availability of such a procedure is bound to make the defendant take a look at *his* "hole card" in order to make certain that he is using every means available to both avoid costly protracted litigation and possible loss of the case if it goes to trial. The Rule interpreted in accordance with its "plain meaning" offers a defendant a method for preventing further accrual of taxable costs in the case of inflated or "nuisance" lawsuits; if the plaintiff is of the opinion that the offer is too low to be worth acceptance or even serious consideration, he need not even respond to it and the case will, unless settled in some other manner, go to trial. By following such a course, a plaintiff who obtains a judgment in excess of the defendant's Rule 68 offer loses absolutely nothing; a plaintiff against whom a "take nothing" judgment is entered loses only the possibility that a district court might exercise its discretion and not award costs to the prevailing defendant. Although the vast increase in the amount of litigation in this Nation today is not a valid reason for twisting rules or statutes in order to reduce such volume, if the plain meaning of a rule may have a tendency to encourage settlement rather than trial, this is surely not an unfortunate mishap in our system of administering justice.

DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* BRADLEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 79–855. Argued October 14, 1980—Decided March 9, 1981

600 F. 2d 807, affirmed by an equally divided Court.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Litvack, Harriet S. Shapiro, Robert B. Nicholson, Frederic Freilicher, Joseph F. Nakamura,* and *Thomas E. Lynch.*

Nicholas Prasinos argued the cause for respondents. With him on the briefs were *Faith F. Driscoll, Henry L. Hanson,* and *Ronald T. Reiling.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

**Edward S. Irons, Mary Helen Sears,* and *Robert P. Beshar* filed a brief for National Semiconductor Corp. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Donald R. Dunner, Kenneth E. Kuffner,* and *Travis Gordon White* for the American Patent Law Association, Inc.; by *Reed C. Lawlor* and *James W. Geriak* for the Los Angeles Patent Association; and by *Morton C. Jacobs* for Applied Data Research, Inc., et al.

William James Beard and *John F. Tregoning* filed a brief for Halliburton Services as *amicus curiae.*

DOE ET AL. *v.* DELAWARE

APPEAL FROM THE SUPREME COURT OF DELAWARE

No. 79-5932. Argued January 12, 1981—Decided March 9, 1981

Appeal dismissed. Reported below: 407 A. 2d 198.

Gary A. Myers argued the cause for appellants. With him on the briefs was *Michael Boudin.*

Regina Mullen Small, State Solicitor of Delaware, argued the cause for appellee. With her on the brief were *John A. Parkins, Jr.,* Assistant State Solicitor, and *Roger A. Akin, Thomas M. LaPenta,* and *Timothy A. Casey,* Deputy Attorneys General.*

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

JUSTICE BRENNAN, with whom JUSTICE WHITE joins, dissenting.

Appellants, a half brother and sister, are the natural parents of five children who were in the custody of the Division of Social Services of the Delaware Department of Health and Social Services at the beginning of this litigation.[1] After de-

**Carol R. Golubock, Daniel Yohalem,* and *Marian Wright Edelman* filed a brief for the American Orthopsychiatric Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* were filed by *Marcia Robinson Lowry* and *Bruce J. Ennis* for the American Civil Liberties Union; by *Janet Fink, Carol Sherman, Jane M. Sufian,* and *Henry S. Weintraub* for the Legal Aid Society of the City of New York, Juvenile Rights Division; and by *Douglas J. Besharov* and *Robert M. Horowitz* for the National Association of Counsel for Children et al.

[1] This Court granted appellants' motion to seal the record, 445 U. S. 949 (1980), and the pseudonyms John Doe and Jane Roe have been substituted for appellants' real names.

termining that the children should be put up for adoption,[2] the Division filed suit pursuant to Delaware law to obtain termination of appellants' parental rights over their children. The Superior Court of Delaware ordered termination, and the Supreme Court of Delaware affirmed.[3] Appellants appealed to this Court, arguing that the termination order and the Delaware statute authorizing it were unconstitutional. We noted probable jurisdiction. 445 U. S. 942 (1980).

The Court today dismisses this appeal for want of a properly presented federal question, thereby permitting the termination order to remain in effect despite the existence of a substantial federal constitutional challenge to the Delaware statutory scheme under which the order was entered.[4] Because I believe that the federal question *was* properly presented within the definition of that requirement in our cases, I dissent from this dismissal. Instead, I would vacate the judgment below, and remand for reconsideration in light of

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[2] See Tr. of Oral Arg. 35. The Division has apparently not made any formal arrangements for adoptive homes for the children. See Del. Code Ann., Tit. 13, §§ 907–908 (1975) (making termination of the parental rights of the natural parents a prerequisite to adoption in the absence of the consent of the natural parents).

[3] The order of termination issued orally by the Superior Court on September 12, 1975, App. to Juris. Statement 5b, was initially reversed by the Delaware Supreme Court for failure to decide whether termination of parental rights was in the best interests of the children, as required by Del. Code Ann., Tit. 13, § 1108 (1975). App. to Juris. Statement 1c. On remand, the Superior Court concluded that Doe and Roe "are incapable of providing proper care for their children," and that "it is in the best interests of the children that their parental rights of the children be terminated." *Id.*, at 3d. The Delaware Supreme Court affirmed. *In re Five Minor Children*, 407 A. 2d 198 (1979).

[4] The Court apparently does not question the *substantiality* of the federal question presented by this appeal, since it is dismissing the appeal "for want of a properly presented federal question" rather than "for want of [a] substantial federal question," *e. g.*, *Black* v. *Payne*, 438 U. S. 909 (1978), or "for want of a properly presented substantial federal question," *e. g.*, *Greenwald* v. *Maryland*, 363 U. S. 721 (1960).

supervening changes in the factual circumstances and the applicable state law.

I

Appellants challenge the constitutionality of certain portions of the former Del. Code Ann., Tit. 13, §§ 1101–1112 (1975), in effect while this litigation was pending in the state courts. These provisions established a "procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption." § 1103. Petitions for termination of parental rights could be filed by certain specified categories of persons, including the Division. § 1104 (8). Upon a finding by the Superior Court that the parents were "not fitted to continue to exercise parental rights," § 1103 (4), and that termination of existing parental rights would be "in the best interests of the child," the court was required to issue an order of termination, and to transfer parental rights to another person, organization, or agency. § 1108 (a). The effect of the termination order was "that all of the rights, duties, privileges and obligations recognized by law between the [parents] and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the [parents] were and always had been strangers." § 1112. Either an order of termination or the consent of the natural parents was required before children in the custody of the State could be placed for adoption. §§ 907–908.

Appellants argue here, as they did at each stage of the litigation in the state courts, that this statutory scheme for termination of parental rights was invalid under the United States Constitution. Specifically, they contend: (1) that Del. Code Ann., Tit. 13, § 1103 (4) (1975), which provides for such termination where the parent is "not fitted," is unconstitutionally vague and indefinite; (2) that a higher

standard than the mere "preponderance of the evidence" is required to terminate parental rights; and (3) that substantive due process forbids termination of parental rights in the absence of a demonstration of a compelling state interest, in the form of specific findings of existing or threatened injury to the child.[5] There is no doubt that appellants raised their federal constitutional claim in a timely manner in both the Superior Court [6] and the Supreme Court [7] of Delaware, nor that the Delaware Supreme Court explicitly considered and rejected the federal constitutional challenge.[8]

Dismissal of this appeal for want of a properly presented federal question is, therefore, unwarranted. The practice in this Court has been to dismiss an appeal taken under 28 U. S. C. § 1257 (2) for want of a properly presented federal question only when the federal question was not raised at the proper juncture in the state-court proceedings or in accordance with reasonable state rules. *Jones* v. *Florida,* 419 U. S. 1081, 1083 (1974) (BRENNAN, J., dissenting); *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181 (1919); R. Stern & E. Gressman, Supreme Court Practice 380–381 (5th ed. 1978).[9] See,

[5] Appellants' first argument "draw[s] in question the validity of a statute of [a] state on the ground of its being repugnant to the Constitution . . . of the United States," and is therefore within this Court's appellate jurisdiction. 28 U. S. C. § 1257 (2). We may therefore assume jurisdiction to decide the second and third issues in the case as well. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 487, n. 14 (1975); *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 547 (1922).

[6] App. to Juris. Statement 2i–6i, 8i.

[7] Opening Brief for Appellants in No. 259 (Del. Sup. Ct.) 2, 8–36; Reply Brief for Appellants in No. 259 (Del. Sup. Ct.) 1–21.

[8] 407 A. 2d, at 199–200.

[9] In *Pearson* v. *Dodd,* 429 U. S. 396 (1977), an appeal from the Supreme Court of Appeals of West Virginia was dismissed "for want of a properly presented federal question." *Id.,* at 398. A reading of the *per curiam* opinion in *Pearson* reveals, however, that the dismissal should have been styled "for want of a substantial federal question," for the Court determined that the appellant had "no constitutionally protected property or entitlement interest" upon which to base her claim. *Ibid.*

e. g., Street v. *New York,* 394 U. S. 576, 581–585 (1969); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn.,* 360 U. S. 334, 342, n. 7 (1959); *Raley* v. *Ohio,* 360 U. S. 423, 434–435 (1959); *Bailey* v. *Anderson,* 326 U. S. 203, 206–207 (1945); *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213–214 (1945); *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185–187 (1945); *Hunter Co.* v. *McHugh,* 320 U. S. 222, 226–227 (1943); *Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 462–463 (1936); *Whitney* v. *California,* 274 U. S. 357, 360–361 (1927); *Live Oak Water Users' Assn.* v. *Railroad Comm'n,* 269 U. S. 354, 357–359 (1926); *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 116–117 (1923); *Zadig* v. *Baldwin,* 166 U. S. 485, 488 (1897); *Crowell* v. *Randell,* 10 Pet. 368, 391–392, 398 (1836); cf. *Cardinale* v. *Louisiana,* 394 U. S. 437, 438–439 (1969) (dismissal of writ of certiorari); *Beck* v. *Washington,* 369 U. S. 541, 549–554 (1962) (same).[10] If the record shows that a federal constitutional challenge to a state statute was brought to the attention of the state court "with fair precision and in due time," then "the claim is . . . regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928). Indeed, if the highest state court

[10] Dismissal for want of a properly presented federal question is distinguishable from dismissal because of the inadequacy of the record for deciding the question presented, *e. g., Cowgill* v. *California,* 396 U. S. 371, 372 (1970) (Harlan, J., concurring); *Mitchell* v. *Oregon Frozen Foods Co.,* 361 U. S. 231 (1960) (dismissal of writ of certiorari); but cf. *Villa* v. *Van Schaick,* 299 U. S. 152, 155–156 (1936) (judgment on appeal vacated and remanded because of the inadequacy of the record), and from dismissal because problems of construction and interpretation of state law preclude addressing the constitutional issues "in clean-cut and concrete form," *e. g., Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584 (1947). In the instant case, since appellants' challenge to the Delaware termination-of-parental-rights statutes does not depend on the specific facts of the case, and since the Supreme Court of Delaware has resolved the questions of statutory interpretation relevant to this appeal, dismissal on the latter grounds would not be appropriate.

reaches the federal constitutional question and decides it on the merits, this Court will consider the case despite any possible failure of the litigants to raise the federal question in compliance with state procedural requirements. *Charleston Federal Savings & Loan Assn.* v. *Alderson, supra,* at 185–186; *Louisville & Nashville R. Co.* v. *Higdon,* 234 U. S. 592, 598 (1914); see *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 476 (1975).

Since appellants challenged the constitutionality of the Delaware statutory scheme at each stage of the state-court litigation, and the Delaware Supreme Court expressly addressed the issue, ruling that the termination-of-parental-rights procedure was constitutional, this Court's dismissal of the appeal for want of a properly presented federal question is unprecedented and inexplicable.[11]

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[11] *Naim* v. *Naim,* 350 U. S. 985 (1956), is not to the contrary. In *Naim,* we dismissed the appeal for want of a properly presented federal question. In an earlier appeal in the same case, 350 U. S. 891 (1955), we vacated the judgment of the Supreme Court of Appeals of Virginia, and remanded for further proceedings. Our order explained:

"The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered 'in clean-cut and concrete form, unclouded' by such problems. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584." *Ibid.*

On remand, the Supreme Court of Appeals of Virginia adhered to its decision, and noted that the record reflected the relation of the parties to the Commonwealth both before and after the marriage. *Naim* v. *Naim,* 197 Va. 734, 735, 90 S. E. 2d 849, 850 (1956). This Court's subsequent dismissal of the appeal from that decision for want of a properly presented federal question is best understood, therefore, as attributable to "the failure of the parties to bring here all questions relevant to the disposition of the case." 350 U. S., at 891. In the instant case, there is no such failure.

II

The living situation of appellants and their children has changed dramatically since the trial court proceedings in this case. Doe and Roe have ceased to live together, thus ending the incestuous relationship that formed the predicate for the Superior Court's original judgment of unfitness. See App. to Juris. Statement 5b. According to their attorney, Doe now resides in another State, while Roe has married and now lives with her husband and his child in Delaware. Tr. of Oral Arg. 4. Doe and Roe have not seen their five children since 1975.[12] The children, who ranged in age from 11 months to 4 years old when the Superior Court issued its first order of termination in 1975, are now about 6 to 9 years old. The children have never lived together as a family, and are now in four separate placements. Appellants' attorney stated at oral argument that "the eventual goal of the mother" is to obtain custody of her children, and that she would permit the father to visit them. *Id.*, at 3. There is no evidence on any of these matters in the record because it has been closed since December 1976. *Id.*, at 39.

Moreover, Del. Code Ann., Tit. 13, § 1103 (1975), was amended, effective July 11, 1980, to alter the standard for termination of parental rights. Instead of requiring a finding of "unfitness" as a predicate for termination, the new statute provides for termination if the parents "are not able, or have failed, to plan adequately for the child's physical needs or his mental and emotional health and development" and:

> "a. In the case of a child in the care of an authorized agency:
>
> "1. The child has been in the care of an authorized

[12] Appellants state that the reason they have not seen their children since 1975 is that the Division did not permit them to visit. Brief for Appellants 10, n. 17. The record does not reflect, however, when or how often appellants attempted to see their children.

agency for 1 year, or there is a history of previous placement or placements of this child, or a history of neglect, abuse, or lack of care of other children by this parent; and

"2. The conditions which led to the child's placement still persist, and there appears to be little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future.

"b. In the case of a child in the home of the stepparent or blood relative:

"1. The child has resided in the home of the stepparent or blood relative for a period of at least 1 year; and

"2. The Court finds the noncustodial parent or parents incapable of exercising parental responsibilities, and that there appears to be little likelihood such parent or parents will be able to exercise such parental responsibilities in the foreseeable future." Del. Code Ann., Tit. 13, § 1103 (5) (Supp. 1980).[13]

As stated in *Bell* v. *Maryland,* 378 U. S. 226, 237 (1964), this Court has "long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law." In the exercise of our jurisdiction under 28 U. S. C. § 1257, this Court has the power "not only to correct error in the judgment under review but to make such disposition of the case as justice requires." *Patterson* v. *Alabama,* 294 U. S. 600, 607 (1935). And, as Chief Justice Hughes further observed in *Patterson:* "[I]n determining what justice does require, the Court is bound to con-

[13] In order to require termination of parental rights, the Court must also make a "best interests of the child" determination as required by Del. Code Ann., Tit. 13, § 1108 (1975), which was not affected by the 1980 amendments.

sider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act." *Ibid.* See *Giles* v. *Maryland,* 386 U. S. 66, 80 (1967) (plurality opinion); *Thorpe* v. *Housing Authority,* 386 U. S. 670, 673–674 (1967); *Trunkline Gas Co.* v. *Hardin County,* 375 U. S. 8 (1963); *Wolfe* v. *North Carolina,* 364 U. S. 177, 195, n. 13 (1960); *Williams* v. *Georgia,* 349 U. S. 375, 389–391 (1955); *State Farm Mutual Automobile Ins. Co.* v. *Duel,* 324 U. S. 154, 161 (1945); *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155–156 (1944); *Walling* v. *James V. Reuter, Inc.,* 321 U. S. 671, 676–677 (1944); *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690–691 (1943); *Vanderbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 542 (1941); *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 515–516 (1939); *Honeyman* v. *Hanan,* 300 U. S. 14, 25–26 (1937); *Villa* v. *Van Schaick,* 299 U. S. 152, 155 (1936); *Pagel* v. *MacLean,* 283 U. S. 266, 268–269 (1931); *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n,* 273 U. S. 126, 130–131 (1927); *Dorchy* v. *Kansas,* 264 U. S. 286, 289, 291 (1924); *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503, 505–507, 509 (1912); see also *Piccirillo* v. *New York,* 400 U. S. 548, 556, n. 2 (1971) (BRENNAN, J., dissenting from dismissal of writ of certiorari).[14]

[14] In *Sanks* v. *Georgia,* 401 U. S. 144 (1971), this Court dismissed an appeal from the Supreme Court of Georgia after both the factual circumstances of the case and the applicable state law had so changed that the "focus of [the] lawsuit [had] been completely blurred, if not altogether obliterated, and our judgment on the important issues involved [had become] potentially immaterial." *Id.,* at 152. The effect of dismissing in *Sanks,* however, was identical to vacating and remanding, because the appeal was from an interlocutory order, and the appellants were able to raise both state and federal claims, based on the altered circumstances and law, on remand. *Id.,* at 148–150. Moreover, it was doubtful that the federal constitutional question in *Sanks* continued to present a justiciable controversy sufficient to support Supreme Court jurisdiction in light of the

The instant case falls squarely within the principle of *Bell* and *Patterson*. The change in the factual circumstances and in the applicable state statute might well produce a different result under Delaware law. This Court should not decide what effect these changes might have under state law,[15] or how the Supreme Court of Delaware might decide this case under the new circumstances and amended statute.[16] See *Bell* v. *Maryland*, 378 U. S., at 237. Nor, however, should we "ignore the supervening change in state law and proceed to decide the federal constitutional questions presented by this case. To do so would be to decide questions which, because of the possibility that the state court would now reverse the [order of termination], are not necessarily presented for decision." *Ibid.*; see *id.*, at 241; *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n, supra*, at 131; *Gulf, C. & S. F. R. Co.* v. *Dennis, supra*, at 507.

III

To argue that the proper disposition of this case is to vacate and remand rather than to dismiss for want of a properly presented federal question is not merely to quibble over words. Appellants in this case are parents who have been irrevocably separated from their children by process of

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changed circumstances. Dismissal was therefore an appropriate disposition. To similar effect is *United States* v. *Fruehauf*, 365 U. S. 146 (1961).

[15] That this Court has the *power* to decide for itself what effect the changes would have on the outcome of this case is not doubted. See *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, 273 U. S. 126, 131 (1927); *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 455–459 (1865). We have recognized, however, that the exercise of this power is at times "inconsistent with our tradition of deference to state courts on questions of state law." *Bell* v. *Maryland*, 378 U. S. 226, 237 (1964). To avoid this "pitfal[l]," we have adopted a policy of vacating and remanding the judgment where the effect of supervening events presents a question of state law. *Ibid.*

[16] Appellants did not seek a remand in state court based on the changed factual circumstances. Tr. of Oral Arg. 12–14.

a state law they contend is unconstitutional. To vacate and remand is to recognize that supervening events have made further state-court proceedings necessary before this Court can reach the constitutional questions; to dismiss is to end the litigation, leaving Doe and Roe without any means to vindicate their parental rights.[17] See *Pagel* v. *MacLean, supra,* at 269; *Gulf, C. & S. F. R. Co.* v. *Dennis, supra,* at 509.

The appellate jurisdiction of this Court is not discretionary. *Hicks* v. *Miranda,* 422 U. S. 332, 344 (1975). Having raised a federal constitutional challenge to the former Del. Code Ann., Tit. 13, § 1103 (4) (1975), under which their parental rights were terminated, and having received a final judgment from the highest court of the State upholding the statute and affirming the termination order, appellants have a *right* to appellate review. I can discern no basis for dismissing this appeal for want of a properly presented federal question, and therefore respectfully dissent.

JUSTICE STEVENS, dissenting.

The wisdom of the Court's policy of avoiding the premature or unnecessary adjudication of constitutional questions is well established. See *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 568–575. That policy provides

[17] I express no opinion on whether appellants would be eligible for relief under Rule 60 of the Rules of Civil Procedure for the Superior Court of Delaware, which permits the Superior Court to "relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment."

Nor do I mean to imply that the State, as custodian of the children, is without countervailing interest in obtaining a prompt resolution of this controversy. Until the order of termination is made final, the children may not be placed for adoption. Del. Code Ann., Tit. 13, §§ 907, 908 (1975). As this Court recognized in *Smith* v. *Organization of Foster Families,* 431 U. S. 816, 833–838 (1977), the "limbo" in which children remain between leaving the care of their natural parents and entering the care of permanent adoptive parents may have deleterious consequences for them.

some support for the Court's otherwise inexplicable conclusion that the three federal questions raised by this appeal are somehow not "properly presented." [1] That policy also would provide some support for JUSTICE BRENNAN'S view that this case should be remanded to the Delaware courts for further proceedings before this Court addresses any of the federal issues. In my opinion, however, both the Court's disposition and JUSTICE BRENNAN'S proposed disposition are inadequately supported by that policy because adjudication of one of the federal questions presented in this case would be neither premature nor unnecessary.

To explain my position, I shall focus on the question whether the Due Process Clause of the Fourteenth Amendment requires that the termination of parental rights be supported by a higher standard of proof than a mere preponderance of the evidence.[2] For the reasons stated by the Court

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[1] Appellants raise three constitutional objections to the termination order entered against them See BRENNAN, J., dissenting, *ante*, at 384–385. In their brief on the merits, appellants argue the following questions:

"1. Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is 'not fitted,' unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

"2. In light of the protected nature of the family relationship under decisions of this Court, does the Due Process Clause and this Court's decision in *Addington* v. *Texas*, 441 U. S. 418 (1979), preclude the termination of the parent-child relationship based upon a mere 'preponderance of the evidence'?

"3. Under the Due Process Clause, must the state demonstrate a compelling state interest, by making specific findings of existing or threatened harm to the child, before terminating the parent-child relationship?" Brief for Appellants 3.

See also Juris. Statement 2–3.

[2] If the standard-of-proof issue were not presented, I would agree with JUSTICE BRENNAN'S proposed disposition. Because the substance of the unfitness standard has been revised in the new statute, see *ante*, at 388–389, the other two questions raised by appellants should be remanded to the Delaware Supreme Court for consideration in light of the new statute, after

in *Addington* v. *Texas*, 441 U. S. 418, that question is undeniably substantial. For the reasons stated by JUSTICE BRENNAN, *ante*, at 384–387, there is no procedural defect in the record that provides a legitimate basis for the Court's conclusion that the question is not "properly presented" in this case. In my opinion, the Court has the duty to decide that question now because there is no reason to believe that delay will affect either the character of the question or the necessity of deciding it in this case. Unlike JUSTICE BRENNAN, I believe that neither the change in the status of the appellants nor the change in the Delaware statute justifies a remand for further state-court proceedings without first deciding whether the Federal Constitution requires that an order terminating parental rights be supported by clear and convincing evidence.

Neither in the Supreme Court of Delaware nor in this Court have appellants argued that the change in their living situation subsequent to the entry of the termination order is a sufficient basis for setting aside that order.[3] Of course, if there is an independent basis for vacating the order—or if the state court decided to rely on postjudgment events to set aside its own decision—a new proceeding to determine the welfare of appellants' children undoubtedly should consider

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a decision by this Court on the merits of the standard-of-proof question. The new statutory language would clearly be relevant to these questions if, as a matter of state law, the new statute is applicable in this termination proceeding.

[3] Appellants did not seek a remand in the Delaware Supreme Court based upon the change in their status. See BRENNAN, J., dissenting, *ante*, at 391, n. 16. That court was informed of the changed circumstances, see App. to Juris. Statement 5a; Tr. of Oral Arg. 11–14, 29–30, but it apparently concluded that the new circumstances did not warrant a remand to the trial court in the absence of a request by one of the parties. In their opening brief in this Court, appellants do not even mention that the factual circumstances have changed, and in their reply brief they allude to their present status only in the vaguest of terms. It was only at oral argument that appellants' counsel squarely addressed the details of their present living situation.

recent, as well as ancient, history. I do not believe, however, that such recent events—which are unrelated to the federal questions that support our appellate jurisdiction—provide an appropriate basis for this Court to exercise its power to vacate the judgment of the Delaware Supreme Court.

Nor, in my opinion, does the enactment of the new Delaware statute make it appropriate for us to vacate the judgment of the Delaware Supreme Court. This is not a case like *Bell* v. *Maryland,* 378 U. S. 226, in which the State has made lawful the conduct that formed the basis of a criminal conviction pending on appeal,[4] or otherwise has taken action that significantly changed the federal question presented by an appeal to this Court. None of the parties and none of the many *amici curiae* suggest that the new Delaware statute has changed the standard of proof required by Delaware law.[5]

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[4] As the Court noted in *Bell:*

"Petitioners' convictions were affirmed by the Maryland Court of Appeals on January 9, 1962. Since that date, Maryland has enacted laws that abolish the crime of which petitioners were convicted." 378 U. S., at 228.

In addition, it is not at all clear that the Delaware courts would regard the enactment of the new statute as a reason to modify or vacate the termination order entered against appellants. In *Bell,* the Court emphasized the fact that under Maryland law the supervening change in the governing criminal statute probably would result in reversal of the petitioners' convictions by the state courts. See *id.,* at 230–237. In this case, we do not know what effect, if any, the new statute is likely to have on termination proceedings initiated and substantially completed prior to its enactment. The State of Delaware, in its brief in this Court, has not suggested that the new statute has any bearing, as a matter of state law, on this litigation.

[5] Both the original and the revised statutes are silent with respect to the standard of proof applicable in termination proceedings. The Delaware Supreme Court, in its consideration of the standard-of-proof issue in this case, did not rely upon any specific language of the termination statute, but rather based its conclusion primarily upon the civil, nonpenal

If it was unconstitutional to apply the preponderance-of-the-evidence standard at the 1972 termination proceeding, it would be equally unconstitutional to apply that standard at a new proceeding held under the revised statute. Because the constitutionality of applying that standard in a case of this kind is now squarely at issue, I believe we have the power and the obligation to resolve this federal question *before* any further proceedings are conducted.

As the Court stated in *Patterson* v. *Alabama,* 294 U. S. 600, 607, we have the power "not only to correct error in the judgment under review but to make such disposition of the case as justice requires." See BRENNAN, J., dissenting, *ante,* at 389. In my judgment, justice requires that we promptly resolve the critical federal question properly presented in this case, because this litigation involves the family status of growing children [c] and because this federal question is certain to reappear before us in the same form at a later date. Accordingly, I would decide the standard-of-proof question and thereafter either remand to the Delaware Su-

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nature of termination proceedings in Delaware. See App. to Juris. Statement 9a–11a; *In re Five Minor Children,* 407 A. 2d 198, 200 (1979). Nothing on the face of the new statute suggests that it will be interpreted to change the civil nature of Delaware termination proceedings. Thus, even if the new statute would be applicable in this case as a matter of state law, the federal constitutional question would remain the same.

[c] The initial termination order was entered in 1975. Appellants have not seen their five children, now ranging in age from 6 to 9 years old, since that time. The children are presently in four separate foster homes, and apparently have never lived together as a family. Because of the pendency of this proceeding, the children have been separated from each other and from their natural parents, and also have been ineligible for adoption because of the statutory requirement that the rights of the natural parents be finally terminated before adoption can take place without their consent. See Del. Code Ann., Tit. 13, §§ 907, 908 (1975). Further delay in a proceeding of this nature may well frustrate whatever hope remains that these children will ever be able to enjoy the benefits of a secure and permanent family environment.

preme Court for consideration of the two remaining questions in light of the new statute or remand for a new trial under the correct standard of proof, depending upon how that question is resolved by a majority of the Members of this Court.

I respectfully dissent.

H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL.

APPEAL FROM THE SUPREME COURT OF UTAH

No. 79–5903. Argued October 6, 1980—Decided March 23, 1981

A Utah statute requires a physician to "[n]otify, if possible," the parents or guardian of a minor upon whom an abortion is to be performed. Appellant, while an unmarried minor living with and dependent on her parents, became pregnant. A physician advised her that an abortion would be in her best medical interest but, because of the statute, refused to perform the abortion without first notifying her parents. Believing that she should proceed with the abortion without notifying her parents, appellant instituted a suit in state court seeking a declaration that the statute is unconstitutional and an injunction against its enforcement. She sought to represent a class consisting of unmarried minors "who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so" because of their physicians' insistence on complying with the statute. The trial court upheld the statute as not unconstitutionally restricting a minor's right of privacy to obtain an abortion or to enter into a doctor-patient relationship. The Utah Supreme Court affirmed.

Held:

1. Since appellant did not allege or offer evidence that either she or any member of her class is mature or emancipated, she lacks standing to challenge the Utah statute as being unconstitutional on its face on the ground of overbreadth in that it could be construed to apply to all unmarried minor girls, including those who are mature and emancipated. *Harris* v. *McRae,* 448 U. S. 297. Moreover, the State is bound by a ruling in another case that the statute does not apply to emancipated minors, and the Utah Supreme Court has had no occasion to consider the statute's application to mature minors. Pp. 405–407.

2. As applied to an unemancipated minor girl living with and dependent upon her parents, and making no claim or showing as to maturity or as to her relations with her parents, the Utah statute serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution. Pp. 407–413.

(a) Although a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, *Bellotti* v. *Baird,* 443 U. S. 622; *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, a statute setting out a mere requirement of parental notice when possible does not violate the constitutional rights of an immature, dependent minor. Pp. 407–410.

(b) The Utah statute does not give parents a veto power over the minor's abortion decision. As applied to immature and dependent minors, the statute serves important considerations of family integrity and protecting adolescents as well as providing an opportunity for parents to supply essential medical and other information to the physician. The statute is not unconstitutional for failing to specify what information parents may furnish to physicians, or to provide for a mandatory period of delay after the physician notifies the parents; or because the State allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carries the child to term; or because the notice requirement may inhibit some minors from seeking abortions. Pp. 411–413.

604 P. 2d 907, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART, J., joined, *post*, p. 413. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 420. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 425.

David S. Dolowitz argued the cause and filed a brief for appellant.

Paul M. Tinker, Assistant Attorney General of Utah, argued the cause for appellees. With him on the brief was *Robert B. Hansen*, Attorney General.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether a state statute which requires a physician to "[n]otify, if possible,"

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*Briefs of *amici curiae* urging reversal were filed by *Abigail English* and *Pauline H. Tesler* for the Coalition for the Medical Rights of Women et al.; and by *Eve W. Paul* and *Harriet F. Pilpel* for the Planned Parenthood Federation of America, Inc., et al.

Dennis J. Horan, Victor G. Rosenblum, John D. Gorby, Patrick A. Trueman, and *Dolores V. Horan* filed a brief for Americans United for Life as *amicus curiae* urging affirmance.

Lynn D. Wardle and *Robert W. Barker* filed a brief for the Utah Association of Women et al. as *amici curiae*.

the parents of a dependent, unmarried minor girl prior to performing an abortion on the girl violates federal constitutional guarantees.

I

In the spring of 1978, appellant was an unmarried 15-year-old girl living with her parents in Utah and dependent on them for her support. She discovered she was pregnant. She consulted with a social worker and a physician. The physician advised appellant that an abortion would be in her best medical interest. However, because of Utah Code Ann. § 76–7–304 (1978), he refused to perform the abortion without first notifying appellant's parents.

Section 76–7–304, enacted in 1974, provides:

> "To enable the physician to exercise his best medical judgment [in considering a possible abortion], he shall:
>
> "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> "(a) Her physical, emotional and psychological health and safety,
>
> "(b) Her age,
>
> "(c) Her familial situation.
>
> "(2) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor* or the husband of the woman, if she is married." (Emphasis supplied.) [1]

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[1] Whether parents of a minor are liable under Utah law for the expense of an abortion and related aftercare is not disclosed by the record.

Utah also provides by statute that no abortion may be performed unless a "voluntary and informed written consent" is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion. See Utah Code Ann. § 76–7–305 (1978). In *Planned Parenthood of Central Mo.* v. *Danforth,*

Violation of this section is a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $1,000.[2]

Appellant believed "for [her] own reasons" that she should proceed with the abortion without notifying her parents. According to appellant, the social worker concurred in this decision.[3] While still in the first trimester of her pregnancy, appellant instituted this action in the Third Judicial District Court of Utah.[4] She sought a declaration that § 76–7–304 (2) is unconstitutional and an injunction prohibiting appellees, the Governor and the Attorney General of Utah, from enforcing the statute. Appellant sought to represent a class consisting of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so" because of their physicians' insistence on complying with § 76–7–304 (2). The trial judge declined to grant a temporary restraining order or a preliminary injunction.[5]

The trial judge held a hearing at which appellant was the only witness. Appellant affirmed the allegations of the complaint by giving monosyllabic answers to her attorney's

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428 U. S. 52, 65–67 (1976), we rejected a constitutional attack on written consent provisions.

[2] Utah Code Ann. §§ 76–7–314 (3), 76–3–204 (1), 76–3–301 (3) (1978).

[3] Appellant's counsel stated in his jurisdictional statement and again in his brief that the physician concluded not only that an abortion would be in appellant's best interests, but also that parental notification would not be in appellant's best interests. However, at oral argument, counsel corrected this statement and conceded that there is no evidence to support this assertion. Tr. of Oral Arg. 8, 17.

[4] The record does not reveal whether appellant proceeded with the abortion.

[5] The trial judge allowed appellant to proceed without appointment of a guardian *ad litem*. He noted that a guardian would be required to notify the parents.

leading questions.[6] However, when the State attempted to cross-examine appellant about her reasons for not wishing to notify her parents, appellant's counsel vigorously ob-

[6] The testimony was as follows:

"BY MR. DOLOWITZ [appellant's counsel]:

"Q At the time that the Complaint in this matter was signed, you were pregnant?

"A Yes.

"Q You had consulted with a counselor about that pregnancy?

"A Yeah.

"Q You had determined after talking to the counselor that you felt you should get an abortion?

"A Yes.

"Q You felt that you did not want to notify your parents—

"A Right.

"Q —of that decision? You did not feel for your own reasons that you could discuss it with them?

"A Right.

"Q After discussing the matter with a counselor, you still believed that you should not discuss it with your parents?

"A Right.

"Q And they shouldn't be notified?

"A Right.

"Q After talking the matter over with a counselor, the counselor concurred in your decision that your parents should not be notified?

"A Right.

"Q You were advised that an abortion couldn't be performed without notifying them?

"A Yes.

"Q You then came to me to see about filing a suit?

"A Right.

"Q You and I discussed it as to whether or not you had a right to do what you wanted to do?

"A Yes.

"Q You decided that, after our discussion, you should still proceed with the action to try to obtain an abortion without notifying your parents?

"A Right.

"Q Now, at the time that you signed the Complaint and spoke with the counselor and spoke with me, you were in the first trimester of pregnancy, within your first twelve weeks of pregnancy?

jected,[7] insisting that "the specifics of the reasons are really irrelevant to the Constitutional issue." [8] The only constitutionally permissible prerequisites for performance of an abortion, he insisted, were the desire of the girl and the medi-

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"A Yes.

"Q You feel that, from talking to the counselor and thinking the situation over and discussing it with me, that you could make the decision on your own that you wished to abort the pregnancy?

"A Yes.

"Q You are living at home?

"A Yes.

"Q You still felt, even though you were living at home with your parents, that you couldn't discuss the matter with them?

"A Right."

Tr. 5–7.

[7] "BY MR. McCARTHY [counsel for the State]:

"Q . . . Are you still living at home?

"A Yes.

"Q Are you dependent on your parents?

"A Yes.

"Q All your money comes from them?

"A Yes.

"Q How old are you now?

"A Fifteen.

"Q Aside from the issue of abortion, do you have any reason to feel that you can't talk to your parents about other problems?

"A Yes.

"Q What are those reasons?

"MR. DOLOWITZ: Now you are moving into the problem area that I indicated. . . ."

Id., at 8.

[8] *Id.*, at 10. Appellant repeatedly pressed this point despite the trial court's statements that it could "conceive of a situation where a child probably wouldn't have to tell the parents" and that the statute "might be [u]nconstitutional as it relates to a particular fact situation but [c]onstitutional as it relates to another fact situation." *Id.*, at 10, 17.

There is no evidence to support the "surmise" in the dissent, *post*, at 438, n. 24, that "appellant expects family conflict over the abortion decision."

cal approval of a physician.[9] The trial judge sustained the objection, tentatively construing the statute to require appellant's physician to notify her parents "if he is able to physically contact them."

Thereafter, the trial judge entered findings of fact and conclusions of law. He concluded that appellant "is an appropriate representative to represent the class she purports to represent." [10] He construed the statute to require notice to appellant's parents "if it is physically possible." He concluded that § 76–7–304 (2) "do[es] not unconstitutionally restrict the right of privacy of a minor to obtain an abortion or to enter into a doctor-patient relationship." [11] Accordingly, he dismissed the complaint.

On appeal, the Supreme Court of Utah unanimously upheld the statute. 604 P. 2d 907 (1979). Relying on our decisions in *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52 (1976), *Carey* v. *Population Services International,* 431 U. S. 678 (1977), and *Bellotti* v. *Baird,* 443 U. S. 622 (1979) (*Bellotti II*), the court concluded that the statute serves "significant state interest[s]" that are present with respect to minors but absent in the case of adult women.

The court looked first to subsection (1) of § 76–7–304. This provision, the court observed, expressly incorporates the factors we identified in *Doe* v. *Bolton,* 410 U. S. 179 (1973), as pertinent to exercise of a physician's best medical judgment in making an abortion decision. In *Doe,* we stated:

> "We agree with the District Court . . . that the medical judgment may be exercised in the light of *all factors—physical, emotional, psychological, familial, and the wom-*

[9] Tr. 18.

[10] The trial judge adopted, verbatim, findings of fact and conclusions of law prepared by appellant. The findings, the conclusions, and the opinion of the State Supreme Court make no mention whatsoever of the precise limits of the class.

[11] The trial judge also ruled that the statute does not violate 42 U. S. C. § 1983.

> *an's age—relevant to the well-being of the patient.* All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.*, at 192 (emphasis supplied).

Section 76–7–304 (1) of the Utah statute suggests that the legislature sought to reflect the language of *Doe.*

The Utah Supreme Court held that notifying the parents of a minor seeking an abortion is "substantially and logically related" to the *Doe* factors set out in § 76–7–304 (1) because parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child. 604 P. 2d, at 909–910. The court also concluded that encouraging an unmarried pregnant minor to seek the advice of her parents in making the decision of whether to carry her child to term promotes a significant state interest in supporting the important role of parents in child-rearing. *Id.*, at 912. The court reasoned that since the statute allows no veto power over the minor's decision, it does not unduly intrude upon a minor's rights.

The Utah Supreme Court also rejected appellant's argument that the phrase "if possible" in § 76–7–304 (2) should be construed to give the physician discretion whether to notify appellant's parents. The court concluded that the physician is required to notify parents "if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification." The court added, however, that "the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion." 604 P. 2d, at 913.

II

Appellant challenges the statute as unconstitutional on its face. She contends it is overbroad in that it can be construed to apply to all unmarried minor girls, including those who are mature and emancipated. We need not reach that question

since she did not allege or proffer any evidence that either she or any member of her class is mature or emancipated.[12] The trial court found that appellant "is unmarried, fifteen years of age, resides at home and is a dependent of her parents." That affords an insufficient basis for a finding that she is either mature or emancipated. Under *Harris* v. *McRae,* 448 U. S. 297, 320 (1980), she therefore lacks "the personal stake in the controversy needed to confer standing" to advance the overbreadth argument.

There are particularly strong reasons for applying established rules of standing in this case. The United States District Court for Utah has held that § 76–7–304 (2) does not apply to emancipated minors and that, if so applied, it would be unconstitutional. *L. R.* v. *Hansen,* Civil No. C–80–0078J (Feb. 8, 1980). Since there was no appeal from that ruling, it is controlling on the State. We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors.[13] See *Bellotti* v. *Baird,* 428 U. S. 132, 146–148 (1976) (*Bellotti I*). Nor is there any reason to assume that a minor in need of emergency treatment will be treated in any way different from

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[12] In *Bellotti II,* by contrast, the principal class consisted of "unmarried [pregnant] minors in Massachusetts *who have adequate capacity to give a valid and informed consent* [to abortion], and who do not wish to involve their parents." 443 U. S., at 626 (emphasis supplied). The courts considered the rights of "all pregnant minors who might be affected" by the statute. *Id.,* at 627, n. 5.

[13] The record shows that the State unsuccessfully argued in the trial court that it should be permitted to inquire into appellant's degree of maturity. Tr. 11.

JUSTICE STEVENS and the dissent argue that the Utah Supreme Court held that the statute may validly be applied to all members of the class described in the complaint. *Post,* at 421, 430, 431, 432–433. However, as we have shown, neither of the state courts mentioned the scope or limits of the class. See n. 10, *supra.* Moreover, appellant's counsel prepared the findings and conclusions. In addition to considerations of standing, we construe the ambiguity against appellant.

a similarly situated adult.[14] The Utah Supreme Court has had no occasion to consider the application of the statute to such situations. In *Bellotti I, supra,* we unanimously declined to pass on constitutional challenges to an abortion regulation statute because the statute was "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" *Id.,* at 147, quoting *Harrison* v. *NAACP,* 360 U. S. 167, 177 (1959). See *Kleppe* v. *New Mexico,* 426 U. S. 529, 546–547 (1976); *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (concurring opinion). We reaffirm that approach and find it controlling here insofar as appellant challenges a purported statutory exclusion of mature and emancipated minors.

The only issue before us, then, is the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.

III

A

Appellant contends the statute violates the right to privacy recognized in our prior cases with respect to abortions. She

[14] There is no authority for the view expressed in the dissent that the statute would apply to "minors with emergency health care needs." *Post,* at 450–451. Appellant does not so contend, and the Utah Supreme Court in this case took pains to say that time is of the essence in an abortion decision. 604 P. 2d 907, 913 (1979). When the specific question was properly posed in *Bellotti II,* the Massachusetts statute was construed by the state court not to apply in such cases. 443 U. S., at 630.

The same is true for minors with hostile home situations, a class referred to by appellant's *amici curiae* and by the dissent, *post,* at 437–441.

places primary reliance on *Bellotti II*, 443 U. S., at 642, 655. In *Danforth*, we struck down state statutes that imposed a requirement of prior written *consent* of the patient's spouse and of a minor patient's parents as a prerequisite for an abortion. We held that a state

> "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U. S., at 74.

We emphasized, however, "that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*, at 75, citing *Bellotti I, supra*. There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

In *Bellotti II*, dealing with a class of concededly mature pregnant minors, we struck down a Massachusetts statute requiring parental or judicial consent before an abortion could be performed on any unmarried minor. There the State's highest court had construed the statute to allow a court to overrule the minor's decision even if the court found that the minor was capable of making, and in fact had made, an informed and reasonable decision to have an abortion. We held, among other things, that the statute was unconstitutional for failure to allow mature minors to decide to undergo abortions without parental consent. Four Justices concluded that the flaws in the statute were that, as construed by the state court, (a) it permitted overruling of a mature minor's decision to abort her pregnancy; and (b) "it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to

consent or that an abortion would be in her best interests." 443 U. S., at 651. Four other Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge, "no matter how mature and capable of informed decisionmaking" the minor might be. *Id.*, at 653–656.

Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion,[15] a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor.[16] Four Justices in *Bellotti II* joined in stating:

> "[Plaintiffs] suggest . . . that the mere requirement of parental notice [unduly burdens the right to seek an abortion]. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns. . . .
>
> " 'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of

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[15] *Bellotti II*, 443 U. S., at 642–643, 653–656; *Danforth*, 428 U. S., at 74.

[16] *Bellotti II*, *supra*, at 640, 649; *id.*, at 657 (dissenting opinion); *Danforth*, *supra*, at 90–91 (concurring opinion); see *Bellotti* v. *Baird*, 428 U. S. 132, 145, 147 (1976) (*Bellotti I*); cf. *Carey* v. *Population Services International*, 431 U. S. 678, 709–710 (1977).

her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.'" *Id.*, at 640–641 (footnotes omitted), quoting *Danforth*, 428 U. S., at 91 (concurring opinion).

Accord, 443 U. S., at 657 (dissenting opinion).

In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968). In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), the Court expanded on this theme:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, [405 U. S. 645 (1972)]; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Id.*, at 255, quoting *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944).

See also *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). We have recognized that parents have an important "guiding role" to play in the upbringing of their children, *Bellotti II*, *supra*, at 633–639, which presumptively includes counseling them on important decisions.

B

The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision.[17] As in *Bellotti I*, "we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent." 428 U. S., at 147. As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity [18] and protecting adolescents [19] which we identified in *Bellotti II*. In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.[20] An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

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[17] The main premise of the dissent seems to be that a requirement of notice to the parents is the functional equivalent of a requirement of parental consent. See *post*, at 437–441. In *Bellotti II*, however, we expressly declined to equate notice requirements with consent requirements. 443 U. S., at 640, 657.

[18] *Bellotti II*, *supra*, at 637–639. The short shrift given by the dissent to "parental authority and family integrity," *post*, at 447, runs contrary to a long line of constitutional cases in this Court. See cases cited *supra*, at 410.

[19] *Bellotti II*, *supra*, at 634–637.

[20] Abortion is associated with an increased risk of complication in subsequent pregnancies. Maine, Does Abortion Affect Later Pregnancies?, 11 Family Planning Perspectives 98 (1979). The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults. Wallerstein, Kurtz, & Bar-Din, Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women, 27 Arch. Gen. Psychiatry 828 (1972); see also Babikian & Goldman, A Study in Teen-Age Pregnancy, 128 Am. J. Psychiatry 755 (1971).

Appellant intimates that the statute's failure to declare, in terms, a detailed description of what information parents may provide to physicians, or to provide for a mandatory period of delay after the physician notifies the parents,[21] renders the statute unconstitutional. The notion that the statute must itemize information to be supplied by parents finds no support in logic, experience, or our decisions. And as the Utah Supreme Court recognized, 604 P. 2d, at 913, time is likely to be of the essence in an abortion decision. The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.[22]

Appellant also contends that the constitutionality of the statute is undermined because Utah allows a pregnant minor to consent to other medical procedures without formal notice to her parents if she carries the child to term.[23] But a state's interests in full-term pregnancies are sufficiently different to justify the line drawn by the statutes. Cf. *Maher* v. *Roe*, 432 U. S. 464, 473–474 (1977). If the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave

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[21] At least five States have enacted parental notification statutes containing brief mandatory waiting periods. See La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1981) (24 hours' actual notice or 72 hours' constructive notice except for court-authorized abortions); Mass. Gen. Laws Ann., ch. 112, § 12S (West Supp. 1981) (24 hours); Me. Rev. Stat. Ann., Tit. 22, § 1597 (1980) (24 hours); N. D. Cent. Code § 14–02.1–03 (Supp. 1979) (24 hours); Tenn. Code Ann. § 39–302 (Supp. 1979) (two days).

[22] Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. See *Bellotti II, supra,* at 647. This case does not require us to decide in what circumstances a state must provide alternatives to parental notification.

[23] See Utah Code Ann. § 78–14–5 (4)(f) (1977) (permitting any female to give informed consent "to any health care not prohibited by law . . . in connection with her pregnancy or childbirth").

emotional and psychological consequences of the decision to abort.

That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life." *Harris* v. *McRae,* 448 U. S., at 325. Accord, *Maher* v. *Roe, supra,* at 473–474.[24]

As applied to the class properly before us, the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution.[25] The judgment of the Supreme Court of Utah is

Affirmed.

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring.

I

This case requires the Court to consider again the divisive questions raised by a state statute intended to encourage

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[24] See also *Bellotti II,* 443 U. S., at 643–644; *Bellotti I,* 428 U. S., at 148–149; *Danforth,* 428 U. S., at 65–67, 79–81; *Connecticut* v. *Menillo,* 423 U. S. 9, 11 (1975); *West Side Women's Services, Inc.* v. *City of Cleveland,* 450 F. Supp. 796, 798 (ND Ohio), affirmance order, 582 F. 2d 1281 (CA6), cert. denied, 439 U. S. 983 (1978).

[25] Appellant argues that the statute violates her right to secure necessary treatment from a physician who, in the exercise of his best medical judgment, does not believe the parents should be notified. Since there is no evidence that the physician had such an opinion, we decline to reach this question. See *supra,* at 401, n. 3, and 405–407.

The dissenting opinion purports to see in the Court's opinion "a clear signal" as to how the Court will decide a future case concerning this or a similar statute, and goes on to forecast a successful challenge on the

parental involvement in the decision of a pregnant minor to have an abortion. See *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52 (1976); *Bellotti* v. *Baird,* 443 U. S. 622 (1979) (*Bellotti II*). I agree with the Court that Utah Code Ann. § 76–7–304 (2) (1978) does not unconstitutionally burden this appellant's right to an abortion. I join the opinion of the Court on the understanding that it leaves open the question whether § 76–7–304 (2) unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification. See *ante,* at 412, n. 22. I write to make clear that I continue to entertain the views on this question stated in my opinion in *Bellotti II.* See n. 8, *infra.*

II

Section 76–7–304 (2) requires that a physician "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." [1] Appellant attacks this notice requirement on the ground that it burdens the right of a minor who is emancipated, or who is mature enough to make the abortion decision independently of parental involvement, or whose parents will react obstructively upon notice. See *ante,* at 405. The threshold question, as the Court's opinion notes, is whether appellant has standing to make such a challenge. Standing depends initially on what the complaint alleges, *Warth* v. *Seldin,* 422 U. S. 490, 498, 501 (1975), as courts have the power "only to redress or otherwise to protect against injury to the complaining party."

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merits. Today, of course, the Court's function is to decide only the question properly presented in this case, and there is no occasion to intimate or predict a view as to the proper resolution of some future case. Speaking for the unanimous Court in *Kleppe* v. *New Mexico,* 426 U. S. 529 (1976), JUSTICE MARSHALL took note of the impropriety of deciding constitutional questions "in the absence of 'an adequate and full-bodied record.'" *Id.,* at 546, quoting *Public Affairs Associates, Inc.* v. *Rickover,* 369 U. S. 111, 113 (1962).

[1] Section 76–7–304 is quoted in full in the Court's opinion. *Ante,* at 400.

Id., at 499. The complaint in this case was carefully drawn. Appellant's allegations about herself and her familial situation are few and laconic. She alleged that she did "not wish to inform her parents of her condition and believe[d] that it [was] in her best interest that her parents not be informed of her condition." Complaint ¶ 6. She also alleged that she understood "what is involved in her decision," ¶ 9, and that the physician she consulted had told her that "he could not and would not perform an abortion upon her without informing her parents prior to aborting her." ¶ 7.

Appellant was 15 years of age and lived at home with her parents when she filed her complaint. She did not claim to be mature, and made no allegations with respect to her relationship with her parents. She did not aver that they would be obstructive if notified, or advance any other reason why notice to her parents would not be in her best interest. Similarly, the complaint contains no allegation that the physician—while apparently willing to perform the abortion—believed that notifying her parents would have adverse consequences. In fact, nothing in the record shows that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant.

A

This case does not come to us on the allegations of the complaint alone. An evidentiary hearing occurred after the trial court had denied appellant's motion for a preliminary injunction. Appellant was the only witness, and her testimony—and statements by her counsel—make clear beyond any question that the "bare bones" averments of the complaint were deliberate, and that appellant is arguing that a mere notice requirement is invalid *per se* without regard to the minor's age, whether she is emancipated, whether her parents are likely to be obstructive, or whether there is some health or other reason why notification would not be in the minor's best interests.

On direct examination, appellant merely verified the allegations of her complaint by affirming each allegation as paraphrased for her by her lawyer in a series of leading questions.[2] Her testimony on cross-examination added nothing to the complaint.[3] In addition, appellant's lawyer insistently objected to all questions by counsel for the State as to the appellant's reasons for not wishing to notify her parents.[4] The trial court, on its own initiative, pressed unsuccessfully to elicit some reasons, inquiring how it could "find out the validity of [appellant's] reasons without [the State's lawyer] being permitted to cross-examine her." Tr. 9. Appellant's lawyer replied:

> "It is our position [c]onstitutionally that she has the right to make [the abortion] decision and if she has consulted with a counselor and the counselor concurs that those are valid reasons, why then—
>
> . . . . .
>
> "In terms of going beyond [the complaint allegations], our point is that the specifics of *the reasons are really irrelevant to the* [c]*onstitutional issue.*" *Id.*, at 9–10 (emphasis supplied).

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[2] Appellant's testimony on direct examination is quoted in full in the Court's opinion. *Ante,* at 402–403, n. 6.

[3] Appellant's testimony on cross-examination is quoted in full in the Court's opinion. *Ante,* at 403, n. 7.

[4] After his direct examination of appellant and the State's brief cross-examination, appellant's lawyer insisted repeatedly during subsequent argument that "there is no relevancy to any other facts," Tr. 17; that "the particular facts that come before a [minor's doctor], are irrelevant," *id.*, at 18; and that "[t]he specific facts of any individual case, no matter how ridiculous they are or how strong or weak they are, really become irrelevant," *ibid.* In summarizing his position, appellant's lawyer stated: "Our position is that it is the doctor/patient relationship that is the key. If the doctor determines he should go ahead with the patient, then he should. The specific facts in any case, whether [the doctor] is wrong or right, are [c]onstitutionally protected to make that decision and go ahead and act on it. This is why I say it is irrelevant." *Ibid.*

When appellant's lawyer insisted that the facts with respect to this particular minor were irrelevant, the trial court sustained the validity of the statute.[5]

In sum, and as the Court's opinion emphasizes, appellant alleges nothing more than that she desires an abortion, that she has decided—for reasons which she declined to reveal—that it is in her best interest not to notify her parents, and that a physician would be willing to perform the abortion if notice were not required. Although the trial court did not rule in terms of standing, it is clear that these bald allegations do not confer standing to claim that § 76–7–304 (2) unconstitutionally burdens the right either of a mature minor or of a minor whose best interests would not be served by parental notification.[6] They confer standing only to claim that § 76–7–304 (2) is an unconstitutional burden upon an unemanci-

[5] At the end of the evidentiary hearing, appellant's lawyer framed the trial court's ruling as follows:

"If your ruling is that 'if possible' [as used in the statute means "physically possible"] and there are no circumstances whatever that justify the violation of the statute, then the issue is closed." *Id.*, at 19.

[6] Because this case is a class action, it might be presumed that other members could raise the question whether a pregnant minor has a right to abortion, without parental notice, upon a showing that she is mature or that her parents will interfere with her abortion. But the record in this case contains no facts to support a presumption that the class includes such members. The only complaint allegations about the class are that appellant's claims "are typical of the claims of all members of the class," and that the class consists of "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76–7–304 (2)." Complaint ¶ 10. Thus, the record supports only the conclusion that the class consists entirely of pregnant minors who assert the identical claim that appellant presents: a constitutional right to an abortion without notifying their parents, and without claiming to be mature or that notification would not be in their best interest. In short, the class members—like appellant—assert an absolute right to make this decision themselves, independently of everyone except a physician.

pated minor who desires an abortion without parental notification but also desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents.[7]

B

On the facts of this case, I agree with the Court that § 76–7–304 (2) is not an unconstitutional burden on appellant's right to an abortion. Numerous and significant interests compete when a minor decides whether or not to abort her

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[7] The trial court entered findings of fact and conclusions of law after the evidentiary hearing. Paragraph 7 of the trial court's findings reads:

"The plaintiff consulted with a counselor to assist her in deciding whether or not she should terminate her pregnancy. She determined, after consultation with her counselor, that she should secure an abortion, but was advised when consulting her physician that under the provisions of Section 76–7–304 (2), Utah Code Annotated, 1953, that he believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so." Civil No. C–78–2719 (Dec. 26, 1978).

Precisely what this paragraph finds is ambiguous. At the least, it finds that appellant "consulted" a physician and that the physician agreed with appellant that an abortion would be in appellant's best medical interest. The final portion of the finding—"he was unwilling to perform an abortion upon her without complying with the provisions of the statute even though he believed it was best to do so"—could be read to find that the physician also agreed with appellant that "it was best" to "perform an abortion upon her without complying with the provisio[n]" requiring parental notice. Or, the final portion could be read to find only that the physician would not perform an abortion without complying with the statute even though he believed that "it was best" to abort appellant's pregnancy In light of appellant's limited allegations and testimony, and the legal argument of her lawyer, the trial court's finding cannot be read as saying that the physician determined that appellant's parents would react hostilely or obstructively to notice of appellant's abortion decision.

pregnancy. The right to make that decision may not be unconstitutionally burdened. *Roe* v. *Wade,* 410 U. S. 113, 154 (1973); *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S., at 74–75. In addition, the minor has an interest in effectuating her decision to abort, if that is the decision she makes. *Id.,* at 75; *Bellotti II,* 443 U. S., at 647. The State, aside from the interest it has in encouraging childbirth rather than abortion, cf. *Maher* v. *Roe,* 432 U. S. 464 (1977); *Harris* v. *McRae,* 448 U. S. 297 (1980), has an interest in fostering such consultation as will assist the minor in making her decision as wisely as possible. *Planned Parenthood of Central Mo.* v. *Danforth, supra,* at 91 (STEWART, J., concurring); *post,* at 422–423 (STEVENS, J., concurring in judgment). The State also may have an interest in the family itself, the institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Moore* v. *East Cleveland,* 431 U. S. 494, 503–504 (1977). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years. *Bellotti II, supra,* at 637–639.

None of these interests is absolute. Even an adult woman's right to an abortion is not unqualified. *Roe* v. *Wade, supra,* at 154. Particularly when a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like. If we were to accept appellant's claim that § 76–7–304 (2) is *per se* an invalid burden on the asserted right of a minor to make the abortion decision, the circumstances which normally are relevant would—as her counsel insisted—be immaterial. *Supra,* at 417. The Court would have to decide that the minor's wishes are virtually absolute. To be sure, our cases have emphasized the necessity to consult a physician. But we have never held with respect to a minor that the opin-

ion of a single physician as to the need or desirability of an abortion outweighs all state and parental interests.[8]

In sum, a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests. My opinion in *Bellotti II,* joined by three other Justices, stated at some length the reasons why such a decisionmaker is needed. *Bellotti II, supra,* at 642–648.[9] The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none[10]—would create an inflexibility that often would allow for no consideration of the rights and interests identified above. Our cases have never gone to this extreme, and in my view should not.

JUSTICE STEVENS, concurring in the judgment.

As the Court points out, this is a class action in which the appellant represents all unmarried " 'minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so' because of their physicians' insistence on complying with § 76–7–304 (2)" of the Utah

[8] While the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained "on demand." See *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 91–92, n. 2 (1976) (STEWART, J., concurring); *Bellotti II,* 443 U. S., at 641, n. 21.

[9] Although *Bellotti II* involved a statute requiring parental consent, the rationale of the plurality opinion with respect to this need is applicable here.

[10] The dissenting opinion of JUSTICE MARSHALL, which would hold the Utah statute invalid on its face, elevates the decision of the minor and her physician to an absolute status ignoring state and parental interests.

Code. *Ante,* at 401. The Utah Supreme Court held that the statute may validly be applied to *all* members of that class. This appeal therefore squarely presents the question whether that holding is consistent with the Constitution of the United States. The Court, however, declines to reach this question and instead decides the narrower question presented by the appellant's particular factual situation. Because I believe we have a duty to answer the broader question decided by the Utah Supreme Court, I am unable to join the opinion of the Court.

In *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 72–75 (1976), the Court held that a pregnant minor's right to make the decision to obtain an abortion may not be conditioned on parental consent. My dissent from that holding, *id.,* at 102–105, does not qualify my duty to respect it as a part of our law. See *Bellotti* v. *Baird,* 443 U. S. 622, 652–656 (1979) (STEVENS, J., concurring in judgment). However, as I noted in *Bellotti,* neither that case nor *Danforth* "determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." 443 U. S., at 654, n. 1. Since the outcome in this case is not controlled by *Danforth,* the principles that I considered dispositive of the parental consent issue in that case plainly dictate that the Utah statute now before us be upheld.

The fact that a state statute may have some impact upon a minor's exercise of his or her rights begins, rather than ends, the constitutional inquiry. Once the statute's impact is identified, it must be evaluated in light of the state interests underlying the statute. The state interest that the Utah statute at issue in this case attempts to advance is essentially the same state interest considered in *Danforth.* As I noted in *Danforth,* that interest is fundamental and substantial:

> "The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he

may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* [410 U. S. 113 (1973)] that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

"The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative." 428 U. S., at 102–103.

In my opinion, the special importance of a young woman's abortion decision, emphasized by JUSTICE MARSHALL in dissent, *post,* at 435–436, provides a special justification for reasonable state efforts intended to ensure that the decision be wisely made. Such reasonable efforts surely may include a requirement that an abortion be procured only after consul-

tation with a licensed physician. And, because "the most significant consequences of the [abortion] decision are not medical in character," 428 U. S., at 103, the State unquestionably has an interest in ensuring that a young woman receive other appropriate consultation as well. In my opinion, the quality of that interest is plainly sufficient to support a state legislature's determination that such appropriate consultation should include parental advice.

Of course, a conclusion that the Utah statute is invalid would not prevent young pregnant women from voluntarily seeking the advice of their parents prior to making the abortion decision. But the State may legitimately decide that such consultation should be made more probable by ensuring that parents are informed of their daughter's decision:

> "If there is no parental-[notice] requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children,[1] and further, that the imposition

[1] My conclusion, in this case and in *Danforth*, that a state legislature may rationally decide that most parents will, when informed of their daughter's pregnancy, act with her welfare in mind is consistent with the "pages of human experience that teach that parents generally do act in the child's best interests" relied upon by the Court in *Parham* v. *J. R.*,

of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision." *Id.*, at 103–104 (STEVENS, J.).

Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur. Good-faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

The fact that certain members of the class of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies" may actually be emancipated or sufficiently mature to make a well-reasoned abor-

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442 U. S. 584, 602–603 (1979). It is also consistent with JUSTICE BRENNAN'S opinion in *Parham*, which I joined. *Id.*, at 625–639.

As the Court noted in *Parham*, the presumption that parents act in the best interests of their children may be rebutted by "experience and reality." *Id.*, at 602–603. In my opinion, nothing in the fact that a minor child has become pregnant, and therefore may be confronted with the abortion decision, undercuts the general validity of the presumption. However, when parents decide to surrender custody of their child to a mental hospital and thereby destroy the ongoing family relationship, that very decision raises an inference that parental authority is not being exercised in the child's best interests. See *id.*, at 631–632 (BRENNAN, J., dissenting in part). Accordingly, while the abortion decision and the commitment decision are of comparable gravity, reliance upon the "pages of human experience" is, in my judgment, more appropriate in the former case than in the latter.

tion decision does not, in my view, undercut the validity of the Utah statute. As I stated in *Danforth*, a state legislature has constitutional power to utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution. 428 U. S., at 104–105. Accordingly, I would reach the question reserved by the Court and hold that the Utah parental-notice statute is constitutionally valid as applied to all members of the certified class.[2]

Because my view in this case, as in *Danforth*, is that the State's interest in protecting a young pregnant woman from the consequences of an incorrect abortion decision is sufficient to justify the parental-notice requirement, I agree that the decision of the Utah Supreme Court should be affirmed.

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

The decision of the Court is narrow. It finds shortcomings in appellant's complaint and therefore denies relief. Thus, the Court sends out a clear signal that more carefully drafted pleadings could secure both a plaintiff's standing to

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[2] The Court's unwillingness to decide whether the Utah statute may constitutionally be applied to the entire class certified by the state courts presumably rests on the assumption that requiring notice to the parents of a mature or emancipated minor might prevent such a minor from obtaining an abortion. See *ante*, at 406. Almost by definition, however, a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval. Furthermore, if every minor with the wisdom of an adult has a constitutional right to be treated as an adult, a uniform minimum voting age is surely suspect. Instead of simply enforcing general rules promulgated by the legislature, perhaps the judiciary should grant hearings to all young persons desirous of establishing their status as mature, emancipated minors instead of confining that privilege to unmarried pregnant young women.

challenge the overbreadth of Utah Code Ann. § 76–7–304 (2) (1978), and success on the merits.[1]

Nonetheless, I dissent. I believe that even if the complaint is defective, the majority's legal analysis is incorrect and it yields an improper disposition here. More important, I cannot agree with the majority's view of the complaint, or its standing analysis. I therefore would reverse the judgment of the Supreme Court of Utah.

I

The Court finds appellant's complaint defective because it fails to allege that she is mature or emancipated, and neglects to specify her reasons for wishing to avoid notifying her parents about her abortion decision. As a result, the Court rea-

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[1] Under the majority's view, to assure standing, the plaintiff pregnant minor simply need allege her desire to obtain an abortion, her inability to do so because of the statute, and her view that she is emancipated, mature, or that it is in her best interests to have an abortion performed without notifying her parents. The majority finds no standing problem where the complaint alleges that the plaintiff is emancipated or mature, and thus reaffirms the standing analysis employed in *Bellotti* v. *Baird,* 443 U. S. 622 (1979) (*Bellotti II*). See *ante,* at 406, n. 12. In addition, the Court relies in part on a decision by the Federal District Court in Utah, which enjoined application of the same Utah statute involved here to emancipated minors. *L. R.* v. *Hansen,* Civil No. C–80–0078J (Feb. 8, 1980). The Court apparently contemplates that similar challenges will meet with success in the future. For example, the District Court in *L. R.* v. *Hansen* also accorded intervenor status and awarded preliminary relief to a minor woman who, like appellant, is under 17 years old and is dependent upon a parent with whom she resides. The only difference between the allegations of the instant appellant and those of that intervenor is the latter's express allegation that parental notice would result in her expulsion from home and destruction of her relationship with her parent. *L. R.* v. *Hansen,* Civil No. C–80–0078J (Findings of Fact and Conclusions of Law ¶ 4) (Oct. 24, 1980). Finally, the Court today does not question our prior decision upholding the standing of physicians to challenge abortion restrictions. See n. 4, *infra.*

sons, appellant lacks standing to challenge the overbreadth of the Utah parental notification statute.[2]

The majority's standing analysis rests on prudential con-

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[2] In essence, the Court concludes that because appellant neglected to make specific allegations about herself and her situation, she "lacks 'the personal stake in the controversy needed to confer standing' to advance the overbreadth argument," *ante*, at 406 (quoting *Harris* v. *McRae*, 448 U. S. 297, 320 (1980)). The majority thus assumes that a plaintiff raising an overbreadth challenge to an abortion statute must allege that she herself falls within the statute's overbroad reach. The quotation from *Harris* actually refers to an entirely different kind of standing issue: there the plaintiffs lacked standing because they failed to allege that they were in a position either to seek abortions or to receive Medicaid, and thus they lacked the concrete adverseness necessary to advance their challenge to the Medicaid limit on abortion funding. None of the cases cited for this point in *Harris* apply to the instant appeal. See *O'Shea* v. *Littleton*, 414 U. S. 488 (1974) (plaintiffs lack standing because of failure to allege specific injury); *Bailey* v. *Patterson*, 369 U. S. 31, 32 (1962) (petitioners "lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them").

A standing limitation on overbreadth challenges to an abortion statute has roots in a context hardly analogous to the instant case. For while we have frequently ruled that criminal defendants lack standing to challenge a statute's overbreadth when their conduct indisputedly falls within the statute's legitimate core, *e. g.*, *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963); *United States* v. *Harriss*, 347 U. S. 612 (1954); *Williams* v. *United States*, 341 U. S. 97 (1951), these rulings bear little relationship to appellant's challenge to a State's restriction of her exercise of a fundamental right. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); *Doe* v. *Bolton*, 410 U. S. 179 (1973). More relevant, I believe, is our analysis of standing to claim that a statute's overbreadth affects fundamental liberties, primarily those guaranteed by the First Amendment. Because of the risk that exercise of personal freedoms may be chilled by broad regulation, we permit facial overbreadth challenges without a showing that the moving party's conduct falls within the protected core. *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Coates* v. *Cincinnati*, 402 U. S. 611 (1971); *United States* v. *Robel*, 389 U. S. 258 (1967); *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Aptheker* v. *Secretary of*

cerns and not on the constitutional limitations set by Art. III. See *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99–100 (1979); *Warth* v. *Seldin,* 422 U. S. 490, 498–499, 517–518 (1975). For the Court does not question that appellant's injury due to the statute's requirement falls within the legally protected ambit of her privacy interest, and that the relief requested would remedy the harm. See *ante,* at 407–409 (majority opinion); *ante,* at 418–419 (opinion of POWELL, J.). The Court decides only that appellant cannot challenge the blanket nature of the statute because she neglected to allege that by her personal characteristics, she is a member of particular groups that undoubtedly deserve exemption from a parental notice requirement.[3] Thus, the Court seems to apply the familiar prudential principle that an individual should not be heard to raise the rights of other persons. This principle, of course, has not precluded standing in other instances where, as here, the party has established the requisite and legally protected interest capable of

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State, 378 U S. 500 (1964); *Kunz* v. *New York,* 340 U. S. 290 (1951). See also *United States* v. *Reese,* 92 U. S. 214 (1876) (facial challenge under Fifteenth Amendment).

[3] See n. 1, *supra.* The Court does not question that exceptions from a parental notice requirement are necessary for minors emancipated from the custody or control of their parents, see n. 48, *infra,* and for minors able to demonstrate their maturity for the purpose of choosing to have an abortion, *ante,* at 406–407. See also *Bellotti II,* 443 U. S., at 651 (POWELL, J.); *id.,* at 653 (STEVENS, J.). Nor does the Court depart from the view, made explicit in JUSTICE POWELL's opinion in *Bellotti II, supra,* at 651, that a State cannot require parental notice when it would not be in the minor's best interests to do so. This position is articulated anew today by JUSTICE POWELL, *ante,* at 420, and bolstered by the majority, which acknowledges the need for exception where parental notification interferes with emergency medical treatment, *ante,* at 407, n. 14, and which leaves open the possibility of relief where the minor makes a "claim or showing as to . . . her relations with her parents," *ante,* at 407, or demonstrates a "hostile home situatio[n]," *ante,* at 407, n. 14. See also *L. R.* v. *Hansen,* Civil No. C–80–0078J (Utah, Feb. 8, 1980, and Oct. 24, 1980).

redress through the relief requested.[4] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U. S. 59, 80–81 (1978); *Singleton* v. *Wulff,* 428 U. S. 106, 113–118 (1976) (plurality opinion of BLACKMUN, J.); *Doe* v. *Bolton,* 410 U. S. 179, 188–189 (1973); *Griswold* v. *Connecticut,* 381 U. S. 479, 481 (1965); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 459–460 (1958); *Barrows* v. *Jackson,* 346 U. S. 249, 259 (1953).

I do not believe that prudential considerations should bar standing here, for I am persuaded that appellant's complaint establishes a claim that notifying her parents would not be in her best interests.[5] She alleged that she "believes that it is in her best interest that her parents not be informed of her [pregnant] condition," Complaint ¶ 6, App. 4, and that after consulting with her physician, attorney, and social worker, "she understands what is involved in her decision" to seek an abortion, Complaint ¶ 9, App. 4.[6] This claim was further

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[4] It is especially noteworthy that we have not refrained from according to physicians, threatened with the personal risk of prosecution, standing to challenge abortion restrictions by asserting the rights of any of their patients. *E. g., Planned Parenthood of Central Mo.* v. *Danforth, supra,* at 62; *Doe* v. *Bolton, supra; Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

[5] In the instant case, application of the prudential rule causes undue commingling of jurisdictional and merits issues. For here, the third-party interests do not even come into play until appellant wishes to rebut the State's interests, which themselves are asserted only after appellant has established a burden on her protected interests. First, the appellant must satisfy a court that, on the merits, her fundamental right to privacy in consulting her physician about an abortion is burdened by the Utah statute. Only then need the State assert its countervailing state interests, which here include promoting family autonomy and parental authority. And only in rebuttal would appellant next challenge as overbroad the means employed by the State, for the absolute ban regulates the abortion decision of emancipated and mature minors, and others whose best interests call for an abortion without parental notice. Thus, in the name of prudence, the majority's standing analysis depends upon its evaluation of the complicated merits.

[6] Appellant's consultation with three professionals casts substantial

supported, albeit without detail, at the evidentiary hearing. There appellant testified she did not feel she could discuss the abortion decision with her parents even after she consulted a social worker on the issue. Tr. 8, App. 26.[7] In my judgment, appellant has adequately asserted that she has persistently held reasons for believing parental notice would not be in her best interests. This provides a sufficient basis for standing to raise the challenge in her complaint. Appellant seeks to challenge a state statute, construed definitively by the highest court of that State to permit no exception to the notice requirement on the basis of any reasons offered by the minor. 604 P. 2d 907, 913 (Utah 1979). As standing is a jurisdictional issue, separate and distinct from the merits, a court need not evaluate the persuasiveness of her reasons for opposing parental notice to conclude that appellant has a concrete interest in determining whether the parental notice statute is valid.[8]

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doubt on JUSTICE POWELL's suggestion, see *ante*, at 418, that appellant "desires not to explain to anyone her reasons either for wanting the abortion or for not wanting to notify her parents."

[7] This portion of the transcript is set out in full *ante*, at 402–403, n. 6, 403, n. 7.

JUSTICE POWELL correctly reports, *ante*, at 416–417, that the in-chambers hearing elicited from appellant statements essentially identical to her complaint. And it is also true that counsel for appellant objected to inquiries by the appellees and the trial judge regarding appellant's exact reasons for not wanting to talk with her parents about her pregnancy or other matters. What JUSTICE POWELL neglects to note, however, is that counsel's objections stemmed from the trial court's own ruling that any facts specific to appellant's situation would be irrelevant to the physician's duty under the statute to notify her parents of an abortion decision. Because the trial judge ruled that the statute and its sanctions would apply regardless of the pregnant minor's personal reasons for opposing parental notification, the judge sustained the objections to questions about appellant's particular reasons. Tr. 14–20, App. 31–36. It is this ruling that is the legal basis for the decision below, and not the trial judge's preliminary comments cited by the majority, *ante*, at 403, n. 8.

[8] I also doubt the wisdom in pinning a minor's success in challenging a

Yet even if the Court's view of appellant's complaint is correct, and even if prudence calls for denying her standing to raise the overbreadth claim, the Court erroneously concludes that the class represented by appellant suffers the identical standing disability. In so doing, the Court is apparently indifferent to the federalism or comity issues arising when this Court presumes to supervise the procedural determinations made by a state trial court under state law. Even if application of federal law governing class actions were appropriate in this case, the majority misapplies federal law by disturbing the class definition as approved by the trial court. The Court acknowledges, *ante,* at 401, 404 (BURGER, C. J.); *ante,* at 417, n. 6 (POWELL, J.), that the trial court granted appellant's motion to represent a class, and it is undisputed that this class includes all "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so inasmuch as their physicians will not perform an abortion upon them without compliance with the provisions of Section 76–7–304 (2)." Complaint ¶ 10, App. 5. This class by definition includes *all* minor women, self-supporting or dependent, sophisticated or naive, as long as the Utah statute interferes with the ability of these women to decide with their physicians to obtain abortions. If the Court is correct that appellant cannot raise challenges based on the interest of emancipated or mature minors, or others whose best interests call for avoiding parental notification, the proper disposition under federal law would be a remand. This remand would protect such class members by permitting the trial court to determine whether appellant is a proper and adequate class representative, and whether her claims are sufficiently similar to the class to warrant the class ac-

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blanket parental notice requirement to consideration of her particular situation by judges, as opposed to others who are more regularly involved in the counseling of adolescents. Cf. *Bellotti II,* 443 U. S., at 655–656 (STEVENS, J.).

tion.[9] Since the trial court enjoys considerable latitude in approving class actions, such a remand is appropriate only on those rare occasions where the reviewing court discerns an abuse of discretion.[10] But where an abuse of discretion is clear from the record, remand should ensue, and could result in redefinition or dismissal of the class, addition of other named plaintiffs to represent interests appellant cannot advance, or creation of subclasses with additional representative parties.[11] In contrast, it is improper to assume appel-

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[9] As the Court observed in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 176 (1974), the federal class action procedure "was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." The binding effect of the class action's disposition poses serious due process concerns where the interests of class members are not properly represented. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1765 (1972).

Where review of the claims asserted is impaired by an obvious lack of homogenity in the class approved by the trial court, the reviewing court must remand "for reconsideration of the class definition," *Kremens* v. *Bartley*, 431 U. S. 119, 134–135 (1977), and for a determination whether the named plaintiff is a proper representative of the class, *Martin* v. *Thompson Tractor Co.*, 486 F. 2d 510, 511 (CA5 1973).

[10] *E. g.*, *Bogus* v *American Speech & Hearing Assn.*, 582 F. 2d 277 (CA3 1978); *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 566 F. 2d 167 (1977), cert. denied, 438 U. S. 916 (1978); *Barnett* v. *W. T. Grant Co.*, 518 F. 2d 543 (CA4 1975); *Arkansas Ed. Assn.* v. *Board of Ed. of Portland, Arkansas School Dist.*, 446 F. 2d 763 (CA8 1971); *Gold Strike Stamp Co.* v. *Christensen*, 436 F. 2d 791 (CA10 1970).

It is difficult to conclude that the trial judge below in fact abused his discretion in approving the class. Other courts have approved similar classes represented by similar named plaintiffs, *e. g.*, *Gary-Northwest Indiana Women's Services* v. *Bowen*, 421 F. Supp. 734 (ND Ind. 1976) (unmarried pregnant 16-year-old proper representative for class of unmarried pregnant minors under 18 challenging abortion restriction), summarily aff'd, 429 U. S. 1067 (1977). Conflict within the class, moreover, seems unlikely, for "it is difficult to imagine why any person in the class appellant represents would have an interest in seeing [the challenged statute] upheld." *Sosna* v. *Iowa*, 419 U. S. 393, 403, n. 13 (1975).

[11] A class may need to be redefined, *e. g.*, *Gesicki* v. *Oswald*, 336 F.

lant adequately represents the entire class as defined by the trial court, but redefine the class appellant is deemed to represent, and deny relief on that basis.[12] Nonetheless, that is exactly the course selected by the majority today.

I instead assume that appellant adequately represents the class which the trial judge concluded she represents—all minor women seeking an abortion but finding the parental notice requirement an obstacle. I then would find that their rights and interests can be raised here by appellant in support of a facial challenge to the Utah statute, and conduct the appropriate review of appellant's claims.

Supp. 371, 374 (SDNY 1971) (three-judge court), divided into subclasses, *e. g., Francis* v. *Davidson,* 340 F. Supp. 351 (Md. 1972) (three-judge court), or otherwise modified, to adequately protect its members' interests. See generally 7 Wright & Miller, *supra,* §§ 1758–1771 (1972 and Supp. 1980).

The majority mistakenly assumes, *ante,* at 406, n. 13, that it is free to rewrite the class as approved by the trial court because that court based its class definition on submissions from the plaintiff. This assumption runs counter to the general practice in both state and federal courts whereby the party seeking class certification proposes a class definition which is then subject to challenge by the opposing party. See 1 H. Newberg, Class Actions 644 (1977); 5 *id.,* at 1376, 1403. Appellees challenged the class without success, and the State Supreme Court never questioned the trial court's approval of appellant's class.

[12] See *ante,* at 420–421 (opinion of STEVENS, J.). JUSTICE POWELL reasons, *ante,* at 417, n. 6, that the class members cannot raise the overbreadth claims because the record fails to disclose that they wish to raise such claims. In my view, the record is quite to the contrary. The class members, through their class representative, unequivocally raised in the complaint the overbreadth challenge to the Utah statute. Complaint ¶ 17, App. 6. This claim, along with the other allegations in the complaint, provided the context in which the trial judge approved appellant as class representative. In so approving, the trial court was obliged to ensure that appellant's allegations would adequately protect the interests of the class members, who would be bound by the judgment. If a reviewing court subsequently alters the claims that can be asserted by the named plaintiff, protection of the class interests requires a remand for reconsideration of the adequacy of the named plaintiff as class representative.

II

Because the Court's treatment is so cursory, I review appellant's claims with due attention to our precedents.

Our cases have established that a pregnant woman has a fundamental right to choose whether to obtain an abortion or carry the pregnancy to term. *Roe* v. *Wade,* 410 U. S. 113 (1973); *Doe* v. *Bolton,* 410 U. S. 179 (1973).[13] Her choice, like the deeply intimate decisions to marry,[14] to procreate,[15] and to use contraceptives,[16] is guarded from unwarranted state intervention by the right to privacy.[17] Grounded in the Due Process Clause of the Fourteenth Amendment, the right to privacy[18] protects both the woman's "interest in independence in making certain kinds of important decisions"

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[13] See also *Carey* v *Population Services International,* 431 U. S. 678, 684–685 (1977); *Griswold* v. *Connecticut,* 381 U. S., at 482–485.

[14] *Zablocki* v. *Redhail,* 434 U. S. 374, 384–386 (1978); *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967).

[15] *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942). See also *Cleveland Board of Education* v. *La Fleur,* 414 U. S. 632 (1974).

[16] *Eisenstadt* v. *Baird,* 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut, supra; Carey* v. *Population Services International, supra; Poe* v. *Ullman,* 367 U. S. 497, 539 (1961) (Harlan, J., dissenting) (ban on contraception is "intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life").

[17] See also *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

[18] The right has often been termed "the right to be let alone." See *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted with approval in *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969), and *Eisenstadt* v. *Baird, supra,* at 453–454, n. 10). Defining the spheres within which the government may not act without sufficient justification, the notion of privacy "emanates from the totality of the constitutional scheme under which we live." *Poe* v. *Ullman, supra,* at 521 (Douglas, J., dissenting).

and her "individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe,* 429 U. S. 589, 599–600 (1977).

In the abortion context, we have held that the right to privacy shields the woman from undue state intrusion in, and external scrutiny of, her very personal choice. Thus, in *Roe* v. *Wade, supra,* at 164, we held that during the first trimester of the pregnancy, the State's interest in protecting maternal health or the potential life of the fetus could not override the right of the pregnant woman and the attending physician to make the abortion decision through private, unfettered consultation. We further emphasized the restricted scope of permissible state action in this area when, in *Doe* v. *Bolton, supra,* at 198–200, we struck down state-imposed procedural requirements that subjected the woman's private decision with her physician to review by other physicians and a hospital committee.

It is also settled that the right to privacy, like many constitutional rights,[19] extends to minors. *Planned Parenthood*

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[19] "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e. g., Breed* v. *Jones,* 421 U. S. 519 (1975); *Goss* v. *Lopez,* 419 U. S. 565 (1975); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969); *In re Gault,* 387 U. S. 1 (1967). The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Prince* v. *Massachusetts,* 321 U. S., at 170; *Ginsberg* v. *New York,* 390 U. S. 629 (1968)." *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S., at 74–75.

See also *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (children entitled to equal protection in schools).

The privacy right does not necessarily guarantee that "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Planned Parenthood of Central Mo.* v. *Danforth, supra,* at 75. Utah, however, assigns this consent authority to a woman of any age who seeks pregnancy-related medical care, Utah Code Ann. § 78–14–5 (4)(f) (1977), subject to the State's informed consent requirements, see Utah Code Ann. § 76–7–305 (1978); § 78–14–5 (1977). This

of Central Mo. v. *Danforth,* 428 U. S. 52 (1976); *Bellotti* v. *Baird,* 443 U. S. 622, 639 (1979) (*Bellotti II*) (POWELL, J.); *id.,* at 653 (STEVENS, J.); *T. H.* v. *Jones,* 425 F. Supp. 873, 881 (Utah 1975), summarily aff'd on other grounds, 425 U. S. 986 (1976). Indeed, because an unwanted pregnancy is probably more of a crisis for a minor than for an adult, as the abortion decision cannot be postponed until her majority, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti II, supra,* at 646 (POWELL, J.).[20] Thus, for both the adult and the minor woman, state-imposed burdens on the abortion decision can be justified only upon a showing that the restrictions advance "important state interests." *Roe* v. *Wade,* 410 U. S., at 154; accord, *Planned Parenthood of Central Mo.* v. *Danforth, supra,* at 61. Before examining the state interests asserted here, it is necessary first to consider Utah's claim that its statute does not "imping[e] on a woman's decision to have an abortion" or "plac[e] obstacles in the path of effectuating such a decision." Brief for Appellees 9. This requires an examination of whether the parental notice requirement of the Utah statute imposes any burden on the abortion decision.

The ideal of a supportive family so pervades our culture that it may seem incongruous to examine "burdens" imposed by a statute requiring parental notice of a minor daughter's

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appeal does not present the broad issue of when may a State require parental consent for a surgical procedure on a minor child, 604 P. 2d 907, 910, n. 5 (Utah 1979). At issue here is only the scope of the minor's constitutional privacy right in the face of a statutory parental notice requirement.

[20] In striking down a related Utah prohibition against family planning assistance for minors absent parental consent, a Federal District Court reasoned that the "financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults." *T. H.* v. *Jones,* 425 F. Supp. 873, 881 (Utah 1975), summarily aff'd on other grounds, 425 U. S. 986 (1976).

decision to terminate her pregnancy.[21] This Court has long deferred to the bonds which join family members for mutual sustenance. See *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535 (1925); *May* v. *Anderson,* 345 U. S. 528, 533 (1953); *Griswold* v. *Connecticut,* 381 U. S., at 486; *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972); *Moore* v. *East Cleveland,* 431 U. S. 494, 504–505 (1977) (plurality opinion of POWELL, J.). Especially in times of adversity, the relationships within a family can offer the security of constant caring and aid. See *id.,* at 505. Ideally, a minor facing an important decision will naturally seek advice and support from her parents, and they in turn will respond with comfort and wisdom.[22] If the pregnant minor herself confides in her family, she plainly relinquishes her right to avoid telling or involving them. For a minor in that circumstance, the statutory requirement of parental notice hardly imposes a burden.

Realistically, however, many families do not conform to this ideal. Many minors, like appellant, oppose parental notice and seek instead to preserve the fundamental, personal right to privacy. It is for these minors that the parental notification requirement creates a problem. In this context, involving the minor's parents against her wishes [23] effectively cancels her right to avoid disclosure of her personal choice. See *Whalen* v. *Roe,* 429 U. S., at 599–600. Moreover, the absolute notice requirement publicizes her private consulta-

[21] Appellees also argue that "[i]t is difficult to contemplate a relationship where the right of privacy as formulated in the abortion context could be less relevant than in the confines of the nuclear family." Brief for Appellees 22. This view, however, was expressly rejected in *Planned Parenthood of Central Mo.* v. *Danforth,* supra, at 75.

[22] Realization of this ideal, however, must depend on the quality of emotional attachments within the family, and not on legal patterns imposed by the State. See *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978); *Moore* v. *East Cleveland,* 431 U. S., at 506.

[23] Nothing prevents the physician from encouraging the minor to consult her parents; only the minor who strenuously objects will remain burdened by the notice requirement.

tion with her doctor and interjects additional parties in the very conference held confidential in *Roe* v. *Wade, supra,* at 164. Besides revealing a confidential decision, the parental notice requirement may limit "access to the means of effectuating that decision." *Carey* v. *Population Services International,* 431 U. S. 678, 688 (1977). Many minor women will encounter interference from their parents after the state-imposed notification.[24] In addition to parental disappoint-

[24] The record here contains little about appellant's situation because the trial judge excluded any such evidence as irrelevant to the facial challenge to the mandatory notice requirement. In light of her claim that the notice requirement inhibits the exercise of her right to choose an abortion, however, we may surmise that appellant expects family conflict over the abortion decision. Indeed, the transcript of the evidentiary hearing, quoted *ante,* at 402–403, n. 6, 403, n. 7 (opinion of BURGER, C. J.), demonstrates that consultation with her social worker, her physician, and her lawyer did not alter appellant's steadfast belief that she could not discuss the issue with her parents.

The records in other cases are also instructive as to the interference posed by some parents to the exercise of some minor's privacy right. See *L. R.* v. *Hansen,* Civil No. C–80–0078J (Utah, Oct. 24, 1980) (preliminary relief awarded to minor alleging parent expelled from home minor sister who disclosed facts of pregnancy and abortion); see *Women's Community Health Center, Inc.* v. *Cohen,* 477 F. Supp. 542, 548 (Me. 1979) (expert affidavits that some parents "will pressure the minor, causing great emotional distress and otherwise disrupting the family relationship"); *Baird* v. *Bellotti,* 450 F. Supp. 997, 1001 (Mass. 1978) (uncontested evidence some parents "would insist on an undesired marriage, or on continuance of the pregnancy as punishment" or even physically harm the minor); *Wynn* v. *Carey,* 582 F. 2d 1375, 1388, n. 24 (CA7 1978) (suggesting same problems); *In re Diane,* 318 A. 2d 629, 630 (Del. Ch. 1974) (father opposes minor's abortion on religious grounds); *State* v. *Koome,* 84 Wash. 2d 901, 908, 530 P. 2d 260, 265 (1975) (parent thinks forcing daughter to bear child will deter her future pregnancies). See *Margaret S.* v. *Edwards,* 488 F. Supp. 181 (ED La. 1980). Parents also may oppose a minor's decision not to abort. *E. g., In re Smith,* 16 Md. App. 209, 295 A. 2d 238 (1972). See generally F. Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing 54 (1976); Jolly, Young, Female, and Outside the Law, in Teenage Women in the Juvenile Justice System: Changing Values 97, 102 (1979) ("When a young girl becomes pregnant, many families refuse to allow her back into their home"); Osofsky &

ment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision. Furthermore, the threat of parental notice may cause some minor women to delay past the first trimester of pregnancy, after which the health risks increase significantly.[25] Other pregnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification.[26] Still others may foresake

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Osofsky, Teenage Pregnancy: Psychosocial Considerations, 21 Clin. Obstet. Gynecol. 1161, 1164–1165 (1978). See also J. Bedger, Teenage Pregnancy 123–124 (1980) (large majority of sampled pregnant minors predict parental opposition to their abortions).

[25] *Women's Community Health Center, Inc.* v. *Cohen, supra,* at 548 (affidavits showing parental notice "may cause an adolescent to delay seeking assistance with her pregnancy, increasing the hazardousness of an abortion should she choose one"); Cates, Adolescent Abortions in the United States, 1 J. Adolescent Health Care 18, 24 (1980); Bracken & Kasl, Delay in Seeking Induced Abortion: A Review and Theoretical Analysis, 121 Am. J. Obstet. Gynecol. 1008, 1013 (1975); Hofmann, Consent and Confidentiality and Their Legal and Ethical Implications for Adolescent Medicine, in Medical Care of the Adolescent 42, 51 (J. Gallagher, F. Heald & D. Garell eds., 3d ed. 1976).

If she decides to abort after the first trimester of pregnancy, the minor faces more serious health risks. *Roe* v. *Wade,* 410 U. S. 113, 163 (1973); Benditt, Second-Trimester Abortion in the United States, 11 Family Planning Perspectives 358 (1979); Cates, Schulz, Crimes, & Tyler, The Effect of Delay and Method Choice on the Risk of Abortion Morbidity, 9 Family Planning Perspectives 266 (1977). If she decides to bear the child, her health risks are also greater than if she had a first trimester abortion. Cates, 1 J. Adolescent Health Care, *supra,* at 24; Cates & Tietze, Standardized Mortality Rates Associated with Legal Abortion: United States 1972–1975, 10 Family Planning Perspectives 109 (1978) (abortion within first 16 weeks of pregnancy safer than carrying pregnancy to term); "The Earlier the Safer" Applies to all Abortions, 10 Family Planning Perspectives 243 (1978). See also Zackler, Andelman, & Bauer, The Young Adolescent as an Obstetric Risk, 103 Am. J. Obstet. Gynecol. 305 (1969) (complications associated with childbirth by minors).

[26] *Women's Community Health Center, Inc.* v. *Cohen, supra,* at 548 (affidavits that minor may turn to illegal abortion rather than have parents notified). See also Kahan, Baker, & Freeman, The Effect of

an abortion and bear an unwanted child, which, given the minor's "probable education, employment skills, financial resources and emotional maturity, . . . may be exceptionally burdensome." *Bellotti II*, 443 U. S., at 642 (POWELL, J.). The possibility that such problems may not occur in particular cases does not alter the hardship created by the notice requirement on its face.[27] And that hardship is not a mere disincentive created by the State,[28] but is instead an actual

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Legalized Abortion on Morbidity Resulting from Criminal Abortion, 121 Am. J. Obstet. Gynecol. 114 (1975) (illegal abortion rate drops when legal abortion available) The minor may also seek to abort herself, *Alice* v. *Department of Social Welfare*, 55 Cal. App. 3d 1039, 1044, 128 Cal. Rptr. 374, 377 (1976); A. Holder, Legal Issues in Pediatrics and Adolescent Medicine 285 (1977); or even commit suicide, see Teicher, A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide, in Current Issues in Adolescent Psychiatry 129, 136 (J. Schoolar ed. 1973) (study showing that approximately one-fourth of female minors who attempt suicide do so because they are or believe they are pregnant).

[27] It is the presence of the notice requirement, and not merely its implementation in a particular case, that signifies the intrusion. Cf. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976) (availability of veto, not exercise of veto, found unconstitutional).

Despite the Court's objection today that we have in the past "expressly declined to equate notice requirements with consent requirements," *ante*, at 411, n. 17, in *Bellotti II* the Court rejected a statute authorizing judicial review of a minor's abortion decision—as an alternative to parental consent—precisely because a parent notified of the court action might interfere. Thus, JUSTICE POWELL wrote for four Members of the Court: "[A]s the District Court recognized, 'there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court.' . . . There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." 443 U. S., at 647.

[28] Thus, the notice requirement produces not only predictable disincentives to choose to abort, *Harris* v. *McRae*, 448 U. S., at 338 (MARSHALL, J., dissenting); *id.*, at 330 (BRENNAN, J., dissenting); but also " 'direct state interference with a protected activity,' " *id.*, at 315 (quoting with approval *Maher* v. *Roe*, 432 U. S. 464, 475 (1977)).

state-imposed obstacle to the exercise of the minor woman's free choice.[29] For the class of pregnant minors represented by appellant, this obstacle is so onerous as to bar the desired abortions.[30] Significantly, the interference sanctioned by the statute does not operate in a neutral fashion. No notice is required for other pregnancy-related medical care,[31] so only the minor women who wish to abort encounter the burden imposed by the notification statute. Because the Utah requirement of mandatory parental notice unquestionably burdens the minor's privacy right, the proper analysis turns next to the State's proffered justifications for the infringements posed by the statute.

III

As established by this Court in *Planned Parenthood of Central Mo.* v. *Danforth,* the statute cannot survive appellant's challenge unless it is justified by a "significant state interest." [32] Further, the State must demonstrate that the means

[29] See *Doe* v. *Bolton,* 410 U. S. 179 (1973) (invalidating procedural restrictions on availability of abortions); *Carey* v. *Population Services International,* 431 U. S., at 687–689 (partial restrictions on access to contraceptives subject to constitutional challenge). Regardless of the personal views each of us may hold, the privacy right by definition secures latitude of choice for the pregnant minor without state approval of one decision over another. Thus, JUSTICE STEVENS improperly inverts the reasoning of our decisions when he reiterates his previous view that the importance of the abortion decision points to a " 'State's interest in maximizing the probability that the decision be *made correctly* and with full understanding of the consequences of either alternative,' " *ante,* at 422 (emphasis added).

[30] See text accompanying n. 8 and see nn. 20, 24, 25, *supra.*

[31] Utah permits pregnant minors to consent to any medical procedure in connection with pregnancy and childbirth, but requires parental notice only before an abortion. Compare Utah Code Ann. § 78–14–5 (4) (f) (1977) with § 76–7–304 (2) (1978).

[32] 428 U. S., at 75. Cf. *Zablocki* v. *Redhail,* 434 U. S., at 388; *NAACP* v. *Button,* 371 U. S. 415, 438 (1963). In *Roe* v. *Wade,* this Court concluded that the woman's privacy right may be tempered by "important [state] interests," 410 U. S., at 154, but the Court ultimately applied the

it selected are closely tailored to serve that interest.[33] Where regulations burden the rights of pregnant adults, we have held that the State legitimately may be concerned with "protection of health, medical standards, and prenatal life." *Roe* v. *Wade*, 410 U. S., at 155. We concluded, however, that during the first trimester of pregnancy none of these interests sufficiently justifies state interference with the decision reached by the pregnant woman and her physician. *Id.*, at 162–163. Nonetheless, appellees assert here that the parental notice requirement advances additional state interests not implicated by a pregnant adult's decision to abort. Specifically, appellees contend that the notice requirement improves the physician's medical judgment about a pregnant minor in two ways: it permits the parents to provide additional information to the physician, and it encourages consultation between the parents and the minor woman. Appellees also advance an independent state interest in preserving parental rights and family autonomy. I consider each of these asserted interests in turn.[34]

A

In upholding the statute, the Utah Supreme Court concluded that the notification provision might encourage parental transmission of "additional information, which might

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"compelling state interest" test commonly used in reviewing state burdens on fundamental rights. *Id.*, at 155. Although it may seem that the minor's privacy right is somehow less fundamental because it may be overcome by a "significant state interest," the more sensible view is that state interests inapplicable to adults may justify burdening the minor's right. *Planned Parenthood of Central Mo* v. *Danforth*, *supra*, at 74–75.

[33] *E. g.*, *Roe* v. *Wade*, *supra*, at 155; *Griswold* v. *Connecticut*, 381 U. S., at 485.

[34] Appellees also argue that the notice requirement furthers legitimate state interests in enforcing Utah's criminal laws against statutory rape, fornication, adultery, and incest. Brief for Appellees 28–30. These interests were not asserted below, and are too tenuous to be considered seriously here.

prove invaluable to the physician in exercising his 'best medical judgment.' " [35] Yet neither the Utah courts nor the statute itself specifies the kind of information contemplated for this purpose, nor why it is available to the parents but not to the minor woman herself. Most parents lack the medical expertise necessary to supplement the physician's medical judgment, and at best could provide facts about the patient's medical history. It seems doubtful that a minor mature enough to become pregnant and to seek medical advice on her own initiative would be unable or unwilling to provide her physician with information crucial to the abortion decision. In addition, by law the physician already is obligated to obtain all information necessary to form his best medical judgment,[36] and nothing bars consultation with the parents should the physician find it necessary.

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[35] 604 P. 2d, at 909–910.

[36] Section 76–7–304 (1) requires the physician to

"Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

"(a) Her physical, emotional and psychological health and safety,

"(b) Her age,

"(c) Her familial situation."

Violations of this requirement are punishable by a year's imprisonment and $1,000 fine. Utah Code Ann. §§ 76–3–204 (1), 76–3–301 (3), 76–7–314 (3) (1978). Criminal sanctions also apply if the physician neglects to obtain the minor's informed written consent, and such consent can be secured only after the physician has notified the patient:

"(a) Of the names and addresses of two licensed adoption agencies in the state of Utah and the services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

"(b) Of the details of development of unborn children and abortion procedures, including any foreseeable complications, risks, and the nature of the post-operative recuperation period; and

"(c) Of any other factors he deems relevant to a voluntary and informed consent." Utah Code Ann. § 76–7–305 (2) (1978).

The risk of malpractice suits also ensures that the physician will acquire whatever information he finds necessary before performing the abortion. See Utah Code Ann. § 78–14–5 (1977).

Moreover, "[i]f a physician is licensed by the State, he is recognized by

Even if mandatory parental notice serves a substantial state purpose in this regard, the Utah statute fails to implement it. Simply put, the statute on its face does not require or even encourage the transfer of information; it does not even call for a conversation between the physician and the parents. A letter from the physician to the parents would satisfy the statute, as would a brief telephone call made moments before the abortion.[37] Moreover, the statute is patently underinclusive if its aim is the transfer of information known to the parents but unavailable from the minor woman herself. The statute specifically excludes married minors from the parental notice requirement; only her husband need be told of the planned abortion, Utah Code Ann. § 76–7–304 (2) (1978), and Utah makes no claim that he possesses any information valuable to the physician's judgment but unavailable from the pregnant woman. Furthermore, no notice is required for other pregnancy-related care sought by the minor. See Utah Code Ann. § 78–14–5 (4) (f) (1977) (authorizing woman of any age to consent to pregnancy-related medical care). The minor woman may consent to surgical removal and analysis of amniotic fluid, caesarian delivery, and other medical care related to pregnancy. The physician's decisions concerning such procedures would be enhanced by parental information as much as would the abortion decision, yet only the abortion decision triggers the parental notice requirement. This result is especially anomalous given the comparatively lesser health risks associated with abortion as contrasted with other pregnancy-related medical care.[38] Thus, the statute not only fails to promote

the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies." *Doe* v. *Bolton*, 410 U. S., at 199.

[37] The parties conceded as much at oral argument. Tr. of Oral Arg. 18–19, 29, 48.

[38] I am baffled by the majority's statement today that "[i]f the pregnant girl elects to carry her child to term, the *medical* decisions to be made

the transfer of information as is claimed, it does not apply to other closely related contexts in which such exchange of information would be no less important. The goal of promoting consultation between the physician and the parents of the pregnant minor cannot sustain a statute that is so ill-fitted to serve it.[39]

B

Appellees also claim the statute serves the legitimate purpose of improving the minor's decision by encouraging consultation between the minor woman and her parents. Appellees do not dispute that the State cannot legally or

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entail few—perhaps none—of the potentially grave and emotional and psychological consequences of the decision to abort," *ante*, at 412–413. Choosing to participate in diagnostic tests involves risks to both mother and child, and also may burden the pregnant woman with knowledge that the child will be handicapped. See 3 National Institutes of Health, Prevention of Embryonic, Fetal, and Perinatal Disease 347–352 (R. Brent & M Harris eds. 1976); Risks in the Practice of Modern Obstetrics 59–81, 369–370 (S. Aladjem ed. 1975). The decision to undergo surgery to save the child's life certainly carries as serious "emotional and psychological consequences" for the pregnant adolescent as does the decision to abort; in both instances, the minor confronts the task of calculating not only medical risks, but also all the issues involved in giving birth to a child. See *id.*, at 59–81. For an unwed adolescent, these issues include her future educational and job opportunities, as well as the more immediate problems of finding financial and emotional support for offspring dependent entirely on her. *Michael M.* v. *Sonoma County Superior Court, post*, at 470, and nn. 3 and 4 (REHNQUIST, J.) (plurality opinion). When surgery to save the child's life poses greater risks to the mother's life, the emotional and ethical dimensions of the medical care decision assume crisis proportion. Of course, for minors, the mere fact of pregnancy and the experience of childbirth can produce psychological upheaval.

[39] More flexible regulations which defer to the physician's judgment but provide for parental notice in emergencies have been proposed. *E. g.*, IJA–ABA Standards for Juvenile Justice, Rights of Minors 4.2, 4.6, 4.8 (1980) (minor can consent to pregnancy-related medical care; physician should seek to obtain minor's permission to notify parent, and notify parent over minor's objection only if failure to inform "could seriously jeopardize the health of the minor").

practically require such consultation.[40] Nor do appellees contest the fact that the decision is ultimately the minor's to make.[41] Nonetheless, the State seeks through the notice requirement to give parents the opportunity to contribute to the minor woman's abortion decision.

Ideally, facilitation of supportive conversation would assist the pregnant minor during an undoubtedly difficult experience. Again, however, when measured against the rationality of the means employed, the Utah statute simply fails to advance this asserted goal. The statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents. Moreover, appellant's claims require us to examine the statute's purpose in relation to the parents who the minor believes are likely to respond with hostility or opposition. In this light, the statute is plainly overbroad. Parental consultation hardly seems a legitimate state purpose where the minor's pregnancy resulted from incest, where a hostile or abusive parental response is assured, or where the minor's fears of such a response deter her from the abortion she desires. The absolute nature of the statutory requirement, with exception permitted only if the parents are physically unavailable, violates the requirement that regulations in this fundamentally personal area be carefully tailored to serve a significant state interest.[42] "The need to preserve the consti-

[40] 604 P. 2d, at 912 ("the State has a special interest in encouraging (but does not require) an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child").

[41] *Ibid.* (notification statute "does not per se impose any restriction on the minor as to her decision to terminate her pregnancy"). Cf. Utah Code Ann. § 78–14–5 (4) (f) (1977) (woman of any age can consent to any medical care related to pregnancy). See generally *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 74 (State may not delegate absolute veto authority to parents of pregnant minor seeking abortion).

[42] State-sponsored counseling services, in contrast, could promote family dialogue and also improve the minor's decisionmaking process. Appellant

tutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U. S., at 642 (POWELL, J.). Because Utah's absolute notice requirement demonstrates no such sensitivity, I cannot approve its interference with the minor's private consultation with the physician during the first trimester of her pregnancy.

C

Finally, appellees assert a state interest in protecting parental authority and family integrity.[43] This Court, of course, has recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972). See *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Indeed, "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters*, 268 U. S., at 535. Similarly, our decisions "have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts, supra*, at 166. See also *Moore* v. *East Cleveland*, 431 U. S., at 505.

H. L., for example, consulted with a counselor who supported her decision. The role of counselors can be significant in facilitating the pregnant woman's adjustment to decisions related to her pregnancy. See Smith, A Follow-Up Study of Women Who Request Abortion, 43 Am. J. Orthopsychiatry 574, 583–585 (1973).

[43] This interest, although not discussed by the state courts below, was the subject of appellees' most vigorous argument before this Court. The challenged provision does fall within the "Offenses Against the Family" chapter of the Utah Criminal Code, *ante*, at 400 (opinion of BURGER, C. J.), which also provides criminal sanctions for bigamy, Utah Code Ann. § 76–7–101, incest, § 76–7–102, adultery, § 76–7–103, fornication, § 76–7–104, and nonsupport and sale of children, §§ 76–7–201 to 76–7–203 (1978).

The critical thrust of these decisions has been to protect the privacy of individual families from unwarranted state intrusion.[44] Ironically, appellees invoke these decisions in seeking to justify state interference in the normal functioning of the family. Through its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family. Whatever its motive, state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve.[45] In rejecting a statute permitting parental veto of the minor woman's abortion decision in *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S., at 75, we found it difficult to conclude that

> "providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."

More recently, in *Bellotti II, supra,* at 638, JUSTICE POWELL observed that efforts to guide the social and moral development of young people are "in large part . . . beyond the competence of impersonal political institutions."

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[44] *Wynn* v. *Carey,* 582 F. 2d, at 1385–1386; Note, The Minor's Right of Privacy: Limitations on State Action after *Danforth* and *Carey,* 77 Colum L. Rev 1216, 1224 (1977).

[45] "The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely. And we believe that enforcing a single, albeit important, parental decision—at a time when the minor is near to majority status—by an instrument as blunt as a state statute is extremely unlikely to restore parental control." *Poe* v. *Gerstein,* 517 F. 2d 787, 793–794 (CA5 1975), summarily aff'd, 428 U. S. 901 (1976).

Appellees maintain, however, that Utah's statute "merely safeguards a reserved right which parents have to know of the important activities of their children by attempting to prevent a denial of the parental rights through deception." Brief for Appellees 3. Casting its purpose this way does not salvage the statute. For when the threat to parental authority originates not from the State but from the minor child, invocation of "reserved" rights of parents cannot sustain blanket state intrusion into family life such as that mandated by the Utah statute. Such a result not only runs counter to the private domain of the family which the State may not breach; it also conflicts with the limits traditionally placed on parental authority. Parental authority is never absolute, and has been denied legal protection when its exercise threatens the health or safety of the minor children. *E. g., Prince* v. *Massachusetts, supra,* at 169–170. Indeed, legal protection for parental rights is frequently tempered if not replaced by concern for the child's interest.[46] Whatever its importance elsewhere, parental authority deserves *de minimis* legal reinforcement where the minor's exercise of a fundamental right is burdened.

To decide this case, there is no need to determine whether parental rights never deserve legal protection when their as-

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[46] Thus, in *Prince* v. *Massachusetts,* this Court held that even parental rights protected by the First Amendment could be limited by the State's interest in prohibiting child labor. See *Wisconsin* v. *Yoder,* 406 U. S. 205, 233–234 (1972) (discussing *Prince*). The State traditionally exercises a *parens patriae* function in protecting those who cannot take care of themselves. See *Ginsberg* v. *New York,* 390 U. S. 629, 641 (1968). Some of the earliest applications of *parens patriae* protected children against their "objectionable" parents. *E. g., Wellesley* v. *Wellesley,* 2 Bli. N. S. 124, 133–134, 4 Eng. Rep. 1078, 1082 (H. L. 1828). See generally Kleinfeld, The Balance of Power Among Infants, Their Parents and the State, Part III, 5 Family L. Q. 64, 66–71 (1971). Every State has enacted legislation to defend children from parental abuse. Wilcox, Child Abuse Laws: Past, Present, and Future, 21 J. Forensic Sciences 71, 72 (1976).

sertion conflicts with the minor's rights and interests.[47] I conclude that this statute cannot be defended as a mere reinforcement of existing parental rights, for the statute reaches beyond the legal limits of those rights. The statute applies, without exception, to emancipated minors,[48] mature mi-

[47] The contexts in which this issue may arise are too varied to support any general rule. Appellees cite our recent decision in *Parham* v. *J. R.*, 442 U. S. 584 (1979), to support their claim that parents should be presumed competent to be involved in their minor daughter's abortion decision. That decision is inapposite to this case in several respects. First, the minor child in *Parham* who was committed to a mental hospital was presumed incompetent to make the commitment decision himself. *Id.*, at 623 (STEWART, J., concurring in judgment). In contrast, appellant by statute is presumed competent to make the decision about whether to complete or abort her pregnancy. Furthermore, in *Parham*, the Court placed critical reliance on the ultimately determinative, independent review of the commitment decision by medical experts. Here, the physician's independent medical judgment—that an abortion was in appellant's best medical interest—not only was not ultimate, it was defeated by the notice requirement. Finally, as JUSTICE STEWART emphasized in his opinion concurring in the judgment in *Parham*, the pregnant minor has a "personal substantive . . . right" to decide on an abortion. *Id.*, at 623–624, n. 6.

[48] Most States through their legislature or courts have adopted the common-law principle that a minor may become freed of the disabilities of that status—and at the same time release his parents from their parental obligations—prior to the actual date of his majority. Certain acts, in and of themselves, may occasion emancipation. See, *e. g.*, Cal. Civ. Code Ann. § 62 (West 1954 and Supp. 1981) (emancipation upon marriage or entry in Armed Services); Utah Code Ann. § 15–2–1 (Supp. 1979) (emancipation upon marriage); *Crook* v. *Crook*, 80 Ariz. 275, 296 P. 2d 951 (1956) (same). A minor may become partially emancipated if he is partially self-supporting, but still entitled to some parental assistance. See Katz, Schroeder, & Sidman, Emancipating Our Children—Coming of Legal Age in America, 7 Fam. L. Q. 211, 215 (1973). Several States by statute permit emancipation for a specific purpose, such as obtaining medical care without parental consent, *e. g.*, Cal. Civ. Code Ann. § 34.6 (West Supp. 1981); Mont. Code Ann. § 41–1–402 (1979) (woman of any age may consent to pregnancy-related medical care); Utah Code Ann. § 78–14–5 (4)(f) (1977) (same), § 26–6–39.1 (1976) (minor can consent to medical treatment for venereal disease); Tex. Rev. Civ. Stat. Ann., Art. 4447i (Vernon 1976) (person at least 13 years old may consent to medical

nors,[49] and minors with emergency health care needs,[50] all of whom, as Utah recognizes, by law have long been entitled to medical care unencumbered by parental involvement. Most

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treatment for drug dependency). See Pilpel, Minors' Rights to Medical Care, 36 Albany L. Rev. 462 (1972). Several States provide for emancipation once the individual becomes a parent. *E. g.*, Ky. Rev. Stat. § 214.185 (2) (1977). In Utah, minors who become parents are authorized to make all medical care decisions for their offspring. Utah Code Ann. § 78–14–5 (4) (a) (1977). See generally *Cohen* v. *Delaware, L. & W. R. Co.*, 150 Misc. 450, 453–457, 269 N. Y. S. 667, 671–676 (1934); *L. R.* v *Hansen*, No. C–80–0078J (Utah, Feb. 8, 1980) (self-supporting minor seeking abortion is emancipated and mature); Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L. J. 645, 663 (1977) (recommending objective criteria to avoid case-by-case determination of emanicipation).

[49] The "mature minor" doctrine permits a child to consent to medical treatment if he is capable of appreciating its nature and consequences. *E. g., L. R.* v. *Hansen, supra* (this mature minor "is capable of understanding her condition and making an informed decision which she has done after carefully considering the alternatives available to her and consulting the persons with whom she felt she should consult" prior to abortion decision); Ark. Stat. Ann. § 82–363 (g) (1976). See *Lacey* v. *Laird*, 166 Ohio St. 12, 139 N. E. 2d 25 (1956) (physician not liable for battery after acting with minor's consent); *Smith* v. *Seibly*, 72 Wash. 2d 16, 21–22, 431 P. 2d 719, 723 (1967); *Younts* v. *St. Francis Hosp. & School of Nursing, Inc*, 205 Kan. 292, 300–301, 469 P. 2d 330, 337 (1970).

Four Members of this Court embraced the "mature minor" concept in striking down a statute requiring parental notice and consent to a minor's abortion, regardless of her own maturity. *Bellotti II*, 443 U. S., at 643–644, and nn. 22 and 23. In *Bellotti II*, JUSTICE POWELL's opinion for four Members of this Court suggested that a statute could withstand constitutional attack if it permitted case-by-case administrative or judicial determination of a pregnant minor's capacity to make an abortion decision with her physician and independent of her parents. *Ibid.* Because this view was expressed in a case not involving such a statute, and because it would expose the minor to the arduous and public rigors of administrative or judicial process, four other Members of this Court rejected it as advisory and at odds with the privacy interest at stake. *Id.*, at 654–656, and n. 4 (STEVENS, J., joined by BRENNAN, MARSHALL, and BLACKMUN, JJ.). Nonetheless, even under JUSTICE POWELL's reasoning in *Bellotti II*, the

[*Footnote 50 is on p. 452*]

relevant to appellant's own claim, the statutory restriction applies even where the minor's best interests—as evaluated by her physician—call for an abortion. The Utah trial court found as a fact that appellant's physician "believed along with her that she should be aborted and that he felt it was in her best medical interest to do so but he could not and would not perform an abortion upon her without informing her parents prior to aborting her because it was required of him by that statute and he was unwilling to perform an abortion upon

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instant statute is unconstitutional. Not only does it preclude case-by-case consideration of the maturity of the minor, it also prevents individualized review to determine whether parental notice would be harmful to the minor.

[50] *E. g.*, Ky. Rev. Stat. § 214.185 (3) (1977); Utah Code Ann. § 26–31–8 (1976); 1979 Utah Laws, ch. 98, § 7. The need for emergency medical care may even overcome the religious objections of the parents. *E. g.*, *In re Clark*, 21 Ohio Op. 2d 86, 89–90, 185 N. E. 2d 128, 131–132 (Com. Pl., Lucas County 1962); *In re Sampson*, 65 Misc. 2d 658, 317 N. Y. S. 2d 641 (Family Ct.), aff'd, 37 App. Div. 2d 668, 323 N. Y. S. 2d 253 (1970); Mass. Gen. Laws Ann., ch. 112, § 12F (West Supp. 1981); Miss. Code Ann. § 41–41–7 (1972). Delay in treating nonemergency health needs may, of course, produce an emergency, and for that reason, this Court found statutory provision for emergency but not nonemergency care illogical. *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 261, 265 (1974). In asserting that the Utah statute would not apply to minors with emergency health care needs, the Court fails to point to anything in the statute, the record, or Utah case law to the contrary. The Supreme Court of Utah addressed only one kind of emergency: where the parents cannot be physically located in sufficient time to permit performance of the abortion. 604 P. 2d, at 913. The court rejected any other emergency situation as an exception to the statute when it declined to afford a broad interpretation of the phrase, "if possible," which modifies the notice requirement. Even where the emergency is simply that the parents cannot be reached, the statute applies; the physician subject to its sanction merely has been granted an affirmative defense that he exercised "reasonable diligence" in attempting to locate and notify the parents. *Ibid.* The majority purports to draw support for its view of the Utah statute on this point from a Massachusetts statute, construed by the Massachusetts Supreme Judicial Court, see *ante*, at 407, n. 14.

her without complying with the provisions of the statute even though he believed it was best to do so." Civ. No. C–78–2719 (Dec. 26, 1978) (Findings of Fact ¶ 7). Even if further review by adults other than her physician, counselor, and attorney were necessary to assess the minor's best interests, see *Bellotti II,* 443 U. S., at 640–641, 643–644 (opinion of POWELL, J.), Utah's rejection of any exception to the notice requirement for a pregnant minor is plainly overbroad. In *Bellotti II,* we were unwilling to cut a pregnant minor off from any avenue to obtain help beyond her parents, and yet the Utah statute does just that.

In this area, I believe this Court must join the state courts and legislatures which have acknowledged the undoubted social reality: some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents. As we recognized in *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S., at 75, "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." [51] Utah itself has allocated pregnancy-related health care decisions entirely to the pregnant minor.[52] Where the physician has cause to doubt the minor's actual ability to understand and consent, by law he must pursue the requisites of the State's informed consent procedures.[53] The State cannot have a legitimate interest in adding to this scheme mandatory parental notice of the minor's abortion decision. This conclusion does not

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[51] As one medical authority observed: "One can well argue that an adolescent old enough to make the decision to be sexually active . . . , and who is then responsible enough to seek professional assistance for his or her problem, is ipso facto mature enough to consent to his own health care." Hofmann, *supra* n. 25, at 51. See Goldstein, 86 Yale L. J., at 633.

[52] Utah Code Ann. § 78–14–5 (4) (f) (1977).

[53] Utah Code Ann. § 76–7–305 (1978) requires voluntary and informed written consent. See n. 36, *supra.*

affect parents' traditional responsibility to guide their children's development, especially in personal and moral concerns. I am persuaded that the Utah notice requirement is not necessary to assure parents this traditional child-rearing role, and that it burdens the minor's fundamental right to choose with her physician whether to terminate her pregnancy.[54]

IV

In its eagerness to avoid the clear application of our precedents, the Court today relies on a mistaken view of class-action law and prudential standing requirements. The Court's avoidance of the issue presented by the complaint nonetheless leaves our precedents intact. Under those precedents, I have no doubt that the challenged statute infringes upon the constitutional right to privacy attached to a minor woman's decision to complete or terminate her pregnancy. None of the reasons offered by the State justifies this intrusion, for the statute is not tailored to serve them. Rather than serving to enhance the physician's judgment, in cases such as appellant's the statute prevents implementation of the physician's medical recommendation. Rather than promoting the transfer of information held by parents to the minor's physician, the statute neglects to require anything more than a communication from the physician moments before the abortion. Rather than respecting the private realm of family life, the statute invokes the criminal justice machinery of the State in an attempt to influence the interactions within the family. Accordingly, I would reverse the judgment of the Supreme Court of Utah insofar as it upheld the statute against constitutional attack.

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[54] Cf. *Wynn* v. *Carey*, 582 F. 2d, at 1388.

Syllabus

KIRCHBERG v. FEENSTRA ET AL.

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

No. 79–1388. Argued December 10, 1980—Decided March 23, 1981

In 1974, the husband of appellee Feenstra (hereafter appellee), without her knowledge, executed a mortgage on their jointly owned home as security on the husband's promissory note to appellant. The husband executed the mortgage pursuant to a now superseded Louisiana statute (Art. 2404) that gave a husband the unilateral right to dispose of jointly owned community property without his spouse's consent. In 1976, after appellee refused to pay her husband's note, appellant commenced foreclosure proceedings and instituted the instant action in Federal District Court for declaratory relief. Appellee asserted a counterclaim challenging the constitutionality of Art. 2404, and Louisiana and its Governor were joined as third-party defendants on the counterclaim. The District Court granted the State's motion for summary judgment. While appellee's appeal to the Court of Appeals was pending, Louisiana completely revised its community-property code provisions so as to grant spouses equal control over the disposition of such property. Because the new code did not take effect until January 1, 1980, it did not control the mortgage executed by appellee's husband. The Court of Appeals held that Art. 2404 violated the Equal Protection Clause of the Fourteenth Amendment, but limited its decision to prospective application because the ruling "would create a substantial hardship with respect to property rights and obligations within the State of Louisiana."

Held:

1. Article 2404 violated the Equal Protection Clause. Gender-based discrimination is unconstitutional absent a showing that the classification substantially furthers an important governmental interest, and it is immaterial that under the earlier statutory provisions appellee could have made a "declaration by authentic act" prohibiting her husband from executing a mortgage on her home without her consent. The "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law. *Trimble* v. *Gordon*, 430 U. S. 762, 774. Because appellant has failed to offer any justification for the challenged classification and because the State, by declining to appeal from the decision below, has apparently abandoned any claim that an

important government objective was served by Art. 2404, the Court of Appeals' judgment is affirmed. Pp. 459–461.

2. There is no ambiguity on the only other question properly before this Court, which is whether the Court of Appeals' prospective decision applies to the mortgage in this case. The dispute between the parties at its core involves the validity of a single mortgage—that executed by appellee's husband—and in passing on the constitutionality of Art. 2404, the Court of Appeals clearly intended to resolve that controversy adversely to appellant. Pp. 461–463.

609 F. 2d 727, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which REHNQUIST, J., joined, *post*, p. 463.

Alan Ford Schoenberger argued the cause *pro hac vice* for appellant. With him on the brief was *Karl J. Kirchberg, pro se.*

Barbara Hausman-Smith argued the cause and filed a brief for appellee Feenstra.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal we consider the constitutionality of a now superseded Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent. Concluding that the provision violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals for the Fifth Circuit invalidating the statute.

I

In 1974, appellee Joan Feenstra filed a criminal complaint against her husband, Harold Feenstra, charging him with molesting their minor daughter. While incarcerated on that

**Sybil H. Pollet* and *Phyllis N. Segal* filed a brief for the NOW Legal Defense and Education Fund et al. as *amici curiae* urging affirmance.

charge, Mr. Feenstra retained appellant Karl Kirchberg, an attorney, to represent him. Mr. Feenstra signed a $3,000 promissory note in prepayment for legal services to be performed by appellant Kirchberg. As security on this note, Mr. Feenstra executed a mortgage in favor of appellant on the home he jointly owned with his wife. Mrs. Feenstra was not informed of the mortgage, and her consent was not required because a state statute, former Art. 2404 of the Louisiana Civil Code Ann. (West 1971), gave her husband exclusive control over the disposition of community property.[1]

Mrs. Feenstra eventually dropped the charge against her husband. He did not return home, but instead obtained a legal separation from his wife and moved out of the State. Mrs. Feenstra first learned of the existence of the mortgage in 1976, when appellant Kirchberg threatened to foreclose on her home unless she paid him the amount outstanding on the promissory note executed by her husband. After Mrs. Feenstra refused to pay the obligation, Kirchberg obtained an order of executory process directing the local sheriff to seize and sell the Feenstra home.

Anticipating Mrs. Feenstra's defense to the foreclosure action, Kirchberg in March 1976 filed this action in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment against Mrs. Feenstra that he was not liable under the Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, for any nondisclosures concerning the mortgage he held on the Feenstra home. In her answer to Kirchberg's complaint, Mrs. Feenstra alleged as a counterclaim that Kirchberg has violated the Act, but also included a second counter-

[1] Article 2404, in effect at the time Mr. Feenstra executed the mortgage in favor of appellant, provided in pertinent part:

"The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife."

This provision has been repealed. See *infra*, at 458, and nn. 3 and 4.

claim challenging the constitutionality of the statutory scheme that empowered her husband unilaterally to execute a mortgage on their jointly owned home. The State of Louisiana and its Governor were joined as third-party defendants on the constitutional counterclaim. The governmental parties, joined by appellant, moved for summary judgment on this claim. The District Court, characterizing Mrs. Feenstra's counterclaim as an attack on "the bedrock of Louisiana's community property system," granted the State's motion for summary judgment. 430 F. Supp. 642, 644 (1977).[2]

While Mrs. Feenstra's appeal from the District Court's order was pending before the Court of Appeals for the Fifth Circuit, the Louisiana Legislature completely revised its code provisions relating to community property. In so doing, the State abandoned the "head and master" concept embodied in Art. 2404, and instead granted spouses equal control over the disposition of community property. La. Civ. Code Ann., Art. 2346 (West Supp. 1981).[3] The new code also provided that community immovables could not be alienated, leased, or otherwise encumbered without the concurrence of both spouses. La. Civ. Code Ann., Art. 2347 (West Supp. 1981).[4] These provisions, however, did not take effect until January 1, 1980, and the Court of Appeals was therefore required to consider whether Art. 2404, the Civil Code provision which had authorized Mr. Feenstra to mortgage his home in 1974 without his wife's knowledge or consent, violated the Equal Protection Clause of the Fourteenth Amendment.

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[2] After the District Court granted summary judgment against appellee Feenstra on her constitutional challenge to the head and master statute, she and appellant Kirchberg agreed to the dismissal with prejudice of their Truth in Lending Act claims.

[3] Article 2346 provides that "[e]ach spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."

[4] However, either spouse may renounce his or her right to concur in the disposition of community immovables. La. Civ. Code Ann., Art. 2348 (West Supp. 1981).

Because this provision explicitly discriminated on the basis of gender, the Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective. See, *e. g., Wengler* v. *Druggist Mutual Ins. Co.*, 446 U. S. 142 (1980); *Craig* v. *Boren*, 429 U. S. 190 (1976). The court noted that the State had advanced only one justification for the provision—that "[o]ne of the two spouses has to be designated as the manager of the community." [5] The court agreed that the State had an interest in defining the manner in which community property was to be managed, but found that the State had failed to show why the mandatory designation of the husband as manager of the property was necessary to further that interest. The court therefore concluded that Art. 2404 violated the Equal Protection Clause. However, because the court believed that a retroactive application of its decision "would create a substantial hardship with respect to property rights and obligations within the State of Louisiana," the decision was limited to prospective application. 609 F. 2d 727, 735–736 (1979). Only Kirchberg appealed the judgment of the Court of Appeals to this Court. We noted probable jurisdiction. 446 U. S. 917 (1980).[6]

II

By granting the husband exclusive control over the disposition of community property, Art. 2404 clearly embodies the

[5] This assertion was made in the State's brief before the Court of Appeals. 609 F. 2d 727, 735 (1979).

[6] The State and the Governor, as appellees, subsequently filed a motion to dismiss Kirchberg's appeal on the ground that extensive revisions in the State's community property law, see *supra*, at 458, and nn. 3 and 4, had rendered moot the controversy over the constitutionality of Art. 2404. However, because these legislative changes were effective only as of January 1, 1980, they do not govern the mortgage executed by Mr. Feenstra in 1974. The suggestion of mootness was therefore rejected. 449 U. S. 916 (1980).

type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest. In defending the constitutionality of Art. 2404, appellant Kirchberg does not claim that the provision serves any such interest.[7] Instead, appellant attempts to distinguish this Court's decisions in cases such as *Craig* v. *Boren, supra,* and *Orr* v. *Orr,* 440 U. S. 268 (1979), which struck down similar gender-based statutory classifications, by arguing that appellee Feenstra, as opposed to the disadvantaged individuals in those cases, could have taken steps to avoid the discriminatory impact of Art. 2404. Appellant notes that under Art. 2334 of the Louisiana Civil Code, in effect at the time Mr. Feenstra executed the mortgage, Mrs. Feenstra could have made a "declaration by authentic act" prohibiting her husband from executing a mortgage on her home without her consent.[8] By failing to take advantage of this procedure, Mrs. Feenstra, in appellant's view, became the "architect of

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[7] Nor will this Court speculate about the existence of such a justification. "The burden . . . is on those defending the discrimination to make out the claimed justification . . . ." *Wengler* v. *Druggist Mutual Ins. Co.,* 446 U. S. 142, 151 (1980). We note, however, that the failure of the State to appeal from the decision of the Court of Appeals and the decision of the Louisiana Legislature to replace Art. 2404 with a gender-neutral statute, suggest that appellant would be hard pressed to show that the challenged provision substantially furthered an important governmental interest.

[8] Article 2334, as it existed in 1974, provided:

"Where the title to immovable property stands in the names of both the husband and the wife, it may not be leased, mortgaged or sold by the husband without the wife's consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such a declaration in the mortgage and conveyance records of the parish in which the property is situated."

This Article has been replaced with a new code provision prohibiting either spouse from alienating or encumbering community immovables without the consent of the other spouse. See n. 3, *supra.*

her own predicament" and therefore should not be heard to complain of the discriminatory impact of Art. 2404.

By focusing on steps that Mrs. Feenstra could have taken to preclude her husband from mortgaging their home without her consent, however, appellant overlooks the critical question: Whether Art. 2404 substantially furthers an important government interest. As we have previously noted, the "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law. *Trimble* v. *Gordon,* 430 U. S. 762, 774 (1977). See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973). Cf. *Taylor* v. *Louisiana,* 419 U. S. 522 (1975); *Reed* v *Reed,* 404 U. S. 71 (1971). Instead the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an "exceedingly persuasive justification" for the challenged classification. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 273 (1979). See also *Wengler* v. *Druggist Mutual Ins. Co., supra,* at 151. Because appellant has failed to offer such a justification, and because the State, by declining to appeal from the decision below, has apparently abandoned any claim that an important government objective was served by the statute, we affirm the judgment of the Court of Appeals invalidating Art. 2404.[9]

III

Appellant's final contention is that even if Art. 2404 violates the Equal Protection Clause of the Fourteenth Amendment, the mortgage he holds on the Feenstra home is none-

[9] In so ruling, we also reject appellant's secondary argument that the constitutional challenge to Art. 2404 should be rejected because the provision was an integral part of the State's community property law and its invalidation would call into question the constitutionality of related provisions of the Louisiana Civil Code. The issue before us is not whether the State's community property law, as it existed in 1974, could have functioned without Art. 2404, but rather whether that provision unconstitutionally discriminated on the basis of sex.

theless valid because the Court of Appeals limited its ruling to prospective application. Appellant asserts that the opinion of the Court of Appeals is ambiguous on whether the court intended to apply its prospective ruling to his mortgage, which was executed in 1974, or only to those dispositions of community property made pursuant to Art. 2404 between December 12, 1979, the date of the court's decision, and January 1, 1980, the effective date of Louisiana's new community property law. Appellant urges this Court to adopt the latter interpretation on the ground that a contrary decision would create grave uncertainties concerning the validity of mortgages executed unilaterally by husbands between 1974 and the date of the Court of Appeals' decision.

We decline to address appellant's concerns about the potential impact of the Court of Appeals' decision on other mortgages executed pursuant to Art. 2404. The only question properly before us is whether the decision of the Court of Appeals applies to the mortgage in this case, and on that issue we find no ambiguity.[10] This case arose not from any abstract disagreement between the parties over the constitutionality of Art. 2404, but from appellant's attempt to foreclose on the mortgage he held on the Feenstra home. Appellant brought this declaratory judgment action to further that end, and the counterclaim asserted by Mrs. Feenstra specifically sought as relief "a declaratory judgment that the mortgage executed on [her] home by her husband . . . is void as having been executed and recorded without her consent pursuant to an unconstitutional state statute." Thus, the dispute between the parties at its core involves the validity of a single

[10] Indeed, appellant's view that some ambiguity exists concerning the applicability of the Fifth Circuit's decision to the mortgage he held on the Feenstra home appears to be of recent vintage. Appellant Kirchberg never sought clarification from the Court of Appeals on the scope of its decision, and apparently regarded the court's judgment to be sufficiently adverse and binding on him to warrant seeking review on the merits before this Court.

mortgage, and in passing on the constitutionality of Art. 2404, the Court of Appeals clearly intended to resolve that controversy adversely to appellant.

Accordingly, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE STEWART, with whom JUSTICE REHNQUIST joins, concurring in the result.

Since men and women were similarly situated for all relevant purposes with respect to the management and disposition of community property, I agree that Art. 2404 of the Louisiana Civil Code Ann. (West 1971), which allowed husbands but not wives to execute mortgages on jointly owned real estate without spousal consent, violated the Equal Protection Clause of the Fourteenth Amendment. See *Michael M.* v. *Sonoma County Superior Court, post,* at 477–479 (STEWART, J., concurring).

While it is clear that the Court is correct in holding that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that that court's explicit announcement that its holding was to apply only prospectively means that no other mortgage executed before the date of the decision of the Court of Appeals is invalid by reason of its decision.

MICHAEL M. *v.* SUPERIOR COURT OF SONOMA COUNTY (CALIFORNIA, REAL PARTY IN INTEREST)

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 79–1344. Argued November 4, 1980—Decided March 23, 1981

Petitioner, then a 17½-year-old male, was charged with violating California's "statutory rape" law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that the statute unlawfully discriminated on the basis of gender since men alone were criminally liable thereunder. The trial court and the California Court of Appeal denied relief, and on review the California Supreme Court upheld the statute.

Held: The judgment is affirmed. Pp. 468–476; 481–487.

25 Cal. 3d 608, 601 P. 2d 572, affirmed.

JUSTICE REHNQUIST, joined by CHIEF JUSTICE BURGER, JUSTICE STEWART, and JUSTICE POWELL, concluded that the statute does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 468–476.

(a) Gender-based classifications are not "inherently suspect" so as to be subject to so-called "strict scrutiny," but will be upheld if they bear a "fair and substantial relationship" to legitimate state ends. *Reed* v. *Reed,* 404 U. S. 71. Because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," *Rinaldi* v. *Yeager,* 384 U. S. 305, 309, a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Pp. 468–469.

(b) One of the purposes of the California statute in which the State has a strong interest is the prevention of illegitimate teenage pregnancies. The statute protects women from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological consequences are particularly severe. Because virtually all of the significant harmful and identifiable consequences of teenage pregnancy fall on the female, a legislature acts well within its authority when it

elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. Pp 470–473.

(c) There is no merit in petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. The relevant inquiry is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. In any event, a gender-neutral statute would frustrate the State's interest in effective enforcement since a female would be less likely to report violations of the statute if she herself would be subject to prosecution. The Equal Protection Clause does not require a legislature to enact a statute so broad that it may well be incapable of enforcement. Pp. 473–474.

(d) Nor is the statute impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, incapable of becoming pregnant. Aside from the fact that the statute could be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, the Constitution does not require the California Legislature to limit the scope of the statute to older teenagers and exclude young girls. P. 475.

(e) And the statute is not unconstitutional as applied to petitioner who, like the girl involved, was under 18 at the time of sexual intercourse, on the asserted ground that the statute presumes in such circumstances that the male is the culpable aggressor. The statute does not rest on such an assumption, but instead is an attempt to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented. P. 475.

BLACKMUN, J., concluded that the California statutory rape law is a sufficiently reasoned and constitutional effort to control at its inception the problem of teenage pregnancies, and that the California Supreme Court's judgment should be affirmed on the basis of the applicable test for gender-based classifications as set forth in *Reed* v. *Reed*, 404 U. S. 71, 76, and *Craig* v. *Boren*, 429 U. S. 190, 197. Pp. 481–487.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 476. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 481. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 488. STEVENS, J., filed a dissenting opinion, *post*, p. 496.

Gregory F. Jilka argued the cause and filed a brief for petitioner.

Sandy R. Kriegler, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *George Deukmejian,* Attorney General, *Robert H. Philibosian,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, and *William R. Pounders,* Deputy Attorney General.*

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL joined.

The question presented in this case is whether California's "statutory rape" law, § 261.5 of the Cal. Penal Code Ann. (West Supp. 1981), violates the Equal Protection Clause of the Fourteenth Amendment. Section 261.5 defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." The statute thus makes men alone criminally liable for the act of sexual intercourse.

In July 1978, a complaint was filed in the Municipal Court of Sonoma County, Cal., alleging that petitioner, then a 17½-year-old male, had had unlawful sexual intercourse with a female under the age of 18, in violation of § 261.5. The evidence adduced at a preliminary hearing showed that at approximately midnight on June 3, 1978, petitioner and two friends approached Sharon, a 16½-year-old female, and her sister as they waited at a bus stop. Petitioner and Sharon,

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*Briefs of *amici curiae* urging reversal were filed by *Bruce J. Ennis, Jr.,* for the American Civil Liberties Union et al; and by *John W. Karr* for the Women's Legal Defense Fund.

Solicitor General McCree, Assistant Attorney General Heymann, and *Sara Criscitelli* filed a brief for the United States as *amicus curiae* urging affirmance.

who had already been drinking, moved away from the others and began to kiss. After being struck in the face for rebuffing petitioner's initial advances, Sharon submitted to sexual intercourse with petitioner. Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that § 261.5 unlawfully discriminated on the basis of gender. The trial court and the California Court of Appeal denied petitioner's request for relief and petitioner sought review in the Supreme Court of California.

The Supreme Court held that "section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section." 25 Cal. 3d 608, 611, 601 P. 2d 572, 574. The court then subjected the classification to "strict scrutiny," stating that it must be justified by a compelling state interest. It found that the classification was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant." *Ibid.* Canvassing "the tragic human costs of illegitimate teenage pregnancies," including the large number of teenage abortions, the increased medical risk associated with teenage pregnancies, and the social consequences of teenage childbearing, the court concluded that the State has a compelling interest in preventing such pregnancies. Because males alone can "physiologically cause the result which the law properly seeks to avoid," the court further held that the gender classification was readily justified as a means of identifying offender and victim. For the reasons stated below, we affirm the judgment of the California Supreme Court.[1]

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[1] The lower federal courts and state courts have almost uniformly concluded that statutory rape laws are constitutional. See, *e. g.*, *Rundlett* v. *Oliver*, 607 F. 2d 495 (CA1 1979); *Hall* v. *McKenzie*, 537 F. 2d 1232 (CA4 1976); *Hall* v. *State*, 365 So. 2d 1249, 1252–1253 (Ala. App. 1978), cert. denied, 365 So. 2d 1253 (Ala. 1979); *State* v. *Gray*, 122 Ariz.

As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications. The issues posed by such challenges range from issues of standing, see *Orr* v. *Orr*, 440 U. S. 268 (1979), to the appropriate standard of judicial review for the substantive classification. Unlike the California Supreme Court, we have not held that gender-based classifications are "inherently suspect" and thus we do not apply so-called "strict scrutiny" to those classifications. See *Stanton* v. *Stanton*, 421 U. S. 7 (1975). Our cases have held, however, that the traditional minimum rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged. See *Craig* v. *Boren*, 429 U. S. 190, 210 n.* (1976) (POWELL, J., concurring). In *Reed* v. *Reed*, 404 U. S. 71 (1971), for example, the Court stated that a gender-based classification will be upheld if it

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445, 446–477, 595 P. 2d 990, 991–992 (1979); *People* v. *Mackey*, 46 Cal. App. 3d 755, 760–761, 120 Cal. Rptr. 157, 160, cert. denied, 423 U. S. 951 (1975); *People* v. *Salinas*, 191 Colo. 171, 551 P. 2d 703 (1976); *State* v. *Brothers*, 384 A. 2d 402 (Del. Super. 1978); *In re W. E. P.*, 318 A. 2d 286, 289–290 (DC 1974); *Barnes* v. *State*, 244 Ga. 302, 303–304, 260 S. E. 2d 40, 41–42 (1979); *State* v. *Drake*, 219 N. W. 2d 492, 495–496 (Iowa 1974); *State* v. *Bell*, 377 So. 2d 303 (La. 1979); *State* v. *Rundlett*, 391 A. 2d 815 (Me. 1978); *Green* v. *State*, 270 So. 2d 695 (Miss. 1972); *In re J. D. G.*, 498 S. W. 2d 786, 792–793 (Mo. 1973); *State* v. *Meloon*, 116 N. H. 669, 366 A. 2d 1176 (1976); *State* v. *Thompson*, 162 N. J. Super. 302, 392 A. 2d 678 (1978); *People* v. *Whidden*, 51 N. Y. 2d 457, 415 N. E. 2d 927 (1980); *State* v. *Wilson*, 296 N. C. 298, 311–313, 250 S E. 2d 621, 629–630 (1979); *Olson* v. *State*, 588 P. 2d 1018 (Nev. 1979); *State* v. *Elmore*, 24 Ore. App. 651, 546 P. 2d 1117 (1976); *State* v *Ware*, —— R. I. ——, 418 A. 2d 1 (1980); *Roe* v. *State*, 584 S. W. 2d 257, 259 (Tenn. Crim. App. 1979); *Ex parte Groves*, 571 S. W. 2d 888, 892–893 (Tex. Crim. App. 1978); *Moore* v. *McKenzie*, 236 S. E. 2d 342, 342–343 (W. Va. 1977); *Flores* v. *State*, 69 Wis. 2d 509, 510–511, 230 N. W. 2d 637, 638 (1975). Contra, *Navedo* v. *Preisser*, 630 F. 2d 636 (CA8 1980); *United States* v. *Hicks*, 625 F. 2d 216 (CA9 1980); *Meloon* v. *Helgemoe*, 564 F. 2d 602 (CA1 1977) (limited in *Rundlett* v. *Oliver*, *supra*), cert. denied, 436 U. S. 950 (1978).

bears a "fair and substantial relationship" to legitimate state ends, while in *Craig* v. *Boren, supra,* at 197, the Court restated the test to require the classification to bear a "substantial relationship" to "important governmental objectives."

Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham* v. *Hughes,* 441 U. S. 347, 354 (1979) (plurality opinion of STEWART, J.). But because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require " 'things which are different in fact . . . to be treated in law as though they were the same,' " *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966), quoting *Tigner* v. *Texas,* 310 U. S. 141, 147 (1940), this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. *Parham* v. *Hughes, supra; Califano* v. *Webster,* 430 U. S. 313 (1977); *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975); *Kahn* v. *Shevin,* 416 U. S. 351 (1974). As the Court has stated, a legislature may "provide for the special problems of women." *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 653 (1975).

Applying those principles to this case, the fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct.[2] Precisely why the legislature desired that result is of course somewhat less clear. This Court has long recognized that "[i]nquiries into congressional motives or purposes are a hazardous matter," *United States* v. *O'Brien,* 391 U. S. 367, 383–384 (1968); *Palmer* v. *Thompson,* 403 U. S. 217, 224 (1971), and the

[2] The statute was enacted as part of California's first penal code in 1850, 1850 Cal. Stats., ch. 99, § 47, p. 234, and recodified and amended in 1970.

search for the "actual" or "primary" purpose of a statute is likely to be elusive. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977); *McGinnis* v. *Royster*, 410 U. S. 263, 276–277 (1973). Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of "chastity," and still others about promoting various religious and moral attitudes towards premarital sex.

The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies. That finding, of course, is entitled to great deference. *Reitman* v. *Mulkey*, 387 U. S. 369, 373–374 (1967). And although our cases establish that the State's asserted reason for the enactment of a statute may be rejected, if it "could not have been a goal of the legislation," *Weinberger* v. *Wiesenfeld*, *supra*, at 648, n. 16, this is not such a case.

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades,[3] have significant social, medical, and economic consequences for both the mother and her child, and the State.[4]

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[3] In 1976 approximately one million 15-to-19-year-olds became pregnant, one-tenth of all women in that age group. Two-thirds of the pregnancies were illegitimate. Illegitimacy rates for teenagers (births per 1,000 unmarried females ages 14 to 19) increased 75% for 14-to-17-year-olds between 1961 and 1974 and 33% for 18-to-19-year-olds. Alan Guttmacher Institute, 11 Million Teenagers 10, 13 (1976); C. Chilman, Adolescent Sexuality In a Changing American Society 195 (NIH Pub. No. 80–1426, 1980).

[4] The risk of maternal death is 60% higher for a teenager under the age of 15 than for a women in her early twenties. The risk is 13% higher

Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.[5] And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.[6]

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here

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for 15-to-19-year-olds. The statistics further show that most teenage mothers drop out of school and face a bleak economic future. See, *e. g.*, 11 Million Teenagers, *supra*, at 23, 25; Bennett & Bardon, The Effects of a School Program On Teenager Mothers and Their Children, 47 Am. J. Orthopsychiatry 671 (1977); Phipps-Yonas, Teenage Pregnancy and Motherhood, 50 Am. J. Orthopsychiatry 403, 414 (1980).

[5] This is because teenagers are disproportionately likely to seek abortions. Center for Disease Control, Abortion Surveillance 1976, pp. 22–24 (1978). In 1978, for example, teenagers in California had approximately 54,000 abortions and 53,800 live births. California Center for Health Statistics, Reproductive Health Status of California Teenage Women 1, 23 (Mar. 1980).

[6] The policy and intent of the California Legislature evinced in other legislation buttresses our view that the prevention of teenage pregnancy is a purpose of the statute. The preamble to the Pregnancy Freedom of Choice Act, for example, states: "The legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California." Cal. Welf. & Inst. Code Ann. § 16145 (West 1980).

Subsequent to the decision below, the California Legislature considered and rejected proposals to render § 261.5 gender neutral, thereby ratifying the judgment of the California Supreme Court. That is enough to answer petitioner's contention that the statute was the " 'accidental by-product of a traditional way of thinking about females.' " *Califano* v. *Webster*, 430 U. S. 313, 320 (1977) (quoting *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment)). Certainly this decision of the California Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.

protects women from sexual intercourse at an age when those consequences are particularly severe.[7]

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female.[8] We hold that such a statute is

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[7] Although petitioner concedes that the State has a "compelling" interest in preventing teenage pregnancy, he contends that the "true" purpose of § 261.5 is to protect the virtue and chastity of young women. As such, the statute is unjustifiable because it rests on archaic stereotypes. What we have said above is enough to dispose of that contention. The question for us—and the only question under the Federal Constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted. Even if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). In *Orr* v. *Orr*, 440 U. S. 268 (1979), for example, the Court rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. Similarly, in *Washington* v *Davis*, 426 U. S. 229, 243 (1976), the Court distinguished *Palmer* v. *Thompson*, 403 U. S. 217 (1971), on the grounds that the purposes of the ordinance there were not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose. See also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 270, n. 21 (1977); *Mobile* v. *Bolden*, 446 U. S. 55, 91 (1980) (STEVENS, J., concurring in judgment).

[8] We do not understand petitioner to question a State's authority to make sexual intercourse among teenagers a criminal act, at least on a gender-neutral basis. In *Carey* v. *Population Services International*, 431 U. S. 678, 694, n. 17 (1977) (plurality opinion of BRENNAN, J.), four Members of the Court assumed for the purposes of that case that a State may regulate the sexual behavior of minors, while four other Members of the Court more emphatically stated that such regulation would be permissible. *Id.*, at 702, 703 (WHITE, J., concurring in part and concurring in result); *id*, at 705–707, 709 (POWELL, J., concurring in part and concurring in judgment); *id.*, at 713 (STEVENS, J., concurring in part and

sufficiently related to the State's objectives to pass constitutional muster.

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.

We are unable to accept petitioner's contention that the statute is impermissibly underinclusive and must, in order to pass judicial scrutiny, be *broadened* so as to hold the female as criminally liable as the male. It is argued that this statute is not *necessary* to deter teenage pregnancy because a gender-neutral statute, where both male and female would be subject to prosecution, would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations. *Kahn* v. *Shevin,* 416 U. S., at 356, n. 10.

In any event, we cannot say that a gender-neutral statute would be as effective as the statute California has chosen to enact. The State persuasively contends that a gender-neutral statute would frustrate its interest in effective enforcement. Its view is that a female is surely less likely to report

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concurring in judgment); *id.,* at 718 (REHNQUIST, J., dissenting). The Court has long recognized that a State has even broader authority to protect the physical, mental, and moral well-being of its youth, than of its adults. See, *e. g., Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 72–74 (1976); *Ginsberg* v. *New York,* 390 U. S. 629, 639–640 (1968); *Prince* v. *Massachusetts,* 321 U. S. 158, 170 (1944).

violations of the statute if she herself would be subject to criminal prosecution.[9] In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.[10]

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[9] Petitioner contends that a gender-neutral statute would not hinder prosecutions because the prosecutor could take into account the relative burdens on females and males and generally only prosecute males But to concede this is to concede all. If the prosecutor, in exercising discretion, will virtually always prosecute just the man and not the woman, we do not see why it is impermissible for the legislature to enact a statute to the same effect.

[10] The question whether a statute is *substantially* related to its asserted goals is at best an opaque one. It can be plausibly argued that a gender-neutral statute would produce fewer prosecutions than the statute at issue here See STEWART, J., concurring, *post,* at 481, n. 13. JUSTICE BRENNAN'S dissent argues, on the other hand, that

"even assuming that a gender-neutral statute would be more difficult to enforce, . . . [c]ommon sense . . . suggests that a gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators." *Post,* at 493–494 (emphasis deleted).

Where such differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the California Supreme Court, "armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the statute], and familiar with the milieu in which that provision would operate." *Reitman* v. *Mulkey,* 387 U. S. 369, 378–379 (1967).

It should be noted that two of the three cases relied upon by JUSTICE BRENNAN'S dissent are readily distinguishable from the instant one. See *post,* at 490, n. 3. In both *Navedo* v. *Preisser,* 630 F. 2d 636 (CA8 1980), and *Meloon* v. *Helgemoe,* 564 F. 2d 602 (CA1 1977), cert. denied, 436 U. S. 950 (1978), the respective governments asserted that the purpose of the statute was to protect young women from physical injury. Both courts rejected the justification on the grounds that there had been no showing that young females are more likely than males to suffer physical injury from sexual intercourse. They further held, contrary to our decision, that

We similarly reject petitioner's argument that § 261.5 is impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant. Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, see *Rundlett* v. *Oliver,* 607 F. 2d 495 (CA1 1979), it is ludicrous to suggest that the Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.

There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under 18 at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under 18, the male is the culpable aggressor We find petitioner's contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.

In upholding the California statute we also recognize that this is not a case where a statute is being challenged on the grounds that it "invidiously discriminates" against females.

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pregnancy prevention was not a "plausible" purpose of the legislation. Thus neither court reached the issue presented here, whether the statute is substantially related to the prevention of teenage pregnancy. Significantly, *Meloon* has been severely limited by *Rundlett* v. *Oliver,* 607 F. 2d 495 (CA1 1979), where the court upheld a statutory rape law on the ground that the State had shown that sexual intercourse physically injures young women more than males. Here, of course, even JUSTICE BRENNAN'S dissent does not dispute that young women suffer disproportionately the deleterious consequences of illegitimate pregnancy.

To the contrary, the statute places a burden on males which is not shared by females. But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts. Nor is this a case where the gender classification is made "solely for . . . administrative convenience," as in *Frontiero* v. *Richardson,* 411 U. S. 677, 690 (1973) (emphasis omitted), or rests on "the baggage of sexual stereotypes" as in *Orr* v. *Orr,* 440 U. S., at 283. As we have held, the statute instead reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male.

Accordingly the judgment of the California Supreme Court is

Affirmed.

JUSTICE STEWART, concurring.

Section 261.5, on its face, classifies on the basis of sex. A male who engages in sexual intercourse with an underage female who is not his wife violates the statute; a female who engages in sexual intercourse with an underage male who is not her husband does not.[1] The petitioner contends that this state law, which punishes only males for the conduct in question, violates his Fourteenth Amendment right to the equal protection of the law. The Court today correctly rejects that contention.

A

At the outset, it should be noted that the statutory discrimination, when viewed as part of the wider scheme of California law, is not as clearcut as might at first appear. Females are not freed from criminal liability in California for engaging in sexual activity that may be harmful. It is unlawful, for example, for any person, of either sex, to molest, annoy, or contribute to the delinquency of anyone under 18 years of

[1] But see n. 5 and accompanying text, *infra.*

age.[2] All persons are prohibited from committing "any lewd or lascivious act," including consensual intercourse, with a child under 14.[3] And members of both sexes may be convicted for engaging in deviant sexual acts with anyone under 18.[4] Finally, females may be brought within the proscription of § 261.5 itself, since a female may be charged with aiding and abetting its violation.[5]

Section 261.5 is thus but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity. To be sure, § 261.5 creates an additional measure of punishment for males who engage in sexual intercourse with females between the ages of 14 and 17.[6] The question then is whether the Constitution prohibits a state legislature from imposing this *additional* sanction on a gender-specific basis.

B

The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were

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[2] See Cal. Penal Code Ann. §§ 272, 647a (West Supp. 1981).

[3] Cal. Penal Code Ann. § 288 (West Supp. 1981). See *People* v. *Dontanville,* 10 Cal. App. 3d 783, 796, 89 Cal. Rptr. 172, 180 (2d Dist.).

[4] See Cal. Penal Code Ann. §§ 286 (b)(1), 288a (b)(1) (West Supp. 1981).

[5] See Cal. Penal Code Ann. § 31 (West 1970); *People* v. *Haywood,* 131 Cal. App. 2d 259, 280 P. 2d 180 (2d Dist.); *People* v. *Lewis,* 113 Cal. App. 2d 468, 248 P. 2d 461 (1st Dist.). According to statistics maintained by the California Department of Justice Bureau of Criminal Statistics, approximately 14% of the juveniles arrested for participation in acts made unlawful by § 261.5 between 1975 and 1979 were females. Moreover, an underage female who is as culpable as her male partner, or more culpable, may be prosecuted as a juvenile delinquent. Cal. Welf. & Inst. Code Ann. § 602 (West Supp. 1981); *In re Gladys R.,* 1 Cal. 3d 855, 867–869, 464 P. 2d 127, 136–138.

[6] Males and females are equally prohibited by § 288 from sexual intercourse with minors under 14. Compare Cal. Penal Code Ann. § 288 (West Supp. 1981) with Cal. Penal Code Ann. §§ 18, 264 (West Supp. 1981).

born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 522 (dissenting opinion); *McLaughlin* v. *Florida*, 379 U. S. 184, 198 (concurring opinion); *Brown* v. *Board of Ed.*, 347 U. S. 483; *Plessy* v. *Ferguson*, 163 U. S. 537, 552 (dissenting opinion). By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.

As was recognized in *Parham* v. *Hughes*, 441 U. S. 347, 354, "a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Gender-based classifications may not be based upon administrative convenience, or upon archaic assumptions about the proper roles of the sexes. *Craig* v. *Boren*, 429 U. S. 190; *Frontiero* v. *Richardson*, 411 U. S. 677; *Reed* v. *Reed*, 404 U. S. 71. But we have recognized that in certain narrow circumstances men and women are *not* similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional. See *Parham* v. *Hughes*, *supra*; *Califano* v. *Webster*, 430 U. S. 313, 316–317; *Schlesinger* v. *Ballard*, 419 U. S. 498; cf. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 59 (concurring opinion). "[G]ender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated." *Caban* v. *Mohammed*, 441 U. S. 380, 398 (dissenting opinion).

Applying these principles to the classification enacted by the California Legislature, it is readily apparent that § 261.5 does not violate the Equal Protection Clause. Young women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy, and the statute is realistically related to the legitimate state purpose of reducing those problems and risks.

C

As the California Supreme Court's catalog shows, the pregnant unmarried female confronts problems more numerous and more severe than any faced by her male partner.[7] She alone endures the medical risks of pregnancy or abortion.[8] She suffers disproportionately the social, educational, and emotional consequences of pregnancy.[9] Recognizing this dis-

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[7] The court noted that from 1971 through 1976, 83.6% of the 4,860 children born to girls under 15 in California were illegitimate, as were 51% of those born to girls 15 to 17. The court also observed that while accounting for only 21% of California pregnancies in 1976, teenagers accounted for 34 7% of legal abortions. See *ante,* at 470, n. 3.

[8] There is also empirical evidence that sexual abuse of young females is a more serious problem than sexual abuse of young males. For example, a review of five studies found that 88% of sexually abused minors were female. Jaffe, Dynneson, & ten Bensel, Sexual Abuse of Children 129 Am. J. of Diseases of Children 689, 690 (1975). Another study, involving admissions to a hospital emergency room over a 3-year period, reported that 86 of 100 children examined for sexual abuse were girls. Orr & Prietto, Emergency Management of Sexually Abused Children, 133 Am. J. of Diseased Children 630 (1979). See also *State* v. *Craig,* 169 Mont. 150, 156–157, 545 P. 2d 649, 653; Sarafino, An Estimate of Nationwide Incidence of Sexual Offenses Against Children, 58 Child Welfare 127, 131 (1979).

[9] Most teenage mothers do not finish high school and are disadvantaged economically thereafter. See Moore, Teenage Childbirth and Welfare Dependency, 10 Family Planning Perspectives 233–235 (1978). The suicide rate for teenage mothers is seven times greater than that for teenage girls without children. F. Nye, School-Age Parenthood (Wash. State U. Ext. Bull. No. 667) 8 (1976). And 60% of adolescent mothers aged 15 to 17

proportion, California has attempted to protect teenage females by prohibiting males from participating in the act necessary for conception.[10]

The fact that males and females are not similarly situated with respect to the risks of sexual intercourse applies with the same force to males under 18 as it does to older males. The risk of pregnancy is a significant deterrent for unwed young females that is not shared by unmarried males, regardless of their age. Experienced observation confirms the commonsense notion that adolescent males disregard the possibility of pregnancy far more than do adolescent females.[11] And to the extent that § 261.5 may punish males for intercourse with prepubescent females, that punishment is justifiable because of the substantial physical risks for prepubescent females that are not shared by their male counterparts.[12]

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are on welfare within two to five years of the birth of their children. Teenage Pregnancy, Everybody's Problem 3–4 (DHEW Publication (HSA) No. 77–5619).

[10] Despite the increased availability of contraceptives and sex education, the pregnancy rates for young women are increasing. See Alan Guttmacher Institute, 11 Million Teenagers 12 (1976). See generally C Chilman, Adolescent Sexuality in a Changing American Society (NIH Pub. No. 80–1426, 1980).

The petitioner contends that the statute is overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible. The petitioner does not allege, however, that he used a contraceptive, or that pregnancy could not have resulted from the conduct with which he was charged. But even assuming the petitioner's standing to raise the claim of overbreadth, it is clear that a statute recognizing the defenses he suggests would encounter difficult if not impossible problems of proof.

[11] See, *e. g.*, Phipps-Yonas, Teenage Pregnancy and Motherhood, 50 Am. J. Orthopsychiatry 403, 412 (1980). See also *State* v. *Rundlett,* 391 A. 2d 815, 819, n. 13, 822 (Me.); *Rundlett* v. *Oliver,* 607 F. 2d 495, 502 (CA1).

[12] See *Barnes* v *State,* 244 Ga 302, 260 S. E. 2d 40; see generally Orr & Prietto, *supra;* Jaffee, Dynneson, & ten Bensel, *supra;* Chilman, *supra.*

D

The petitioner argues that the California Legislature could have drafted the statute differently, so that its purpose would be accomplished more precisely. "But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the . . . [l]egislature are within constitutional limitations." *Kahn* v. *Shevin*, 416 U. S. 351, 356, n. 10. That other States may have decided to attack the same problems more broadly, with gender-neutral statutes, does not mean that every State is constitutionally compelled to do so.[13]

E

In short, the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination, no such discrimination is presented by this case. The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.

JUSTICE BLACKMUN, concurring in the judgment.

It is gratifying that the plurality recognizes that "[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades" and "have significant social, medical, and economic consequences for both

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[13] The fact is that a gender-neutral statute would not necessarily lead to a closer fit with the aim of reducing the problems associated with teenage pregnancy. If both parties were equally liable to prosecution, a female would be far less likely to complain; the very complaint would be self-incriminating. Accordingly, it is possible that a gender-neutral statute would result in fewer prosecutions than the one before us.

In any event, a state legislature is free to address itself to what it believes to be the most serious aspect of a broader problem. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U. S. 471, 486–487; see also *Williamson* v. *Lee Optical Co.*, 348 U. S. 483.

the mother and her child, and the State." *Ante,* at 470 (footnotes omitted). There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not unrelated problems that attend abortion issues. See, for example, the opinions (and the dissenting opinions) in *Beal* v. *Doe,* 432 U. S. 438 (1977); *Maher* v. *Roe,* 432 U. S. 464 (1977); *Poelker* v. *Doe,* 432 U. S. 519 (1977); *Harris* v. *McRae,* 448 U. S. 297 (1980); *Williams* v. *Zbaraz,* 448 U. S. 358 (1980); and today's opinion in *H. L.* v. *Matheson, ante,* p. 389.

Some might conclude that the two uses of the criminal sanction—here flatly to forbid intercourse in order to forestall teenage pregnancies, and in *Matheson* to prohibit a physician's abortion procedure except upon notice to the parents of the pregnant minor—are vastly different proscriptions. But the basic social and privacy problems are much the same. Both Utah's statute in *Matheson* and California's statute in this case are legislatively created tools intended to achieve similar ends and addressed to the same societal concerns: the control and direction of young people's sexual activities. The plurality opinion impliedly concedes as much when it notes that "approximately half of all teenage pregnancies end in abortion," and that "those children who are born" are "likely candidates to become wards of the State," *Ante,* at 471, and n. 6.

I, however, cannot vote to strike down the California statutory rape law, for I think it is a sufficiently reasoned and constitutional effort to control the problem at its inception. For me, there is an important difference between this state action and a State's adamant and rigid refusal to face, or even to recognize, the "significant . . . consequences"—to the woman—of a forced or unwanted conception. I have found it difficult to rule constitutional. for example, state efforts to block, at that later point, a woman's attempt to deal with the enormity of the problem confronting her, just as I have rejected state efforts to prevent women from rationally tak-

ing steps to prevent that problem from arising. See, *e. g.*, *Carey* v. *Population Services International,* 431 U. S. 678 (1977). See also *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). In contrast, I am persuaded that, although a minor has substantial privacy rights in intimate affairs connected with procreation, California's efforts to prevent teenage pregnancy are to be viewed differently from Utah's efforts to inhibit a woman from dealing with pregnancy once it has become an inevitability.

Craig v. *Boren,* 429 U. S. 190 (1976), was an opinion which, in large part, I joined, *id.,* at 214. The plurality opinion in the present case points out, *ante,* at 468–469, the Court's respective phrasings of the applicable test in *Reed* v. *Reed,* 404 U. S. 71, 76 (1971), and in *Craig* v. *Boren,* 429 U. S., at 197. I vote to affirm the judgment of the Supreme Court of California and to uphold the State's gender-based classification on that test and as exemplified by those two cases and by *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975); and *Kahn* v. *Shevin,* 416 U. S. 351 (1974).

I note, also, that § 261.5 of the California Penal Code is just one of several California statutes intended to protect the juvenile. JUSTICE STEWART, in his concurring opinion, appropriately observes that § 261.5 is "but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity." *Ante,* at 477.

I think, too, that it is only fair, with respect to this particular petitioner, to point out that his partner, Sharon, appears not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978.* Petitioner's and Sharon's nonacquaintance

*Sharon at the preliminary hearing testified as follows:

"Q [by the Deputy District Attorney]. On June the 4th, at approximately midnight—midnight of June the 3rd, were you in Rohnert Park?

[*Footnote is continued on p. 484*]

with each other before the incident; their drinking; their withdrawal from the others of the group; their foreplay, in which she willingly participated and seems to have encour-

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"A [by Sharon]. Yes.
"Q. Is that in Sonoma County?
"A. Yes.
"Q Did anything unusual happen to you that night in Rohnert Park?
"A. Yes.
"Q. Would you briefly describe what happened that night? Did you see the defendant that night in Rohnert Park?
"A. Yes.
"Q. Where did you first meet him?
"A. At a bus stop.
"Q. Was anyone with you?
"A. My sister.
"Q. Was anyone with the defendant?
"A. Yes.
"Q. How many people were with the defendant?
"A. Two.
"Q. Now, after you met the defendant, what happened?
"A. We walked down to the railroad tracks.
"Q. What happened at the railroad tracks?
"A. We were drinking at the railroad tracks and we walked over to this bush and he started kissing me and stuff, and I was kissing him back, too, at first. Then, I was telling him to stop—
"Q. Yes.
"A. —and I was telling him to slow down and stop. He said, 'Okay, okay.' But then he just kept doing it. He just kept doing it and then my sister and two other guys came over to where we were and my sister said—told me to get up and come home. And then I didn't—
"Q. Yes.
"A. —and then my sister and—
"Q. All right.
"A. —David, one of the boys that were there, started walking home and we stayed there and then later—
"Q. All right.
"A. —Bruce left Michael, you know.
"The Court: Michael being the defendant?
"The Witness: Yeah. We was laying there and we were kissing each other, and then he asked me if I wanted to walk him over to the park; so we walked over to the park and we sat down on a bench and then he

aged; and the closeness of their ages (a difference of only one year and 18 days) are factors that should make this case an unattractive one to prosecute at all, and especially to pros-

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started kissing me again and we were laying on the bench. And he told me to take my pants off.

"I said, 'No,' and I was trying to get up and he hit me back down on the bench and then I just said to myself, 'Forget it,' and I let him do what he wanted to do and he took my pants off and he was telling me to put my legs around him and stuff—

. . . . .

"Q. Did you have sexual intercourse with the defendant?
"A. Yeah.
"Q. He did put his penis into your vagina?
"A. Yes.
"Q. You said that he hit you?
"A. Yeah.
"Q. How did he hit you?
"A. He slugged me in the face.
"Q. With what did he slug you?
"A. His fist.
"Q. Where abouts in the face?
"A. On my chin.
"Q. As a result of that, did you have any bruises or any kind of an injury?
"A. Yeah.
"Q. What happened?
"A. I had bruises
"The Court: Did he hit you one time or did he hit you more than once?
"The Witness: He hit me about two or three times.

. . . . .

"Q. Now, during the course of that evening, did the defendant ask you your age?
"A. Yeah.
"Q. And what did you tell him?
"A. Sixteen.
"Q. Did you tell him you were sixteen?
"A. Yes.
"Q. Now, you said you had been drinking, is that correct?
"A. Yes.
"Q. Would you describe your condition as a result of the drinking?

[*Footnote is continued on p. 486*]

ecute as a felony, rather than as a misdemeanor chargeable under § 261.5. But the State has chosen to prosecute in that

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"A. I was a little drunk." App. 20–23.

CROSS-EXAMINATION

"Q. Did you go off with Mr. *M.* away from the others?

"A. Yeah.

"Q. Why did you do that?

"A. I don't know. I guess I wanted to.

"Q. Did you have any need to go to the bathroom when you were there.

"A. Yes.

"Q. And what did you do?

"A. Me and my sister walked down the railroad tracks to some bushes and went to the bathroom.

"Q. Now, you and Mr. *M.*, as I understand it, went off into the bushes, is that correct?

"A. Yes.

"Q. Okay. And what did you do when you and Mr. *M.* were there in the bushes?

"A. We were kissing and hugging.

"Q. Were you sitting up?

"A. We were laying down.

"Q. You were lying down. This was in the bushes?

"A. Yes.

"Q. How far away from the rest of them were you?

"A. They were just bushes right next to the railroad tracks. We just walked off into the bushes; not very far.

. . . . .

"Q. So your sister and the other two boys came over to where you were, you and Michael were, is that right?

"A. Yeah.

"Q. What did they say to you, if you remember?

"A. My sister didn't say anything. She said, 'Come on, Sharon, let's go home.'

"Q. She asked you to go home with her?

"A. (Affirmative nod.)

"Q. Did you go home with her?

"A. No.

"Q. You wanted to stay with Mr. *M.*?

"A. I don't know.

"Q. Was this before or after he hit you?

manner, and the facts, I reluctantly conclude, may fit the crime.

"A. Before.

. . . . .

"Q. What happened in the five minutes that Bruce stayed there with you and Michael?
"A. I don't remember.
"Q. You don't remember at all?
"A. (Negative head shake.)
"Q. Did you have occasion at that time to kiss Bruce?
"A. Yeah.
"Q. You did? You were kissing Bruce at that time?
"A. (Affirmative nod.)
"Q. Was Bruce kissing you?
"A. Yes.
"Q. And were you standing up at this time?
"A. No, we were sitting down.

. . . .

"Q. Okay. So at this point in time you had left Mr. *M.* and you were hugging and kissing with Bruce, is that right?
"A. Yeah.
"Q. And you were sitting up.
"A. Yes.
"Q. Was your sister still there then?
"A. No. Yeah, she was at first.
"Q. What was she doing?
"A. She was standing up with Michael and David.
"Q. Yes. Was she doing anything with Michael and David?
"A. No, I don't think so.
"Q. Whose idea was it for you and Bruce to kiss? Did you initiate that?
"A. Yes.
"Q. What happened after Bruce left?
"A. Michael asked me if I wanted to go walk to the park.
"Q. And what did you say?
"A. I said, 'Yes.'
"Q. And then what happened?
"A. We walked to the park.

. . . .

"Q. How long did it take you to get to the park?
"A. About ten or fifteen minutes.

[*Footnote is continued on p. 488*]

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

I

It is disturbing to find the Court so splintered on a case that presents such a straightforward issue: Whether the admittedly gender-based classification in Cal. Penal Code Ann. § 261.5 (West Supp. 1981) bears a sufficient relationship to the State's asserted goal of preventing teenage pregnancies to survive the "mid-level" constitutional scrutiny mandated by *Craig* v. *Boren*, 429 U. S. 190 (1976).[1] Applying the analytical framework provided by our precedents, I am convinced that there is only one proper resolution of this issue: the classification must be declared unconstitutional. I fear that the plurality opinion and JUSTICES STEWART and BLACKMUN reach the opposite result by placing too much emphasis on the desirability of achieving the State's asserted statutory goal—prevention of teenage pregnancy—and not enough emphasis on the fundamental question of whether the sex-based discrim-

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"Q. And did you walk there?

"A. Yes.

"Q. Did Mr. *M.* ever mention his name?

"A. Yes." *Id.*, at 27–32.

[1] The California Supreme Court acknowledged, and indeed the parties do not dispute, that Cal. Penal Code Ann. § 261.5 (West Supp. 1981) discriminates on the basis of sex. *Ante*, at 467. Because petitioner is male, he faces criminal felony charges and a possible prison term while his female partner remains immune from prosecution. The gender of the participants, not their relative responsibility, determines which of them is subject to criminal sanctions under § 261.5.

As the California Supreme Court stated in *People* v. *Hernandez*, 61 Cal. 2d 529, 531, 393 P. 2d 673, 674 (1964) (footnote omitted):

"[E]ven in circumstances where a girl's actual comprehension contradicts the law's presumption [that a minor female is too innocent and naive to understand the implications and nature of her act], the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him."

ination in the California statute is *substantially* related to the achievement of that goal.[2]

II

After some uncertainty as to the proper framework for analyzing equal protection challenges to statutes containing gender-based classifications, see *ante*, at 468, this Court settled upon the proposition that a statute containing a gender-based classification cannot withstand constitutional challenge unless

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[2] None of the three opinions upholding the California statute fairly applies the equal protection analysis this Court has so carefully developed since *Craig* v. *Boren*, 429 U. S. 190 (1976). The plurality opinion, for example, focusing on the obvious and uncontested fact that only females can become pregnant, suggests that the statutory gender discrimination, rather than being invidious, actually ensures equality of treatment. Since only females are subject to a risk of pregnancy, the plurality opinion concludes that "[a] criminal sanction imposed solely on males . . . serves to roughly 'equalize' the deterrents on the sexes." *Ante*, at 473. JUSTICE STEWART adopts a similar approach. Recognizing that "females can become pregnant as the result of sexual intercourse; males cannot," JUSTICE STEWART concludes that "[y]oung women and men are not similarly situated with respect to the problems and risks associated with intercourse and pregnancy," and therefore § 261.5 "is *realistically* related to the legitimate state purpose of reducing those problems and risks" (emphasis added). *Ante*, at 478, 479. JUSTICE BLACKMUN, conceding that some limits must be placed on a State's power to regulate "the control and direction of young people's sexual activities," also finds the statute constitutional. *Ante*, at 482. He distinguishes the State's power in the abortion context, where the pregnancy has already occurred, from its power in the present context, where the "problem [is] at its inception." He then concludes, without explanation, that "the California statutory rape law . . . is a sufficiently reasoned and constitutional effort to control the problem at its inception." *Ibid.*

All three of these approaches have a common failing. They overlook the fact that the State has not met its burden of proving that the gender discrimination in § 261.5 is *substantially* related to the achievement of the State's asserted statutory goal. My Brethren seem not to recognize that California has the burden of proving that a gender-neutral statutory rape law would be less effective than § 261 5 in deterring sexual activity leading to teenage pregnancy. Because they fail to analyze the issue in these terms, I believe they reach an unsupportable result.

the classification is substantially related to the achievement of an important governmental objective. *Kirchberg* v. *Feenstra, ante,* at 459; *Wengler* v. *Druggists Mutual Ins. Co.,* 446 U. S. 142, 150 (1980); *Califano* v. *Westcott,* 443 U. S. 76, 85 (1979); *Caban* v. *Mohammed,* 441 U. S. 380, 388 (1979); *Orr* v. *Orr,* 440 U. S. 268, 279 (1979); *Califano* v. *Goldfarb,* 430 U. S. 199, 210–211 (1977); *Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren, supra,* at 197. This analysis applies whether the classification discriminates against males or against females. *Caban* v. *Mohammed, supra,* at 394; *Orr* v. *Orr, supra,* at 278–279; *Craig* v. *Boren, supra,* at 204. The burden is on the government to prove both the importance of its asserted objective and the substantial relationship between the classification and that objective. See *Kirchberg* v. *Feenstra, ante,* at 461; *Wengler* v. *Druggists Mutual Ins. Co., supra,* at 151–152; *Caban* v. *Mohammed, supra,* at 393; *Craig* v. *Boren, supra,* at 204. And the State cannot meet that burden without showing that a gender-neutral statute would be a less effective means of achieving that goal. *Wengler* v. *Druggists Mutual Ins. Co., supra,* at 151–152; *Orr* v. *Orr, supra,* at 281, 283.[3]

The State of California vigorously asserts that the "important governmental objective" to be served by § 261.5 is the prevention of teenage pregnancy. It claims that its statute furthers this goal by deterring sexual activity by males—the class of persons it considers more responsible for causing those pregnancies.[4] But even assuming that prevention of teenage

[3] Gender-based statutory rape laws were struck down in *Navedo* v. *Preisser,* 630 F. 2d 636 (CA8 1980), *United States* v. *Hicks,* 625 F. 2d 216 (CA9 1980), and *Meloon* v. *Helgemoe,* 564 F. 2d 602 (CA1 1977), cert. denied, 436 U. S. 950 (1978), precisely because the government failed to meet this burden of proof.

[4] In a remarkable display of sexual stereotyping, the California Supreme Court stated:

"The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physio-

pregnancy is an important governmental objective and that it is in fact an objective of § 261.5, see *infra*, at 494–496, California still has the burden of proving that there are fewer teenage pregnancies under its gender-based statutory rape law than there would be if the law were gender neutral. To meet this burden, the State must show that because its statutory rape law punishes only males, and not females, it more effectively deters minor females from having sexual intercourse.[5]

The plurality assumes that a gender-neutral statute would be less effective than § 261.5 in deterring sexual activity because a gender-neutral statute would create significant enforcement problems. The plurality thus accepts the State's assertion that

> "a female is surely less likely to report violations of the statute if she herself would be subject to criminal prose-

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logically cause the result which the law properly seeks to avoid." 25 Cal. 3d 608, 612, 601 P. 2d 572, 575 (1979) (emphasis in original).

[5] Petitioner has not questioned the State's constitutional power to achieve its asserted objective by criminalizing consensual sexual activity. However, I note that our cases would not foreclose such a privacy challenge.

The State is attempting to reduce the incidence of teenage pregnancy by imposing criminal sanctions on those who engage in consensual sexual activity with minor females. We have stressed, however, that

"[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972) (footnote omitted).

Minors, too, enjoy a right of privacy in connection with decisions affecting procreation. *Carey* v. *Population Services International*, 431 U. S. 678, 693 (1977). Thus, despite the suggestion of the plurality to the contrary, *ante*, at 472–473, n. 8, it is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.

> cution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement." *Ante,* at 473–474 (footnotes omitted).

However, a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under *Craig* v. *Boren.* Rather, the State must produce evidence that will persuade the court that its assertion is true. See *Craig* v. *Boren,* 429 U. S., at 200–204.

The State has not produced such evidence in this case. Moreover, there are at least two serious flaws in the State's assertion that law enforcement problems created by a gender-neutral statutory rape law would make such a statute less effective than a gender-based statute in deterring sexual activity.

First, the experience of other jurisdictions, and California itself, belies the plurality's conclusion that a gender-neutral statutory rape law "may well be incapable of enforcement." There are now at least 37 States that have enacted gender-neutral statutory rape laws. Although most of these laws protect young persons (of either sex) from the sexual exploitation of older individuals, the laws of Arizona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct.[6] California has introduced no evidence that those States have been handi-

[6] See Ariz. Rev. Stat. Ann. § 13–1405 (1978); Fla. Stat. § 794.05 (1979); Ill. Rev. Stat., ch. 38, ¶ 11–5 (1979). In addition, eight other States permit both parties to be prosecuted when one of the participants to a consensual act of sexual intercourse is under the age of 16. See Kan. Stat. Ann. § 21–3503 (1974); Mass. Gen. Laws Ann., ch. 265, § 23 (West Supp. 1981); Mich. Comp. Laws § 750.13 (1970); Mont. Code Ann. §§ 45–5–501 to 45–5–503 (1979); N. H. Rev. Stat. § 632–A:3 (Supp. 1979); Tenn. Code Ann. § 39–3705 (4) (Supp. 1979); Utah Code Ann. § 76–5–401 (Supp. 1979); Vt. Stat. Ann., Tit. 13, § 3252 (3) (Supp. 1980).

capped by the enforcement problems the plurality finds so persuasive.[7] Surely, if those States could provide such evidence, we might expect that California would have introduced it.

In addition, the California Legislature in recent years has revised other sections of the Penal Code to make them gender-neutral. For example, Cal. Penal Code Ann. §§ 286 (b)(1) and 288a (b)(1) (West Supp. 1981), prohibiting sodomy and oral copulation with a "person who is under 18 years of age," could cause two minor homosexuals to be subjected to criminal sanctions for engaging in mutually consensual conduct. Again, the State has introduced no evidence to explain why a gender-neutral statutory rape law would be any more difficult to enforce than those statutes.

The second flaw in the State's assertion is that even assuming that a gender-neutral statute would be more difficult to enforce, the State has still not shown that those enforcement problems would make such a statute less effective than a gender-based statute in deterring minor females from engaging in sexual intercourse.[8] Common sense, however, suggests

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[7] There is a logical reason for this In contrast to laws governing forcible rape, statutory rape laws apply to consensual sexual activity. Force is not an element of the crime. Since a woman who consents to an act of sexual intercourse is unlikely to report her partner to the police—whether or not she is subject to criminal sanctions—enforcement would not be undermined if the statute were to be made gender neutral. See n. 8, *infra.*

[8] As it is, § 261.5 seems to be an ineffective deterrent of sexual activity. Cf. *Carey v. Population Services International, supra,* at 695 (substantial reason to doubt that limiting access to contraceptives will substantially discourage early sexual behavior). According to statistics provided by the State, an average of only 61 juvenile males and 352 adult males were arrested for statutory rape each year between 1975 and 1978. Brief for Respondent 19. During each of those years there were approximately one million Californian girls between the ages of 13–17. Cal. Dept. of Finance, Population Projections for California Counties, 1975–2020, with Age/Sex Detail to 2000, Series E–150 (1977). Although the record in this case

that a gender-neutral statutory rape law is potentially a *greater* deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators. Even if fewer persons were prosecuted under the gender-neutral law, as the State suggests, it would still be true that twice as many persons would be *subject* to arrest. The State's failure to prove that a gender-neutral law would be a less effective deterrent than a gender-based law, like the State's failure to prove that a gender-neutral law would be difficult to enforce, should have led this Court to invalidate § 261.5.

III

Until very recently, no California court or commentator had suggested that the purpose of California's statutory rape law was to protect young women from the risk of pregnancy. Indeed, the historical development of § 261.5 demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse.[9] Be-

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does not indicate the incidence of sexual intercourse involving those girls during that period, the California State Department of Health estimates that there were almost 50,000 pregnancies among 13-to-17-year-old girls during 1976. Cal. Dept. of Health, Birth and Abortion Records, and Physician Survey of Office Abortions (1976). I think it is fair to speculate from this evidence that a comparison of the number of arrests for statutory rape in California with the number of acts of sexual intercourse involving minor females in that State would likely demonstrate to a male contemplating sexual activity with a minor female that his chances of being arrested are reassuringly low. I seriously question, therefore, whether § 261.5 as enforced has a substantial deterrent effect. See *Craig* v. *Boren*, 429 U. S., at 214 (STEVENS, J., concurring).

[9] California's statutory rape law had its origins in the Statutes of Westminster enacted during the reign of Edward I at the close of the 13th century (3 Edw. 1, ch. 13 (1275); 13 Edw. 1, ch. 34 (1285)). The age of consent at that time was 12 years, reduced to 10 years in 1576 (18

cause their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection.[10] In contrast, young men were assumed to

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Eliz. 1, ch. 7, § 4). This statute was part of the common law brought to the United States. Thus, when the first California penal statute was enacted, it contained a provision (1850 Cal. Stats., ch. 99, § 47, p. 234) that proscribed sexual intercourse with females under the age of 10. In 1889, the California statute was amended to make the age of consent 14 (1889 Cal. Stats., ch. 191, § 1, p. 223). In 1897, the age was advanced to 16 (1897 Cal. Stats., ch. 139, § 1, p. 201). In 1913 it was fixed at 18, where it now remains (1913 Cal. Stats., ch. 122, § 1, p. 212).

Because females generally have not reached puberty by the age of 10, it is inconceivable that a statute designed to prevent pregnancy would be directed at acts of sexual intercourse with females under that age.

The only legislative history available, the draftsmen's notes to the Penal Code of 1872, supports the view that the purpose of California's statutory rape law was to protect those who were too young to give consent. The draftsmen explained that the "[statutory rape] provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape." Code Commissioners' note, subd. 1, following Cal. Penal Code § 261, p. 111 (1st ed. 1872). There was no mention whatever of pregnancy prevention. See also Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L. J. 55, 74–76 (1952).

[10] Past decisions of the California courts confirm that the law was designed to protect the State's young females from their own uninformed decisionmaking. In *People* v. *Verdegreen,* 106 Cal. 211, 214–215, 39 P. 607, 608–609 (1895), for example, the California Supreme Court stated:

"The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature."

As recently as 1964, the California Supreme Court decided *People* v. *Hernandez,* 61 Cal. 2d, at 531, 393 P. 2d, at 674, in which it stated that the under-age female

"is presumed too innocent and naive to understand the implications and nature of her act. . . . The law's concern with her capacity or lack thereof

be capable of making such decisions for themselves; the law therefore did not offer them any special protection.

It is perhaps because the gender classification in California's statutory rape law was initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies, that the State has been unable to demonstrate a substantial relationship beween the classification and its newly asserted goal. Cf. *Califano* v. *Goldfarb*, 430 U. S., at 223 (STEVENS, J., concurring in judgment). But whatever the reason, the State has not shown that Cal. Penal Code § 261.5 is any more effective than a gender-neutral law would be in deterring minor females from engaging in sexual intercourse. It has therefore not met its burden of proving that the statutory classification is substantially related to the achievement of its asserted goal.

I would hold that § 261.5 violates the Equal Protection Clause of the Fourteenth Amendment, and I would reverse the judgment of the California Supreme Court.

JUSTICE STEVENS, dissenting.

Local custom and belief—rather than statutory laws of venerable but doubtful ancestry—will determine the volume of sexual activity among unmarried teenagers.[1] The empiri-

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to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition."

It was only in deciding *Michael M.* that the California Supreme Court decided, for the first time in the 130-year history of the statute, that pregnancy prevention had become one of the purposes of the statute.

[1] "Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although

cal evidence cited by the plurality demonstrates the futility of the notion that a statutory prohibition will significantly affect the volume of that activity or provide a meaningful solution to the problems created by it.[2] Nevertheless, as a matter of constitutional power, unlike my Brother BRENNAN, see *ante,* at 491, n. 5, I would have no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. The societal interests in reducing the incidence of venereal disease and teenage pregnancy are sufficient, in my judgment, to justify a prohibition of conduct that increases the risk of those harms.[3]

My conclusion that a nondiscriminatory prohibition would be constitutional does not help me answer the question whether a prohibition applicable to only half of the joint participants in the risk-creating conduct is also valid. It cannot be true that the validity of a total ban is an adequate justification for a selective prohibition; otherwise, the constitutional objection to discriminatory rules would be meaningless. The question in this case is whether the difference between males and females justifies this statutory discrimination based entirely on sex.[4]

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young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not." *Carey* v. *Population Services International,* 431 U. S. 678, 714 (STEVENS, J., concurring in part and in judgment).

[2] If a million teenagers became pregnant in 1976, see *ante,* at 470, n. 3, there must be countless violations of the California statute. The statistics cited by JUSTICE BRENNAN also indicate, as he correctly observes, that the statute "seems to be an ineffective deterrent of sexual activity." See *ante,* at 493–494, n. 8.

[3] See *Carey* v. *Population Services International, supra,* at 713 (STEVENS, J., concurring in part and in judgment).

[4] Equal protection analysis is often said to involve different "levels of scrutiny." It may be more accurate to say that the burden of sustaining an equal protection challenge is much heavier in some cases than in others. Racial classifications, which are subjected to "strict scrutiny," are presumptively invalid because there is seldom, if ever, any legitimate reason for treating citizens differently because of their race. On the other hand,

The fact that the Court did not immediately acknowledge that the capacity to become pregnant is what primarily differentiates the female from the male [5] does not impeach the validity of the plurality's newly found wisdom. I think the plurality is quite correct in making the assumption that the joint act that this law seeks to prohibit creates a greater risk of harm for the female than for the male. But the plurality surely cannot believe that the risk of pregnancy confronted by the female—any more than the risk of venereal disease confronted by males as well as females—has provided an effective deterrent to voluntary female participation in the risk-creating conduct. Yet the plurality's decision seems to rest on the assumption that the California Legislature acted on the basis of that rather fanciful notion.

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most economic classifications are presumptively valid because they are a necessary component of most regulatory programs. In cases involving discrimination between men and women, the natural differences between the sexes are sometimes relevant and sometimes wholly irrelevant. If those differences are obviously irrelevant, the discrimination should be treated as presumptively unlawful in the same way that racial classifications are presumptively unlawful. Cf. *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (STEVENS, J., concurring in judgment). But if, as in this case, there is an apparent connection between the discrimination and the fact that only women can become pregnant, it may be appropriate to presume that the classification is lawful. This presumption, however, may be overcome by a demonstration that the apparent justification for the discrimination is illusory or wholly inadequate. Thus, instead of applying a "mid-level" form of scrutiny in all sex discrimination cases, perhaps the burden is heavier in some than in others. Nevertheless, as I have previously suggested, the ultimate standard in these, as in all other equal protection cases, is essentially the same. See *Craig* v. *Boren*, 429 U. S. 190, 211–212 (STEVENS, J., concurring). Professor Cox recently noted that however the level of scrutiny is described, in the final analysis, "the Court is always deciding whether in its judgment the harm done to the disadvantaged class by the legislative classification is disproportionate to the public purposes the measure is likely to achieve." Cox, Book Review, 94 Harv. L. Rev. 700, 706 (1981).

[5] See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 162 (STEVENS, J., dissenting).

In my judgment, the fact that a class of persons is especially vulnerable to a risk that a statute is designed to avoid is a reason for making the statute applicable to that class. The argument that a special need for protection provides a rational explanation for an exemption is one I simply do not comprehend.[6]

In this case, the fact that a female confronts a greater risk of harm than a male is a reason for applying the prohibition to her—not a reason for granting her a license to use her own judgment on whether or not to assume the risk. Surely, if we examine the problem from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt 50% of the potential violators. See dissent of JUSTICE BRENNAN, *ante*, at 493–494. And, if we view the government's interest as that of a *parens patriae* seeking to protect its subjects from harming themselves, the discrimination is actually perverse. Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter? That is the effect of this statutory classification.

If pregnancy or some other special harm is suffered by one of the two participants in the prohibited act, that special harm no doubt would constitute a legitimate mitigating factor in deciding what, if any, punishment might be appropriate in a given case. But from the standpoint of fashioning a general preventive rule—or, indeed, in determining appropriate punishment when neither party in fact has suffered any spe-

[6] A hypothetical racial classification will illustrate my point. Assume that skin pigmentation provides some measure of protection against cancer caused by exposure to certain chemicals in the atmosphere and, therefore, that white employees confront a greater risk than black employees in certain industrial settings. Would it be rational to require black employees to wear protective clothing but to exempt whites from that requirement? It seems to me that the greater risk of harm to white workers would be a reason for including them in the requirement—not for granting them an exemption.

cial harm—I regard a total exemption for the members of the more endangered class as utterly irrational.

In my opinion, the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other. The risk-creating conduct that this statute is designed to prevent requires the participation of two persons—one male and one female.[7] In many situations it is probably true that one is the aggressor and the other is either an unwilling, or at least a less willing, participant in the joint act. If a statute authorized punishment of only one participant and required the prosecutor to prove that that participant had been the aggressor, I assume that the discrimination would be valid. Although the question is less clear, I also assume, for the purpose of deciding this case, that it would be permissible to punish only the male participant, if one element of the offense were proof that he had been the aggressor, or at least in some respects the more responsible participant in the joint act. The statute at issue in this case, however, requires no such proof. The question raised by this statute is whether the State, consistently with the Federal Constitution, may always punish the male and never the female when they are equally responsible or when the female is the more responsible of the two.

It would seem to me that an impartial lawmaker could give only one answer to that question. The fact that the California Legislature has decided to apply its prohibition only to

[7] In light of this indisputable biological fact, I find somewhat puzzling the California Supreme Court's conclusion, quoted by the plurality, *ante,* at 467, that males "are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." 25 Cal. 3d 608, 612, 601 P 2d 572, 575 (1979) (emphasis in original). Presumably, the California Supreme Court was referring to the equally indisputable biological fact that only females may become pregnant. However, if pregnancy results from sexual intercourse between two willing participants—and the California statute is directed at such conduct—I would find it difficult to conclude that the pregnancy was "caused" solely by the male participant.

the male may reflect a legislative judgment that in the typical case the male is actually the more guilty party. Any such judgment must, in turn, assume that the decision to engage in the risk-creating conduct is always—or at least typically—a male decision. If that assumption is valid, the statutory classification should also be valid. But what is the support for the assumption? It is not contained in the record of this case or in any legislative history or scholarly study that has been called to our attention. I think it is supported to some extent by traditional attitudes toward male-female relationships. But the possibility that such a habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair. For, as I read this statute, it requires that one, and only one, of two equally guilty wrongdoers be stigmatized by a criminal conviction.

I cannot accept the State's argument that the constitutionality of the discriminatory rule can be saved by an assumption that prosecutors will commonly invoke this statute only in cases that actually involve a forcible rape, but one that cannot be established by proof beyond a reasonable doubt.[8] That assumption implies that a State has a legitimate interest in convicting a defendant on evidence that is constitutionally insufficient. Of course, the State may create a lesser-included offense that would authorize punishment of the more guilty party, but surely the interest in obtaining convictions on in-

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[8] According to the State of California:

"The statute is commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships, and the state's interest in these situations is apparent." Brief for Respondent 3.

See also *id.*, at 23–25. The State's interest in these situations is indeed apparent and certainly sufficient to justify statutory prohibition of forcible rape, prostitution, pornography, and nonforcible, but nonetheless coerced, sexual intercourse. However, it is not at all apparent to me how this state interest can justify a statute not specifically directed to any of these offenses.

adequate proof cannot justify a statute that punishes one who is equally or less guilty than his partner.[9]

Nor do I find at all persuasive the suggestion that this discrimination is adequately justified by the desire to encourage females to inform against their male partners. Even if the concept of a wholesale informant's exemption were an acceptable enforcement device, what is the justification for defining the exempt class entirely by reference to sex rather than by reference to a more neutral criterion such as relative innocence? Indeed, if the exempt class is to be composed entirely of members of one sex, what is there to support the view that the statutory purpose will be better served by granting the informing license to females rather than to males? If a discarded male partner informs on a promiscuous female, a timely threat of prosecution might well prevent the precise harm the statute is intended to minimize.

Finally, even if my logic is faulty and there actually is some speculative basis for treating equally guilty males and females differently, I still believe that any such speculative justification would be outweighed by the paramount interest in evenhanded enforcement of the law. A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.

I respectfully dissent.

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[9] Both JUSTICE REHNQUIST and JUSTICE BLACKMUN apparently attach significance to the testimony at the preliminary hearing indicating that the petitioner struck his partner. See opinion of REHNQUIST, J., *ante*, at 467; opinion of BLACKMUN, J., *ante*, at 483–488, n. In light of the fact that the petitioner would be equally guilty of the crime charged in the complaint whether or not that testimony is true, it obviously has no bearing on the legal question presented by this case. The question is not whether "the facts . . . fit the crime," opinion of BLACKMUN, J., *ante*, at 487—that is a question to be answered at trial—but rather, whether the statute defining the crime fits the constitutional requirement that justice be administered in an evenhanded fashion.

Syllabus

ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. *v.* LaSALLE NATIONAL BANK, TRUSTEE

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

No. 79–1157. Argued November 10, 1980—Decided March 24, 1981

Under an Illinois statute, real property owners who contest their property taxes are required first to exhaust their available administrative remedy and, if unsuccessful, are then afforded a legal remedy requiring the payment of the taxes under protest and a subsequent state-court challenge. The customary delay from the time of payment until the receipt of refund upon successful protest is two years, and the refund is not accompanied by a payment of interest. The beneficial owner of an apartment building in Cook County, Ill., challenged the tax assessment of her property for a certain tax year, but, after an unsuccessful administrative appeal, refused to pay the taxes and instead brought an action in Federal District Court for injunctive relief against petitioners (the Treasurer and Assessor of Cook County), alleging, *inter alia*, that by requiring her to pay taxes in excess of the lawful amount, they deprived her of equal protection and due process secured by the Fourteenth Amendment. The District Court dismissed the complaint for want of jurisdiction pursuant to the Tax Injunction Act, which prohibits federal district courts from enjoining the assessment, levy, or collection of state taxes where "a plain, speedy and efficient remedy may be had in the courts of such State." The Court of Appeals reversed, holding that the Tax Injunction Act did not bar federal district court jurisdiction because Illinois' procedure of no-interest refunds after two years was not "a plain, speedy and efficient remedy."

Held: The Illinois refund procedure is "a plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act, thereby barring federal jurisdiction to grant injunctive relief. Pp. 512–528.

(a) The language of the "plain, speedy and efficient remedy" exception appears to require a state-court remedy that meets certain minimal *procedural* criteria, and the Tax Injunction Act's legislative history supports this procedural interpretation. Here, the Illinois state-court refund procedure provided the taxpayer with a "full hearing and judicial determination" at which she might raise any and all constitutional objections to the taxes, and review was authorized in the higher Illinois

courts and ultimately could be obtained in this Court. She did not allege any procedural defect in the Illinois remedy, other than delay, that would preclude preservation and consideration of her federal rights, but rather alleged that Illinois' failure to pay interest on the tax refund made the remedy not "plain, speedy and efficient." Any "federal right" she might have to receive interest could be asserted in the state-court legal proceeding Pp 512–515

(b) With respect to whether the Illinois remedy was "plain," respondent has not alleged that the remedy is uncertain or otherwise unclear There is no question that under the Illinois procedure, the court will hear and decide any federal claim; paying interest or eliminating delay would not make the remedy any more "plain" Pp 516–517.

(c) Because the Illinois remedy imposes no unusual hardship on the taxpayer requiring ineffectual activity or an unnecessary expenditure of time or energy, it cannot be said that it is not "efficient." Pp 517–518

(d) Assessing the 2-year delay in receiving a refund against the usual time for similar litigation, such delay is not unusual and, under the circumstances of this case, did not fall outside the boundary of a "speedy" remedy. Pp. 518–521.

(e) The Tax Injunction Act's overall purpose to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes is consistent with the view that the "plain, speedy and efficient remedy" exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria, and that Illinois' refund procedure meets such criteria. It would be unreasonable to construe a statute passed with such a purpose to mean that Congress nevertheless wanted taxpayers from States not paying interest on refunds to have unimpaired access to the federal courts. If Congress had meant to carve out such an expansive exception, some mention of it would be expected and there is none Pp. 522–524.

(f) Although the Tax Injunction Act had its roots in federal equity practice, nevertheless, where it appears that not every wrinkle of such practice was codified intact, but rather that Congress, among other things, legislated to solve an existing problem by *cutting back* federal equity jurisdiction, the Act will not be interpreted to incorporate that portion of federal equity practice arguably viewing a no-interest refund remedy as inadequate. Pp 524–526

(g) The reasons supporting federal noninterference with state tax administration—such as the dependency of state budgets on the receipt of local tax revenues and the havoc that would be caused if federal injunctive relief against collection of state or local taxes were widely

available—are just as compelling today as they were in 1937 when the Tax Injunction Act was passed. Pp 527–528.

604 F. 2d 530, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p 528. STEVENS, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined, *post,* p. 529.

Henry A. Hauser argued the cause for petitioners. With him on the briefs were *Bernard Carey* and *Michael F. Baccash.*

James L. Fox argued the cause for respondent. With him on the brief was *Donald P. Colleton.**

JUSTICE BRENNAN delivered the opinion of the Court.

The Tax Injunction Act of 1937 provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341. The question we must decide in this case is whether an Illinois remedy which requires property owners contesting their property taxes to pay under protest and if successful obtain a refund without interest in two years is "a plain, speedy and efficient remedy" within the meaning of the Act.[1]

I

LaSalle National Bank is trustee of a land trust for Patricia Cook,[2] the beneficial owner of property improved

**Henry Rose* and *Michael A. O'Connor* filed a brief for the Cook County Legal Assistance Foundation *ex rel.* Fred Schubert as *amicus curiae* urging affirmance.

[1] This Court expressly did not decide whether omission to provide interest on a successful refund application rendered a state remedy not "plain, speedy and efficient," in *Department of Employment* v *United States,* 385 U. S. 355, 358 (1966).

[2] Patricia Cook, the real party in interest, is the beneficial owner of

with a 22-unit apartment building in the all-black low-income community of East Chicago Heights, Ill., located in Cook County.[3] Respondent alleged that, as of January 1, 1977, her property had a fair market value of $46,000. In accordance with a Cook County ordinance, her property should have been assessed for property tax purposes at 33% of fair market value—$15,180.[4] Instead, for the 1977 tax year, the

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Illinois Land Trust No. 44891, of which LaSalle National Bank serves as trustee. Although she was not a named party in this litigation, this opinion will nevertheless refer to her as the respondent.

[3] The facts as stated in this opinion are drawn largely from respondent's complaint. For purposes of our consideration, the allegations of the complaint are accepted as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 174–175 (1965).

[4] Article IX, § 4 (b), of the Illinois Constitution provides that, subject only to limitations prescribed by the State's General Assembly, counties with populations of more than 200,000, which includes Cook County, may classify real property for purposes of taxation. The classification must be reasonable, and the assessments uniform within each class. Moreover, the level of assessment of the highest class cannot exceed 2½ times the level of assessment of the lowest class in the county. Under authority of the Illinois Constitution, Art. IX, § 4, the Illinois General Assembly passed legislation requiring that any "such classification must be established by ordinance of the county board." Ill. Rev. Stat., ch. 120, § 501a (1977).

Pursuant to this authority, the Cook County Board of Commissioners passed the following ordinance:

"Section 2. Real estate is divided into the following assessment classes:

"Class 1: Unimproved real estate.

"Class 2: Real estate used as a farm, or real estate used for residential purposes when improved with a house, an apartment building of not more than six living units, or residential condominium, a residential cooperative or a government-subsidized housing project if required by statute to be assessed in the lowest assessment category.

"Class 3: All improved real estate used for residential purposes which is not included in Class 2.

"Class 4: Real estate owned and used by a not-for-profit corporation in furtherance of the purposes set forth in its charter unless used for resi-

County Assessor assessed the property at $52,150. As a result, respondent's property tax liability was $6,106 instead of $1,775, an overcharge of $4,331.

Respondent also claimed that the County Assessor "knowingly as official policy or governmental custom maintained, adopted or promulgated policy statements, regulations, decisions and systems of assessment which have produced egregious disparities in assessments throughout the County." Plaintiff's Complaint ¶ 11, App. 7. In particular, she cited a study of the Illinois Department of Local Government Affairs showing that, for 1975, property in the same class as respondent's was assessed as low as 3% and as high as 973% of fair market value. She furthermore alleged that such disparities in assessments were "far greater in number and size in older, inner city and county areas, owned, inhabited or used to a larger extent by minorities and poorer people." *Ibid.* Finally, she contended that the Assessor knew that she had previously challenged the 1974, 1975, and 1976 assessments of her property.[5]

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dential purposes If such real estate is used for residential purposes it shall be classified in the appropriate residential class.

"Class 5: All real estate not included in any of the above four classes.

"Section 3 The Assessor shall assess, and the Board of Appeals shall review assessments on real estate in the various classes at the following percentages of market value:

"Class 1:—22%

"Class 2:—17%

"Class 3:—33%

"Class 4:—30%

"Class 5:—40%"

Cook County, Ill., Real Property Assessment Classification Ordinance, §§ 2, 3 (originally enacted Dec. 17, 1973, as amended through June 6, 1977).

Respondent's property qualified as Class 3 real estate.

[5] Respondent had previously challenged her 1974, 1975, and 1976 property tax assessments, first by appealing to the Board of Appeals, and then

Respondent first exhausted her administrative remedy by appealing unsuccessfully for a correction of her 1977 assessment before the Cook County Board of Appeals. Ill. Rev. Stat., ch. 120, §§ 594 (1), 596, 597, 598, 599 (1977).[6] Her only remaining state remedy was to pay the contested tax under protest, and then to file an objection to the Cook County Collector's Application for Judgment before the Circuit Court of Cook County—in effect a reverse suit for refund.[7]

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by objecting in December 1975, November 1976, and December 1977 respectively to the Collector's annual Applications for Judgment. The Circuit Court of Cook County, noting that the parties had agreed to a compromise and settlement at a pretrial conference, Ill Rev. Stat., ch. 120, § 675a (1977), issued three separate judgments simultaneously on March 16, 1978, and ordered refunds to respondent on the erroneously collected portions of her protested tax payments, for $4,586 24, $3,656 29, and $3,937 66 respectively. Respondent had asked for refunds of $5,700, $4,750, and $5,452.41 for the three years.

[6] To challenge a property tax assessment, a Cook County property owner must follow a specific statutory procedure. See generally Ganz & Laswell, Review of Real Estate Assessments—Cook County (Chicago) vs. Remainder of Illinois, 11 John Marshall J. Prac. & Proc. 19 (1977); Parham, Procedures For Obtaining Relief With Respect To Property Tax Assessments and Rates, 61 Ill. Bar J. 306 (1973). The taxpayer may file a written complaint with the County Assessor and is thereafter entitled to a hearing. Ill. Rev. Stat, ch. 120, § 578 (1977). If no relief is obtained, the taxpayer may appeal to the Board of Appeals of Cook County for correction of the assessment. §§ 594 (1), 596, 597, 598, 599. The Board must forward one copy of the complaint to the County Assessor. § 598. Before seeking a legal remedy in state court, the taxpayer must exhaust the available administrative remedy before the Board of Appeals by filing a complaint. *People ex rel Korzen* v. *Fulton Market Cold Storage Co.*, 62 Ill. 2d 443, 446–447, 343 N. E. 2d 450, 452, cert. denied, 429 U. S. 833 (1976).

[7] After exhaustion of the Board of Appeals' administrative remedy, the taxpayer's legal remedy requires payment of the tax under protest and a subsequent court challenge. Ill. Rev. Stat., ch. 120, §§ 675, 716 (1977). See *Clarendon Associates* v. *Korzen*, 56 Ill 2d 101, 104, 306 N. E. 2d 299, 301 (1973). The tax is due in two installments. Ill. Rev. Stat., ch. 120, §§ 705, 705.1 (1977). The taxpayer must file a written protest along with

§§ 675, 716. Although Illinois' statutory refund procedure could theoretically provide a final resolution of the dispute

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the second installment payment setting forth grounds for the objection to the tax. § 675. Then, the Collector of Cook County publishes an advertisement giving notice and stating the date of his intended application to the Circuit Court of Cook County for judgment fixing the correct amount of any tax paid under protest. § 706. Although the month of October is the apparent target date for applying for judgment, § 710, respondent contends that the Cook County Collector's applications are not made until late November or early December, Brief for Respondent 14, n. 14. The Collector at the same time applies to the Circuit Court for judgment for sale of delinquent lands and lots whose owners have failed to pay their property tax bills. § 706.

Once the Collector's Application for Judgment is filed with the Circuit Court, the taxpayer must file a written objection to the application within a period of time specified by the judge, stating his reasons for challenging the tax. The taxpayer may raise constitutional challenges to the assessment in his objection. *LaSalle National Bank* v. *County of Cook*, 57 Ill. 2d 318, 324, 312 N. E. 2d 252, 255–256 (1974). After the filing of the objection, the court must hold a settlement conference between the two sides within 90 days. Ill. Rev. Stat., ch. 120, § 675a (1977). If no settlement is reached, the court must upon demand of either party set the matter for hearing within 90 days of the conference, and decide the case. §§ 675a, 716. Finally, the court enters judgment and orders a refund for any or all of the tax erroneously paid by the taxpayer. §§ 675, 716. The dissatisfied taxpayer may appeal any such judgment to the higher courts of Illinois. § 675.

Illinois courts grant equitable relief by way of injunction against collection of property taxes only when the tax is unauthorized by law or when the tax is levied on exempt properties, *LaSalle National Bank* v. *County of Cook*, *supra*, at 323, 312 N. E. 2d, at 255, on the basis that the state statutory refund procedure is an adequate legal remedy. *Ibid.* It has been suggested, however, that in certain cases of fraudulently excessive assessments, the statutory remedy will be found inadequate and an equitable remedy will lie. See *Clarendon Associates* v. *Korzen*, *supra*, at 108, 306 N. E. 2d, at 303. Accord, *Chicago Sheraton Corp.* v. *Zaban*, 71 Ill. 2d 85, 92–93, 373 N. E. 2d 1318, 1322, appeal dism'd, 439 U. S. 998 (1978); *LaSalle National Bank* v. *County of Cook*, *supra*, at 323, 312 N. E. 2d, at 255; *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F. 2d 439, 441–442 (CA7 1975), cert. denied, 423 U. S. 1073 (1976). Neither

within one year of payment of the tax under protest,[8] respondent alleged that the customary delay from the time of payment until the receipt of refund upon successful protest is two years.[9] The tax refund is not accompanied by a payment of interest.[10] *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101, 109, 306 N. E. 2d 299, 303 (1973); *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill. 2d 415, 422–423, 167 N. E. 2d 236, 240–241 (1960).

Respondent refused to pay her 1977 property taxes and instead brought this 42 U. S. C. § 1983 action in the United States District Court for the Northern District of Illinois, seeking preliminary and permanent injunctive relief to prevent petitioner Rosewell [11] from publishing an advertisement of notice and the intended date of Application for Judgment, from applying for judgment and order of sale against her property, and from selling it. Respondent contended that, by requiring payment of taxes 3½ times the lawful amount, petitioners deprived her of equal protection and due process secured by the Fourteenth Amendment of the United States Constitution, and violated state constitutional and statutory rights as well. Respondent further alleged that she had no plain, speedy, and efficient remedy in the Illinois courts.

Petitioners moved to dismiss, claiming that actions challenging state tax assessments are not cognizable under 42

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petitioners nor respondent suggests that respondent could have obtained equitable relief.

[8] For instance, respondent's 1976 tax protest was resolved within one year from the date of payment. Plaintiff's Complaint ¶ 14, App. 9.

[9] For purposes of their motion to dismiss in Federal District Court, petitioners agreed that the delay was two years. Tr. of Oral Arg. 9.

[10] Respondent claimed that, based on an 8% average prime rate for the 3-year period during which she paid taxes under protest, she lost approximately $2,000 of potential interest on the use of her money Plaintiff's Complaint ¶ 14, App. 8–9.

[11] Respondent sued Edward J. Rosewell, the Treasurer of Cook County, and Thomas M. Tully, the County Assessor.

U. S. C. § 1983 and 28 U. S. C. § 1343,[12] and that Illinois' statutory refund procedure is a plain, speedy, and efficient remedy even though it fails to pay interest. Defendants' Motion to Dismiss, App. 11.

The District Court denied respondent's motion for a preliminary injunction and dismissed the complaint for want of jurisdiction under 28 U. S. C. § 1341.[13] App. to Pet. for Cert. 20a–21a. However, the court enjoined petitioner Rosewell from proceeding to judgment and order of sale against respondent's property pending appeal to the United States Court of Appeals for the Seventh Circuit. Fed. Rule Civ. Proc. 62 (c). The Court of Appeals reversed the District Court, holding that the Tax Injunction Act did not bar federal district court jurisdiction because Illinois' procedure of no-interest refunds after two years was not "a plain, speedy and efficient remedy." 604 F. 2d 530, 536–537 (1979).[14] A petition for rehearing and suggestion for rehearing en banc was denied. *Id.*, at 530. We granted certiorari, 445 U. S. 925 (1980), and now reverse.

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[12] Petitioners likewise urge here that the District Court lacked jurisdiction under 28 U S C § 1343 (3) Since the "Question Presented" in their petition for certiorari did not refer to this issue, Pet for Cert. 2, we question that it is even properly before us. In any event, our resolution of the case makes it unnecessary to address this additional contention.

[13] The District Court stated:

"1. The availability of equitable and declaratory relief in the Illinois state courts provides the plaintiff with a 'plain, speedy and efficient' remedy. *Tully* v *Griffin,* 429 U S. 68 (1976)

"2 The non-payment of interest on refunds pursuant to Sections 675 and 716 of Chapter 120, Illinois Revised Statutes, does not render the remedy in Illinois courts not 'plain, speedy and efficient.' " App. to Pet. for Cert. 20a–21a.

[14] The Court of Appeals also held that the availability of a § 1983 action in state court does not bar federal jurisdiction under the Tax Injunction Act. 604 F. 2d, at 540. Because of the result in this case, we do not reach this issue.

II

At the outset, it must be recognized that the issue we decide is one of statutory construction. Our task is to determine whether the Illinois refund procedure constitutes "a plain, speedy and efficient remedy . . . in the courts of such State" within the meaning of the Tax Injunction Act, 28 U. S. C. § 1341, thereby barring federal jurisdiction to grant injunctive relief. Our review of the plain language of the Act, its legislative history, and its underlying purpose persuades us that the Court of Appeals erred in holding that the Illinois remedy is not "a plain, speedy and efficient remedy."

A

The starting point of our inquiry is the plain language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979); *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596 (1951). See *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, 73 (1980). The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state-court remedy is not "plain, speedy and efficient." On its face, the "plain, speedy and efficient remedy" exception appears to require a state-court remedy that meets certain minimal *procedural* criteria. The Court has only occasionally sought to define the meaning of the exception since passage of the Act in 1937. When it has done so, however, the Court has emphasized a *procedural* interpretation in defining both the entire phrase and its individual word components.

Discussing the general meaning of the phrase, the Court, in *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976), described its "basic inquiry" as "whether under New York law there is a 'plain, speedy and efficient' way for [the taxpayer] to press its constitutional claims while preserving the right to challenge the amount of tax due." More directly, in *Great Lakes*

Dredge & Dock Co. v. *Huffman,* 319 U. S. 293, 300–301 (1943), the Court stated:

> "[I]t is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. *In such a suit he may assert his federal rights* and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." (Emphasis added.)[15]

See *Hillsborough* v. *Cromwell,* 326 U. S. 620, 625 (1946) (issue is "whether the State affords full protection to the federal rights").

What little can be gleaned from the legislative history of the Act on the phrase "plain, speedy and efficient remedy" lends further support to a procedural interpretation. Senator Bone, the Act's primary sponsor, referred to the "plain, speedy and efficient remedy" provision and then stated: "Thus a full hearing and judicial determination of the controversy is assured." 81 Cong. Rec. 1416 (1937). The Senate Report accompanying the Act mirrors Senator Bone's understanding, adding that "[a]n appeal to the Supreme Court of the United State is available as in other cases." S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937).

The phrase "a plain, speedy and efficient remedy" in the Tax Injunction Act was "modeled" after verbatim language

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[15] Although the issue in *Great Lakes* concerned the availability of federal declaratory relief rather than the scope of the Tax Injunction Act itself, the decision was predicated on "[t]he considerations which persuaded federal courts of equity not to grant relief . . . and which led to the enactment of the [Tax Injunction] Act" 319 U. S., at 300. We have no doubt that, had the case presented an injunction suit, the Court would have found it precluded under the Tax Injunction Act.

in the Johnson Act of 1934,[16] an Act prohibiting federal-court interference with orders issued by state administrative agencies to public utilities. As Senator Bone made clear, "[m]ost of the arguments which were used in support of the Johnson Act . . . apply in like manner" to the Tax Injunction Act. 81 Cong. Rec. 1416 (1937). Our examination of the Johnson Act and its legislative history reveals the same procedural emphasis as found in the Tax Injunction Act and its legislative history. As gloss on the words "a plain, speedy and efficient remedy," the Senate Report on the Johnson Act spoke of state laws that provided for an appeal from the determination of the state agency by any dissatisfied party. S. Rep. No. 701, 72d Cong., 1st Sess., 1–2 (1932). The Senate Report continued: "This appeal is taken to the courts of the State, thus giving to both sides of any controversy which may arise a *full hearing and judicial determination of the controversy.*" *Id.*, at 2 (emphasis added).

There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax. *LaSalle National Bank* v. *County of Cook*, 57 Ill. 2d 318, 324, 312 N. E. 2d 252, 255–256 (1974). Appeal to the higher Illinois courts is authorized, Ill. Rev. Stat., ch. 120, § 675 (1977), and review is ultimately available in this Court, 28 U. S. C. § 1257. Respondent does not allege any procedural defect in the Illinois remedy, other than delay,[17] that would preclude preservation and considera-

[16] The Johnson Act, 28 U. S. C. § 1342 (emphasis added), states in pertinent part:

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where

. . . . . .

"(4) *A plain, speedy and efficient remedy may be had in the courts of such State.*"

[17] This argument is discussed *infra*, at 518–521.

tion of her federal rights, since she is free to raise her equal protection and due process federal constitutional objections during the Application for Judgment proceedings before the Circuit Court of Cook County.[18] Rather, respondent's argument—that Illinois' failure to pay interest on the tax refund makes the remedy not "plain, speedy and efficient"—appears to address a more substantive concern. Whether she has any "federal right" to receive interest—a right she has not asserted and on which we express no view—it would appear that she could assert this right in the state-court proceeding. The procedural mechanism for correction of her tax bill remains the same, however, whether interest is paid or not.[19]

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[18] Although respondent could have raised federal constitutional claims in her objection to the Collector's Application for Judgment, she expressly declined to do so in her prior objections in 1974, 1975, and 1976. For example, her objection to the 1976 tax bill stated: "Objector reserves to the federal courts the adjudication of its rights under the United States Constitution . . . " Objections for 1976, p 8, ¶ 8. She did claim that the ordinance and assessment were violations of equal protection and due process under the Illinois Constitution. *Id.*, at 9, ¶ 11.

[19] The dissent construes our opinion to mean that "a state remedy which could not possibly afford any relief or which had the potential for only nominal relief would defeat federal jurisdiction " *Post*, at 537 (footnote omitted). The dissent thus concludes that, under our view, "a computerized calculation accompanied by a preprinted rejection slip would qualify as a 'plain, speedy and efficient remedy.' " *Post*, at 530 But our opinion suggests nothing of the kind. We explicitly state that a state remedy must "provid[e] the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Supra*, at 514 The dissent's hypothetical computer-card remedy would hardly meet this requirement.

The Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were "plain, speedy and efficient" and final review of the substantive federal claim could be obtained in this Court. Under the Illinois refund procedure, a taxpayer may raise all constitutional objections, including those based on the State's failure to pay interest or to return all unconstitutionally collected taxes, in the Illinois legal refund proceeding, *supra*, at

B

A *procedural* interpretation of the phrase "a plain, speedy and efficient remedy," and the *procedural* sufficiency of Illinois' remedy, are supported further by analysis of the phrase's individual words. According to the 1934 edition of Webster's New International Dictionary, *plain* means "clear" or "manifest," *speedy* means "quick," *efficient* means "characterized by effective activity," and a *remedy* is the "legal means to recover a right . . . or obtain redress for . . . a wrong." Webster's New International Dictionary of the English Language 819, 1878, 2106, 2418 (2d ed. 1934).[20]

While the Court has never addressed the meaning of the word "speedy," it has interpreted the words "plain" and "efficient." Thus, the Court suggested that "uncertainty

514, after which the litigants have an opportunity to seek review in this Court. The Act contemplates nothing more

[20] Neither the opinion below nor the brief for respondent specifies whether the remedy fails because it is not "plain," not "speedy," not "efficient," or not a "remedy" at all. The superficial linguistic difficulty of describing interest payments in these terms can be readily observed Indeed at oral argument, respondent's counsel had some difficulty deciding under which of the words the Illinois remedy foundered:

"QUESTION: Do you equate inadequate with inefficient?

"MR. FOX: Yes, sir. 'Inadequate' has been used commonly in the federal court, sir, Mr. Chief Justice, with the 'PS&E,' plain, speedy, and efficient.

. . . . . .

"QUESTION: Well, what you're saying, it seems to me, is that you treat 'efficient' as a synonym for 'adequate.' And this remedy is not efficient, that is, adequate, because it isn't speedy.

"MR. FOX: Nor is it plain.

. . . . . .

"QUESTION: Well, I'm not sure what it means. Plain or fancy wouldn't make much difference. The important thing is whether it's speedy and whether it's adequate. And speedy and adequate are really interrelated, aren't they?

"MR. FOX: I believe so; yes. I think they are subsumed, that speedy is subsumed under the word adequate, which seems to be more generic." Tr. of Oral Arg. 28, 34, 35.

concerning a State's remedy may make it less than 'plain' under 28 U. S. C. § 1341." *Tully* v. *Griffin, Inc.*, 429 U. S., at 76. Earlier cases, without making a direct connection to the word "plain," have held that "uncertainty" surrounding a state-court remedy lifts the bar to federal-court jurisdiction. *Hillsborough* v. *Cromwell*, 326 U. S., at 625–626.[21] Respondent has made no argument that the Illinois refund procedure is uncertain or otherwise unclear. There is no question that under the Illinois procedure, the court will hear and decide any federal claim. Paying interest or eliminating delay would not make the remedy any more "plain."

This Court's interpretation of the word "efficient" has also stressed procedural elements. In *Tully*, the Court commented that "a State's remedy does not become 'inefficient,' merely because a taxpayer must travel across a state line in order to resist or challenge the taxes sought to be imposed." 429 U. S., at 73. In addition, without explicitly mentioning the word "efficient," we have permitted federal-court jurisdiction when the taxpayer's state-court remedy would require a multiplicity of suits, *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299, 303 (1952) (where remedy "would require the filing of over three hundred separate claims in fourteen different counties to protect the single federal claim asserted by [the taxpayer]"), or when the remedy would allow a challenge against only one of many taxing

[21] In *Hillsborough*, the Court concluded that, because it was at best "speculative" whether the New Jersey courts followed the federal constitutional rule that a State may not "impos[e] on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class," 326 U. S., at 623; see *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445–447 (1923), federal jurisdiction would lie. In addition, protection of federal rights was uncertain because the State Board of Tax Appeals had no right to pass on constitutional questions, the allowance of a writ of certiorari to that Board from the New Jersey Supreme Court was only discretionary, and the refusal of a writ was not judicially reviewable by the Court of Errors and Appeals. 326 U. S., at 625–626.

authorities, *id.*, at 301, 303 (where suit-for-refund remedy applied only to state taxes, yet taxpayer railroad also wanted to challenge on the same basis taxes paid to counties, school districts, and municipalities). Because the Illinois remedy imposes no unusual hardship on respondent requiring ineffectual activity or an unnecessary expenditure of time or energy, we cannot say that it is not "efficient." [22]

This Court has never expressly discussed the meaning of the word "speedy," an issue that is squarely presented in this case. We must decide whether Illinois' refund after two years qualifies as a "speedy" remedy. "Speedy" is perforce a relative concept, and we must assess the 2-year delay against the usual time for similar litigation. It surely is no secret that state and federal trial courts have been beset by docket congestion and delay for many years.[23] Whether

[22] A remedy to contest a tax that requires repetitive suits on the same issue in succeeding years may not be "efficient." However, on the record properly before us, the Illinois remedy has not shown itself not "efficient." It is true that respondent appealed unsuccessfully to the Board of Appeals for four straight years, 1974, 1975, 1976, and 1977, see n. 5, *supra*, but it was not until after her 1977 appeal that the Circuit Court of Cook County rendered its judgment. Therefore, neither the County Assessor nor the Board had yet had the benefit of a judicial determination to weigh in their considerations. Further resort to the Illinois statutory refund remedy would become unnecessary should subsequent assessments reflect the Circuit Court's judgment of the correct assessment.

Respondent informs us, however, that her 1978 and 1979 tax assessments were set at the 1977 discriminatory level, despite a complaint filed with the Assessor for 1978 and appeals to the Board for both years. Brief for Respondent 2. Together with her previous four appeals, respondent notes that she has been forced to take remedial action for six successive years. *Id.*, at 31, n. 27. Because these additional facts are not part of the record before us, we have not considered them. Respondent may present these new facts in her pending suit in Federal District Court to enjoin collection of her 1978 property tax. See *id.*, at 2.

[23] For instance, discussing the New York state courts in 1839, David Dudley Field noted that "[s]peedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare." Vanderbilt, Improving the Administration of Justice—Two Decades of Development, 26 U.

this is a necessary, let alone a reasonable, condition of 20th-century litigation is beside the point: The fact of the matter is that legal conflicts are not resolved as quickly as we would like.

In 1976, the median number of days from filing a complaint to disposition of a civil trial matter in 13 urban trial courts ranged from 357 to 980. National Center for State Courts, Justice Delayed 10–11 (1978).[24] In 7 of the 13, over 30% of the civil cases took more than two years from start to finish. *Id.*, at 13. The Cook County Circuit Court had a similar record: from 1974 to 1975, the average time from date of filing to verdict was about 40 months. U. S. Department of Justice, State Court Caseload Statistics: The State of the Art 7 (1978). Federal district courts have not fared much better. As of 1980, the median time interval from filing to disposition for civil cases going to trial was 20 months; 10% of those took

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Cin. L. Rev 155, 157 (1957) Many have long since lamented the seeming inseparability of judicial proceedings and delay See, *e. g.*, National Center for State Courts, Justice Delayed 2 (1978); Lagging Justice, 328 Annuals Am. Acad Pol & Soc. Sci (1960); Vanderbilt, *supra;* Warren, Delay and Congestion in the Federal Courts, 42 J Am Jud Soc. 6, 7–8 (1958); Congestion and Delay: A Selected Bibliography of Recent Materials 1953–1958, in Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation 212–245 (1958).

[24] For over half of the 13 courts surveyed, the median number of days was over a year and a half National Center for State Courts, Justice Delayed 10–11 (1978). Delay has been a particularly pronounced problem for state trial courts located in metropolitan centers. See generally Virtue, The Two Faces of Janus: Delay in Metropolitan Trial Courts, in Lagging Justice, 328 Annals Am Acad. Pol & Soc. Sci. 125 (1960). This results in part from an observed correlation between population and calendar congestion. Institute of Judicial Administration, Calendar Status, in Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation 196 (1958). For example, in 1958, the average time from the beginning of suit until the commencement of jury trial was 18.8 months for counties with populations over 750,000, 11.4 months for counties between 500,000 and 750,000, and 5.6 months for counties under 500,000. *Ibid.*

more than 46 months. Annual Report of the Director of the Administrative Office of the U. S. Courts 81, A–30 (1980). For the United States District Court for the Northern District of Illinois, the District in which respondent brought this suit, the median time interval was 23 months, with 10% of all cases over 53 months. *Id.*, at A–31.[25]

Cast in this light, respondent's 2-year wait, regrettably, is not unusual. Nowhere in the Tax Injunction Act did Congress suggest that the remedy must be the speediest.[26] The

[25] Current statistics are only the latest in a long history of delay and congestion in federal and state courts Congress discussed the problem of congestion in federal district courts in connection with the Tax Injunction Act itself. 81 Cong Rec. 1417 (1937) (remarks of Sen. Bone) (citing portions of Report on the Johnson Act deemed applicable to the Tax Injunction Act) For the year ending June 30, 1930, 37 7% of federal-question law cases terminated without a jury in 13 selected Federal District Courts took 12 months or more to complete American Law Institute, A Study of the Business of the Federal Courts, Pt II, p. 87 (1934). In 1942, the median time interval for civil nonjury trials from filing to disposition in all federal district courts was 12.3 months. Annual Report of the Director of the Administrative Office of the U. S. Courts, Table 9 (1942). The median time for New York's Southern District was 25 months. *Ibid.*

Unfortunately state-court statistics on civil litigation in the 1930's and 1940's are virtually nonexistent. The Institute of Judicial Administration conducted the first major compilation of state civil case data in 1953 See U. S Dept. of Justice, State Court Caseload Statistics: The State of the Art 15, 22 (1978). Even the latest information on state-court time intervals is more complete for appellate than trial litigation. See National Center for State Courts, State Court Caseload Statistics: Annual Report 1976 (1980).

[26] Part of the problem of delay inheres in the very nature of state tax administration. There has yet to be devised a taxing system universally viewed as speedy enough to resolve complaints This is largely because "[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (BRENNAN, J., concurring in part and dissenting in part)

The property tax is especially vulnerable to criticism over its adminis-

payment of interest might make the wait more tolerable, but it would not affect the amount of time necessary to adjudicate respondent's federal claims. Limiting ourselves to the circumstances of the instant case, we cannot say that respondent's 2-year delay falls outside the boundary of a "speedy" remedy.[27]

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tration. Unlike state income or sales taxes that usually can be calculated automatically from the taxpayer's income or the price of a good or service, the property tax is levied on the value of real estate. This element necessarily introduces a degree of subjective individualized judgment by the assessor that would understandably give rise to frequent taxpayer challenges and place pressure on the appellate review procedures. See generally O. Oldman & F. Schoettle, State and Local Taxes and Finance 262–265 (1974); Advisory Commission on Intergovernmental Relations, The Property Tax in a Changing Environment 3–20 (1974); H. Aaron, Who Pays the Property Tax?, 59–67 (1975); Pomp, What Is Happening to the Property Tax, 15 Assessors Journal 107, 108–116 (1980).

[27] The dissent relies on four factors which it believes "combine to make the Illinois remedial scheme demonstrably unjust." *Post*, at 538–541. Leaving aside the issue whether the phrase "demonstrably unjust" describes the proper inquiry, these four factors boil down to the same two elements of delay and failure to pay interest addressed in this Court's opinion. The dissent's first factor—"the tax assessments themselves reveal gross inequities," *post*, at 539—merely states that respondent has alleged a constitutional violation, surely not a ground for federal-court jurisdiction here. The second—that overassessment continues "notwithstanding [the taxpayer's] formal protests and the manifest error in the original assessment," *ibid.*—would appear to require error-free administration that even the best procedures could not guarantee. Indeed, absent a judicial determination of the correct assessment, it is not surprising that respondent's "formal protests" failed to persuade the Assessor and Board of Appeals of their "manifest error." See n. 22, *supra*. Here, respondent's challenges to the three tax years were resolved within two years in a single court proceeding. Those challenges explicitly were not based on federal constitutional grounds, and it is hardly the duty of federal courts to intervene in state-law tax questions. N. 18, *supra*. As we suggest, n. 22, *supra*, the Federal District Court in respondent's pending 1978 litigation may evaluate her latest claim in light of the "efficient" prong of our analysis, now that the Assessor and Board of Appeals are

C

The overall purpose of the Tax Injunction Act is consistent with the view that the "plain, speedy and efficient remedy" exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria, and that Illinois' refund procedure meets such criteria. The statute "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U. S., at 73.[28] This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S., at 301 (Act "predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax after the tax has been paid").[29]

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aware of the Circuit Court of Cook County's adjudication and apparently have nevertheless repeated their prior assessment practices.

The dissent's third factor—delay—and fourth factor—failure to pay interest—are addressed above.

[28] The Tax Injunction Act was only one of several statutes reflecting congressional hostility to federal injunctions issued against state officials in the aftermath of this Court's decision in *Ex parte Young*, 209 U S. 123, 155–156 (1908) (holding that the Eleventh Amendment does not bar federal courts from enjoining unconstitutional actions of state officers). See generally *Perez* v. *Ledesma, supra*, at 106–115 (BRENNAN, J., concurring in part and dissenting in part). See also S. Rep. No. 1035, 75th Cong., 1st Sess, 1 (1937) ("This legislation does not introduce a new principle, since the Congress has passed statutes of similar import").

[29] The Court of Appeals suggested that the purpose of the Act was to prevent out-of-state corporations, through diversity suits, from delaying payment of state taxes during the pendency of federal litigation while in-state citizens would have to pay first and then litigate in state courts. 604 F. 2d, at 535. It is true that the drafters of the Act were particularly

When it passed the Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy. The Senate Report to the Act noted:

> "It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress." S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937).

See H. R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937). See also *Matthews* v. *Rodgers*, 284 U. S. 521, 526 (1932).

It is only common sense to presume that Congress was also aware that some of these same States did not pay interest on their refunds to taxpayers, following the then-familiar rule that interest in refund actions was recoverable only when expressly allowed by statute. 3 T. Cooley, Law of Taxation

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concerned with this practice of out-of-state corporations. S. Rep. No. 1035, *supra*, at 1–2; 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). But the expansive language of the statute belies the notion that Congress was concerned exclusively with this problem. If Congress had wanted solely to address this issue, it surely would have done so by limiting the Act's jurisdictional bar to suits brought in federal diversity jurisdiction.

In addition, the Court of Appeals' narrow interpretation of the Act's purpose might have the perverse effect of making the Act moot. In 1938, one year after its passage, this Court held that federal courts in diversity suits must apply the general case law as well as statutory law of the State. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). If federal courts followed the State's equity law, then out-of-state corporations contesting taxes would be treated no differently from in-state citizens. See Note, The Tax Injunction Act and Suits for Monetary Relief, 46 U. Chi. L. Rev. 736, 743, n. 37 (1979).

§ 1308, pp. 2596–2597 (4th ed. 1924).[30] It would be wholly unreasonable, therefore, to construe a statute passed to limit federal-court interference in state tax matters to mean that Congress nevertheless wanted taxpayers from States not paying interest on refunds to have unimpaired access to the federal courts. If Congress had meant to carve out such an expansive exception, one would expect to find some mention of it. The statute's broad prophylactic language is incompatible with such an interpretation.

III

For the most part, respondent rests her case on the persuasiveness of a syllogism: the Tax Injunction Act is coterminous with pre-1937 federal equity treatment of challenges to state taxes; federal equity practice at that time viewed a no-interest refund remedy as inadequate;[31] therefore, it must follow that the Tax Injunction Act would view a no-interest refund remedy as inadequate, thereby authorizing federal jurisdiction. Brief for Respondent 21. This argu-

[30] One source suggested that the "apparent weight of authority" supported the opposite rule—that interest was allowable even in the absence of a statute. Annot., 112 A. L. R. 1183–1184 (1938). But even that source acknowledged the existence of the contrary view, one that "ha[d] been asserted somewhat more frequently in recent cases." *Id.*, at 1184. Accord, Annot., 57 A L. R. 357–364 (1928).

[31] See *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 386, n. 2 (1931); *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 399–400 (1928); *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165, 166 (SDNY 1924). These cases' treatment of a no-interest refund remedy was undercut by later cases. Without expressly addressing the issue, the Court in two cases decided the same day, *Matthews* v. *Rodgers*, 284 U. S. 521, 528 (1932) (Mississippi refund remedy); *Stratton* v. *St. Louis Southwestern R. Co.*, 284 U. S. 530, 534 (1932) (Illinois refund remedy), found adequate two state refund remedies that apparently did not pay interest, *Gulf, M. & O. R. Co.* v. *Webster County*, 194 Miss. 660, 662, 13 So. 2d 644, 645 (1943); *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill. 2d 415, 422–423, 167 N. E. 2d 236, 240–241 (1960). Therefore, prior federal equity practice is a two-sided sword.

ment also forms part of the basis for the Court of Appeals' decision. 604 F. 2d, at 533, n. 4. And even petitioners, Brief for Petitioners 40, suggest that the Tax Injunction Act is "a congressional confirmation of the Court's prior federal equity practice in the area of state and local taxation." [32]

We are unpersuaded. It is true that post-1937 Court cases have suggested that the Tax Injunction Act recognized and sanctioned pre-existing federal equity practice. See *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 470 (1976); *Hillsborough* v. *Cromwell,* 326 U. S., at 622–623; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S., at 298–299. But these cases do no more than confirm that "the statute has its roots in equity practice," *Tully* v. *Griffin, Inc.,* 429 U. S., at 73, and that it was a longstanding rule of federal equity to keep out of state tax matters as long as a "plain, adequate and complete remedy" could be had at law. *Hillsborough* v. *Cromwell, supra,* at 622–623. Nothing in our decisions suggests that every wrinkle of federal equity practice was codified, intact, by Congress.[33]

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[32] Commentators agree that this issue has never been definitively resolved. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 979 (2d ed. 1973); Berry, A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment, 65 Calif. L. Rev. 828, 833–834 (1977). Most believe that the Act is not equivalent to prior federal equity practice, although they do not agree on the quantity and quality of difference. See, *e. g.,* Comment, 93 Harv. L. Rev. 1016, 1021–1022 (1980) (Act reduces scope of equity); Comment, Jurisdiction to Enforce Federal Statutes Regulating State Taxation: The Eleventh Amendment-Section 1341 Imbroglio, 70 Yale L. J. 636, 643 (1961) (Act limited relief available under equity); Note, Federal Court Interference with the Assessment and Collection of State Taxes, 59 Harv. L. Rev. 780, 783–784 (1946) (Act limited equity to relief from procedural defects in state courts).

[33] Of course, this is not to say that prior federal equity cases may not be instructive on whether a state remedy is "plain, speedy and efficient." And even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may never-

Indeed, Congress, among other things, legislated to solve an existing problem by *cutting back* federal equity jurisdiction. Senator Bone commented that the "*existing* practice of the Federal courts to entertain tax-injunction suits make[s] it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1416 (1937) (emphasis added). See S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937). He furthermore noted that "[p]rovision is made that the bill is not to affect suits pending at the time of its enactment." 81 Cong. Rec., at 1415. Thus, Congress plainly did not intend to permit the federal courts after passage of the Tax Injunction Act to entertain suits in all cases cognizable by them prior to the Act.[34]

Furthermore, Congress did not equate § 1341's "plain, speedy and efficient" with equity's "plain, adequate and complete." Ever since the early days of Congress, this "plain, adequate and complete" standard of federal equity practice had been codified into statutory form. 1 Stat. 82.[35] And it was not until 1948, more than 10 years after passage of the

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theless counsel the withholding of relief. See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 301 (1943) (Act not "a mandatory withdrawal from [federal equity courts] of their traditional power to decline jurisdiction in the exercise of their discretion").

[34] Senator Bone noted that the Tax Injunction Act "does not take away any equitable right of a taxpayer, or deprive him of a day in court," because a "full hearing and judicial determination of the controversy" remained assured. 81 Cong. Rec 1416 (1937). See S Rep No 1035, 75th Cong , 1st Sess., 2 (1937) ; H. R. Rep No. 1503, 75th Cong , 1st Sess., 2 (1937). This statement was merely declaratory of the Act's *general* continuation of an exception to its broad jurisdictional bar against federal injunctive relief.

[35] "[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." § 16, 1 Stat. 82.

Tax Injunction Act, that the "Suits in Equity" statute was repealed. 28 U. S. C. § 384 (1946 ed.) (repealed June 25, 1948). Against this background, we will not interpret the Tax Injunction Act as substantially redundant of § 384.

IV

Finally, we note that the reasons supporting federal noninterference are just as compelling today as they were in 1937. If federal injunctive relief were available,

> "state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Perez* v. *Ledesma,* 401 U. S. 82, 128, n. 17 (1971) (BRENNAN, J., concurring in part and dissenting in part).

The compelling nature of these considerations is underscored by the dependency of state budgets on the receipt of local tax revenues. In 1978, States derived over 61% of their revenue from property, sales, income, and other taxes. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 53, 56 (1980). For Illinois, the percentage was even higher—67.4%. *Ibid.* The property tax is by far the most important source of tax revenue for cities and counties. For the year 1977–1978, almost 33% of all their income nationwide came from the local property tax; for Illinois' local governments, the amount was greater—39.2%. *Id.,* at 78.

The experience of Cook County itself demonstrates how ominous would be the potential for havoc should federal

injunctive relief be widely available. The county collected over $1.5 billion in real estate taxes for the tax year 1975. Ganz & Laswell, Review of Real Estate Assessments—Cook County (Chicago) vs. Remainder of Illinois, 11 John Marshall J. Prac. & Proc. 19, and n. 2 (1977). During the same year, the number of complaints filed with the Cook County Board of Appeals totaled 22,262. *Id.*, at 31, n. 61. We may readily appreciate the difficulties encountered by the county should a substantial portion of its rightful tax revenue be tied up in injunction actions.[36] If each of these complaints alleged entitlement to a refund of around $5,000, as does respondent, over $113 million in revenues potentially could be encumbered in federal-court litigation. See also City of New York, Annual Report of the Tax Commission for Fiscal Year 1978–1979, p. 14 (1979) (41,449 applications for correction of taxes owed concerning 48,170 parcels of land, of which 40,793 applications concerning 47,512 parcels of land involved hearings).

Accordingly, we hold that Illinois' legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is "a plain, speedy and efficient remedy" under the Tax Injunction Act.

Reversed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but I must confess that in doing so I participate in the decision with a distinct lack of enthusiasm. I am aware of just how frustrating it can be for a conscientious property taxpayer who encounters what ap-

[36] It is true that, if we found the Illinois remedy inadequate because of its failure to pay interest, the State or county could avoid any problems of federally enjoined tax payments by choosing to pay interest. See *United States* v. *Livingston*, 179 F. Supp. 9, 15 (EDSC 1959) (three-judge court), aff'd *per curiam*, 364 U. S. 281 (1960). But Congress surely did not intend that the threat of federal injunctive relief be used as a lever to force States to appropriate funds for interest payable to their taxpayers.

pears to him to be unfairness, arbitrariness, delay, and an inadequacy of redress even though he might ultimately prevail on his basic contentions about existing property tax assessment and collection methods. Nearly every municipality encounters like criticism. JUSTICE STEVENS' dissent, however, indicates that Cook County's system surely is not one of the better ones.

But the Tax Injunction Act was passed for a specific purpose and I very much doubt that the cure, although it may provide a headache, is worse than the disease.

The Court's opinion demonstrates, I think, that the remedy provided by Illinois law qualifies, though perhaps only barely, as "plain, speedy and efficient," within the meaning of the Tax Injunction Act, and that federal jurisdiction to grant injunctive relief is therefore statutorily barred. Illinois—and particularly Cook County—may have little reason to be proud of the system, but it seems to pass muster under the Act. One might well hope, even though forlornly, that that system and its administration will be improved so that uncomfortable and distressing litigation like this case need not be pursued.

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

In its discussion of the jurisdictional question presented by this case, the Court correctly assumes that the administration of Cook County's system of taxing real property has violated respondent's federal constitutional rights. The question is whether she must be denied equitable relief in a federal court because Illinois affords her "a plain, speedy and efficient remedy."

Year after year Cook County requires respondent to pay a tax that is three times as great as the amount actually due and then, after a 2-year delay, the county refunds the overassessment without interest. Because the outcome of this annual ritual is predictable, the taxpayer's remedy is "plain"

and because only about 70% of the Nation's litigation is processed more rapidly, the remedy is also "speedy and efficient." That is the consequence of the Court's view that Congress was concerned with nothing more than "minimal *procedural* criteria" when it enacted the Tax Injunction Act.[1] In my view the *substance* of the State's remedy must also be considered. If the substance of the remedy is irrelevant, a computerized calculation accompanied by a preprinted rejection slip would qualify as a "plain, speedy and efficient remedy." Because I am persuaded that a reading of the federal statute that would lead to such an absurd result is manifestly incorrect, and because the Illinois refund remedy cannot fairly be characterized as adequate, I respectfully dissent.

I

If one reads the 1937 Act against its historical background, the conclusion is inescapable that Congress did not intend an inadequate state remedy to oust a federal court of jurisdiction over a taxpayer's constitutional claim. This Court has often recognized that the statute has its roots in pre-existing equity practice. *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 470 (1976); *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 298 (1943). See also *Tully* v. *Griffin, Inc.,* 429 U. S. 68, 73 (1976).[2] Both the statutory and the judicial pred-

[1] "On its face, the 'plain, speedy and efficient remedy' exception appears to require a state-court remedy that meets certain minimal *procedural* criteria." *Ante,* at 512.

"The procedural mechanism for correction of her tax bill remains the same, however, whether interest is paid or not." *Ante,* at 515.

"A *procedural* interpretation of the phrase 'a plain, speedy and efficient remedy,' and the *procedural* sufficiency of Illinois' remedy, are supported further by analysis of the phrase's individual words." *Ante,* at 516.

"This Court's interpretation of the word 'efficient' has also stressed procedural elements." *Ante,* at 517.

[2] In *Salish & Kootenai Tribes,* the Court stated that through enactment of § 1341, Congress "gave explicit sanction to the pre-existing federal

ecessors of the Tax Injunction Act emphasized the substance of the state remedy. Section 16 of the Judiciary Act of 1789 provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Stat. 82. In 1932, the Court, while recognizing the force of this rule of equity in suits to enjoin the collection of state taxes, nevertheless indicated the importance of the substance of the state remedy:

> "The effect of [Section 16 of the Judiciary Act of 1789], which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity *where the right asserted may be fully protected at law.* See *Deweese* v. *Reinhard,* 165 U. S. 386, 389; *New York Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205, 214.
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> "The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case *where the asserted federal right may be preserved without it.* Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or

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equity practice." 425 U. S., at 470. In *Great Lakes Dredge & Dock Co.,* the Court described the restraints imposed on federal equity jurisdiction prior to the passage of the Tax Injunction Act and noted that "Congress recognized and gave sanction to this practice of federal equity courts by the [Tax Injunction] Act." 319 U. S., at 298. In *Tully* v. *Griffin, Inc.,* the Court again noted that "the statute has its roots in equity practice . . . ." 429 U. S., at 73.

municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the *remedy at law is plain, adequate, and complete,* the aggrieved party is left to that remedy in the state courts . . . ." *Matthews* v. *Rodgers,* 284 U. S. 521, 525. (Emphasis added.) [3]

The legislative history of the Tax Injunction Act does not support the notion that Congress intended the Act to alter the standard by eliminating consideration of the substance of the state remedy. The principal sponsor of the Act, Senator Bone, indicated that the statute assured "a full hearing and judicial determination of the controversy." 81 Cong. Rec. 1416 (1937). See also S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937) (hereinafter 1937 Senate Report). The terms "full hearing" and "judicial determination" surely imply that the remedy may not be an empty ritual. Indeed, Senator Bone emphasized that "the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416 (1937). See also 1937 Senate Report, at 2.[4] The legislative history does not justify the Court's miserly reading of the statute.

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[3] In *Educational Films Corp.* v. *Ward,* 282 U. S. 379 (1931), the Court indicated that the substance of the remedy was important by stating that the absence of interest on a refund rendered a state remedy inadequate. *Id.,* at 386, n 2. See also *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393 (1928).

[4] Although Congress omitted the word "adequate" from its description of a state remedy that would defeat federal jurisdiction, the omission may have been an oversight, or the inclusion of such a word may well have been considered unnecessary. Black's Law Dictionary 1163 (5th ed 1979) defines "remedy" as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated." A court cannot insure that the federal rights are "enforced," or the violation of such rights "prevented, redressed, or compensated," without a consideration of the substance of the state remedy. Moreover, the word "efficient," which was defined as "characterized by effective activity," may have been

The conclusion that the substance of the state remedy must be considered does not rest on the premise that Congress codified intact every "wrinkle" of federal equity practice. Clearly, Congress intended the Tax Injunction Act to restrict the equity jurisdiction of the federal courts. Specifically, Congress wanted to eliminate the abuse of diversity jurisdiction by foreign corporations which were able to frustrate the state taxing process by obtaining injunctions in federal court.[5] Moreover, as the Court recognizes, *ante*, at 522, n. 28, the Act was a response to what was perceived as an unwarranted expansion of federal jurisdiction in suits to enjoin state officers that had developed in the wake of *Ex parte Young*, 209 U. S. 123 (1908).[6] The Tax Injunction Act shifted the focus

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intended to require an effective remedy. See Webster's New International Dictionary of the English Language 819 (2d ed. 1934).

[5] The 1937 Senate Report, at 1–2, stated:

"If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

"The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy."

The Johnson Act, 28 U. S. C. § 1342, upon which the Tax Injunction Act was modeled, and its legislative history, reflect the same concern. The Johnson Act specifically deprived district courts of jurisdiction to enjoin the operation of, or compliance with, public utility rates when the jurisdiction of the federal court was based solely on diversity. *Ibid.*; see S. Rep. No. 701, 72d Cong., 1st Sess., 7–13 (1932).

[6] See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 978 (2d ed. 1973) (hereinafter

of the federal courts from a determination of whether the complainant had an adequate remedy at law to a consideration of whether he had a sufficient remedy—either in equity or at law—in the state courts.[7] Although Congress thus gave important protection to state tax administration by cutting back federal equity jurisdiction, there is no reason to believe that Congress intended the expansion of the types of remedies that defeat federal jurisdiction to be accompanied by a drastic relaxation of the scrutiny given to those remedies.[8] If Congress did intend such a relaxation, the Tax Injunction Act's roots in equity are shallow indeed.

This Court has consistently employed the equity adequacy

Bator, Mishkin, Shapiro, & Wechsler); C. Wright, Federal Courts 215–217 (3d ed. 1976) (hereinafter Wright).

[7] Under prior federal equity practice, a state equitable remedy would not defeat the equity jurisdiction of the federal courts. *Bohler* v. *Callaway*, 267 U. S. 479, 486–488 (1925) (state equitable remedy to enjoin collection of excessive assessment would not defeat federal equity jurisdiction). See *Stratton* v *St Louis Southwestern R. Co*, 284 U. S. 530, 533–534 (1932) Such an equitable remedy, however, would bar federal jurisdiction under the Act. See *Garrett* v. *Bamford*, 538 F. 2d 63, 68 (CA3), cert. denied, 429 U. S. 977 (1976); *Horn* v. *O'Cheskey*, 378 F. Supp. 1280 (NM 1974). As originally enacted, the statute deprived the district courts of jurisdiction whenever a "plain, speedy, and efficient remedy may be had *at law or in equity* in the courts of such State." 50 Stat. 738 (emphasis added). The phrase "at law or in equity" was dropped as "unnecessary" in the 1948 revision of the statute. H. R. Rep No. 308, 80th Cong., 1st Sess., A120 (1947). See 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4237, p. 420 (1978) (hereinafter Wright, Miller, & Cooper).

[8] The Court is correct when it asserts that the Act was not intended to permit the federal courts to entertain suits in all cases cognizable by them prior to the Act. Given the restrictions on equity jurisdiction clearly intended by Congress, the Act was not redundant of § 16 of the Judiciary Act of 1789, 1 Stat. 82. Thus the fact that the broader jurisdiction permitted by the Suits in Equity Act existed for 10 years after the passage of the Tax Injunction Act, see *ante*, at 526–527, does not indicate that Congress did not intend the prior equity standard to apply to a determination of the adequacy of state remedies under the Tax Injunction Act.

standard in construing the Tax Injunction Act. In 1944—only seven years after the Act was passed—the Court stated that the District Court had jurisdiction because of "the uncertainty surrounding the adequacy of the Connecticut remedy." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105–106. In 1946, in *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625, the Court held that "uncertainty" as to whether the state remedy "affords full protection to the federal rights" was sufficient to demonstrate that the remedy was not adequate.[9] And recently, in *Tully* v. *Griffin, Inc.*, 429 U. S., at 74, the Court indicated that to be sufficient under the statute the remedy must permit the taxpayer "to press its constitutional claims while preserving the right to challenge the amount of the tax due." [10] Thus our cases support the the-

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[9] The Court correctly notes that the *Cromwell* Court held that because it was unclear whether the New Jersey courts would follow the constitutional rule, established by this Court in *Sioux City Bridge Co* v. *Dakota County*, 260 U. S. 441, 445–447 (1923), that a State may not require the party suffering discrimination to seek an upward revision of the taxes of other members of the class, there was such "uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause." 326 U. S., at 626. Although the Court reasons that this "uncertainty" demonstrates that the remedy was not procedurally "plain," *ante*, at 516–517, the Court fails to note that the *Cromwell* Court clearly indicated that even if the remedy were a certain one, it would be insufficient to defeat federal jurisdiction. After noting that "a long line" of New Jersey decisions "held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment," and that "[h]is remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased," the Court stated that "[o]n the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution." 326 U. S., at 624. Thus the Court was clearly concerned about the substance of the state remedy.

[10] The Court interprets this language to convey a procedural requirement. The "right to challenge the amount of the tax due," however, arguably would not be satisfied by a remedy that did not provide complete protection to the federal right. Moreover, in *Tully* the state remedy, a

ory that Congress, rather than making an unexplained and drastic change in the traditional equity standard as to adequacy, assumed that the prior standard would apply.[11]

This interpretation of the Tax Injunction Act and its history is consistent with the purposes of the Act. By including the "plain, speedy and efficient" exception to the stat-

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declaratory judgment challenging the imposition of the tax accompanied by a preliminary injunction tolling the time period within which the taxpayer could challenge the amount of the assessment, if such a remedy existed, was clearly substantively adequate.

[11] Our decisions construing the Tax Injunction Act noted that the Act was a recognition of the prior equity practice *Tully v Griffin, Inc*, 429 U. S 68, 73 (1976); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 470 (1976); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U S. 293, 298 (1943). Although the Court states that commentators agree that the issue of whether the Tax Injunction Act was a confirmation of prior equity practice has never been "definitively resolved," *ante*, at 525, n. 32, most commentators do agree that this Court has used the equitable and statutory standards interchangeably. See Bator, Mishkin, Shapiro, & Wechsler 979 ("the three major Supreme Court opinions seem to use the terms interchangeably"); Wright 216–217 ("Although it can be argued that the remedy need not be 'adequate' in the traditional equity sense in order to defeat federal jurisdiction, the Supreme Court has regarded 'plain, speedy and efficient' as meaning the same thing as 'adequate' " (footnote omitted)); Wright, Miller, & Cooper § 4237, pp 420–421 ("plain, speedy and efficient" remedy "has been equated with 'adequate' in describing the remedy"); Berry, A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment, 65 Calif. L. Rev. 828, 833–834 (1977) (Supreme Court decisions "implied a continuing concern over the fairness of state proceedings and the narrowness of state equitable relief Since 1937, substitution of the efficiency language for adequacy language 'has generally been ignored' "); Note, Federal Court Interference with the Assessment and Collection of State Taxes, 59 Harv L. Rev 780, 784–785 (1946) (arguing that "Congress intended to permit jurisdiction only where there were procedural limitations in the state remedy and not where substantive defects of law were alleged," but noting that "[t]here has been a definite failure to distinguish between inadequacy of remedy created by uncertainty as to the substantive outcome of any suit, and the fact that the taxpayer has available a complete judicial means of litigating the controversy in the state courts . .").

utory prohibition of federal equity jurisdiction, Congress indicated its clear intent to preserve federal-court jurisdiction unless some state remedy existed. If the federal courts are limited by the Tax Injunction Act to a consideration of the procedural mechanics of the state remedy, and are forbidden to consider the substance of such a remedy, then a state remedy which could not possibly afford any relief or which had the potential for only nominal relief would defeat federal jurisdiction.[12] This form-over-substance interpretation renders the exception contained in the Act meaningless, because there would be little purpose in denying a federal remedy to a litigant and sending him to state court to pursue a state remedy—albeit a quick and certain one—that provided no relief.[13] A futile state remedy is not significantly different from no remedy at all. Similarly, an inadequate state remedy is not analytically different from a state procedure that provides a remedy as to only a portion of the litigant's claims. Such an incomplete remedy will not defeat federal jurisdiction. *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U. S. 299, 303 (1952).[14] Therefore, in my view, if the

[12] For example, the Court notes that the "procedural mechanism" for the recovery of respondent's tax bill would be the same whether interest is paid or not. *Ante,* at 515. The procedural mechanism would also be the same if the state statute prohibited any refund in excess of 10% of the amount claimed.

[13] The purpose of insuring that a state remedy meets minimal procedural standards is to prevent States from erecting procedural barriers that would make the taxpayer's recovery of a refund so difficult as to be worthless. See, *e. g., Georgia Railroad & Banking Co.* v. *Redwine,* 342 U. S. 299, 303 (1952) (remedy requiring taxpayer to bring over 300 suits in 14 counties inadequate). If the state remedy is substantively inadequate, however, the purpose underlying the requirement of a procedurally adequate remedy disappears.

[14] In *Redwine,* the plaintiff railroad sought to enjoin collection of ad valorem taxes assessed by the State and every county, school district, and municipality through which the railroad's lines ran. The State argued that a suit for refund after payment of taxes, a remedy available only with respect to taxes payable to the State, would be a "plain, speedy and

state remedy does not provide adequate protection to the federal right, a federal remedy continues to be available.[15]

II

The inadequacy of the Illinois procedure is much more than a mere failure to pay interest on overassessments. If we take the allegations of the complaint as true, as we must,

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efficient" remedy under the statute. Noting that such a refund would apply to less than 15% of the total taxes in controversy, the Court held that the remedy would not defeat federal jurisdiction and stated that "[a]n adequate remedy as to only a portion of the taxes in controversy does not deprive the federal court of jurisdiction over the entire controversy." *Id*, at 303, and n. 11.

[15] Lower federal courts have recognized that the statute codified the prior adequacy standard. See *Garrett* v. *Bamford*, 538 F 2d, at 67 ("the decisions indicate that 'plain, speedy and efficient' means no more than the prior equity standard of 'adequacy'"); *Dillon* v. *Montana*, 634 F. 2d 463, 466–467 (CA9 1980) (recognizing that Congress gave explicit sanction to pre-existing equity practice and stating that "[t]he remedial certainty contemplated by § 1341 is that a state forum be empowered to consider claims that a tax is unlawful and to issue adequate relief"); *United Gas Pipe Line Co.* v. *Whitman*, 595 F. 2d 323, 325 (CA5 1979) ("Since the 1937 statute was intended as a codification of judicial practice prior to its passage, both the Supreme Court and this court have found it useful to draw on the background of pre-1937 decisions in interpreting the purposes and policies which underlie it"); *Charles R. Shepherd, Inc.* v. *Monaghan*, 256 F. 2d 882, 884 (CA5 1958) (federal court has no jurisdiction under the Tax Injunction Act if "an adequate remedy is provided for the recovery back if improperly collected"); see also *Louisville & Nashville R. Co.* v. *Public Service Comm'n*, 631 F. 2d 426 (CA6 1980) (state remedy limited to seeking upward revision of other taxpayers' assessments did not bar federal-court jurisdiction under § 1341), cert denied, *post*, p. 959; *Alnoa G. Corp.* v. *City of Houston*, 563 F. 2d 769, 772 (CA5 1977) (if potential opportunities for abuse in the form of arbitrary city council decisions reassessing taxpayer's property became reality, "the adequacy of the state remedy might then be seriously questioned"), cert. denied, 435 U. S. 970 (1978); *Helmsley* v. *City of Detroit*, 320 F. 2d 476, 481 (CA6 1963) (remedy was "adequate and complete"); *Bland* v. *McHann*, 463 F. 2d 21, 26–27 (CA5 1972), cert. denied, 410 U. S. 966 (1973). Cf. Clement, Discrimination in Real Property Assessment: A Litigation Strategy for Pennsylvania, 36 U. Pitt. L. Rev. 285, 289 (1974).

it is apparent that four factors combine to make the Illinois remedial scheme demonstrably unjust.

First, the tax assessments themselves reveal gross inequities. Not only was respondent's property admittedly assessed at 3 times its proper assessment value, but other properties in the same class have been assessed at widely divergent rates, ranging from a tiny fraction of actual value to amounts approximately 10 times the true worth.[16] The county's practices apparently give the tax assessor a license to engage in arbitrary and invidious discrimination.

Second, because the overassessment of respondent's property was repeated year after year, notwithstanding her formal protests and the manifest error in the original assessment, it is apparent that the county's procedures do not adequately avoid the risk of repetitive error.[17] The case might well be different if it revealed an isolated mistake affecting only one

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[16] According to a study conducted by the Illinois Department of Public Affairs and cited in respondent's complaint, these assessments ranged from 3% of actual value to 973% of actual value. See *ante*, at 507; App 7. The Court assumes, *ante*, at 528, that the amount of respondent's refund claim is typical, and the Court notes that such disputed assessments may provide the county with an additional $113 million each year. But federal-court litigation could encumber this entire amount only if it is assumed that all refund claimants could make a showing of inequitable assessment sufficient to obtain a federal-court injunction. This assumption highlights an ironic contrast between the Court's indifference to the financial impact of the gross overassessments on the individual taxpayer, who has no lawful method of preventing such overassessments, and the Court's concern with a temporary delay in the collection of county revenues that the State could easily avoid by providing an adequate remedy.

[17] In order to conclude that respondent is powerless to prevent repetition of erroneous assessments, it is not necessary to consider respondent's assertion, not made part of the record, that the 1978 and 1979 assessments indicate that the discrimination against her has continued. Brief for Respondent 2. The four consecutive overassessments, from 1974 through 1977, sufficiently demonstrate the repetitive nature of the injury to respondent. See App. 8.

tax year. But an evaluation of the State's remedy must involve consideration not only of the fairness of the refund procedure, but also of the taxpayer's ability to prevent the same mistake from being made year after year.[18]

Third, although the 2-year period which the county requires to process a refund claim might well be tolerable if its remedy were adequate in all other respects, that time period aggravates each of the other shortcomings.[19] Indeed, like the fourth factor—the failure to pay interest—it actually provides the county with an incentive to make overassessments, because the county has the cost-free use of the taxpayer's money while her claim is being processed.

Finally, the failure to pay any interest at all, in combination with the foregoing factors, makes it a virtual certainty that the taxpayer's ultimate recovery will be worth only a fraction of the actual harm caused by the county's wrong. Cases decided prior to the Tax Injunction Act indicated that state remedies which did not provide for the payment of interest were not sufficient to defeat federal equity jurisdiction. See *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 386, n. 2 (1931); *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393 (1928); *Nutt* v. *Ellerbe,* 56 F. 2d 1058, 1062

[18] In *Garrett* v. *Bamford, supra,* at 71–72, the court held that because adjustment of the taxpayer's taxes in one year would not prevent repetition of disparate assessments in succeeding years, and because the discriminatory assessment pattern was allegedly systematic and intentional, the lack of potential *in futuro* relief was a factor contributing to the inadequacy of the state remedy.

[19] The Court reasons that the fact that respondent had to bring repetitive suits to challenge the repeated overassessments is at least in part attributable to the fact that the Board of Appeals, in considering respondent's appeals from the overassessments, did not have the benefit of the Circuit Court judgment, rendered in 1977, holding that the assessor had overassessed respondent's property and awarding her a refund. *Ante,* at 518, n. 22. That fact, however, merely underscores the cumulative effect of the delay and the taxpayer's inability to avoid repeated mistakes. The delay of the judicial determination, in addition to postponing vindication of the taxpayer's rights, fosters repetition of the error.

(EDSC 1932) (three-judge court); *Procter & Gamble Distributing Co.* v. *Sherman,* 2 F. 2d 165 (SDNY 1924). See also Lockwood, Maw, & Rosenberry, The Use of the Federal Injunction in Constitutional Litigation, 43 Harv. L. Rev. 426, 435 (1930).[20] Post-Act cases provide support for the contention that a refund must provide interest in order to defeat federal jurisdiction. *United States* v. *Livingston,* 179 F. Supp. 9, 15 (EDSC) (three-judge court), aff'd *per curiam,* 364 U. S. 281 (1960); *United States* v. *Department of Revenue,* 191 F. Supp. 723, 726–727 (ND Ill.), vacated, 368 U. S. 30 (1961).[21]

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[20] The Court notes that the Court in two pre-Act cases, *Matthews* v. *Rodgers,* 284 U S. 521, 525 (1932), and *Stratton* v. *St. Louis Southwestern R Co.,* 284 U. S 530 (1932), without expressly reaching the issue, upheld the adequacy of state remedies that "apparently" did not include interest. *Ante,* at 524, n. 31. In light of the fact, however, that none of the parties argued that the failure to pay interest rendered the remedy inadequate, and the fact that the Court did not address the failure to pay interest in either case, such cases are scant authority for the proposition that the prior federal equity cases are a "two-edged sword." See Brief for Appellants, Brief for Appellants on Reargument, Brief for Appellees, and Supplemental Brief for Appellees on Reargument in *Matthews* v. *Rodgers,* O. T. 1931, No. 84; Supplemental Brief for Appellant, Additional Brief for Appellees, Memoranda of Authority on Equity Judisdiction for Appellees, and Pet. for Rehearing in *Stratton* v. *St. Louis Southwestern R. Co.,* O. T. 1931, No. 178.

[21] In *Livingston,* the three-judge court stated:

"It is well-settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld. Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate.

. . . .

"South Carolina may allow interest upon refunds of taxes or not as she chooses. If she does not make clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes." 179 F. Supp., at 15. (Footnote omitted.)

In *United States* v. *Department of Revenue,* the court held that a state

It is not necessary in this case, however, to decide whether the failure to pay interest alone would render a state remedy inadequate.[22] Few remedies fully compensate the victim of official wrongdoing, but surely one would not characterize a remedy that could never exceed one-half or two-thirds of the amount taken as a complete and adequate remedy. Yet if a county may collect 3 to 10 times the amount of tax that a citizen owes and use the excess for two years without paying any interest, the value of that which is ultimately returned is not complete or adequate compensation for the value of what was unjustly taken.[23]

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requirement that a bond be posted which did not provide for recoupment of the cost of the bond was analogous to the failure to award interest on refunds and therefore was not an adequate state remedy. See also Wright, Miller, & Cooper § 4237, p. 423.

[22] In some cases, failure to pay interest would certainly not be enough to render a remedy inadequate. If the amount of the interest were small, either because the amount of the refund was small or the time necessary to obtain the refund was short, then the failure to pay interest would not be a substantial defect in the remedy. See *Group Assisting Sewer Proposal-Ansonia* v. *City of Ansonia*, 448 F. Supp. 45, 47 (Conn. 1978); *Abernathy* v. *Carpenter*, 208 F. Supp. 793, 796–797 (WD Mo. 1962), aff'd *per curiam*, 373 U. S. 241 (1963). See also Comment, 93 Harv. L. Rev. 1016, 1023–1024 (1980).

[23] In *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165 (SDNY 1924), Judge Learned Hand held that the uncertainty of the availability of a refund rendered a remedy inadequate. He further noted:

"But quite independently of such doubts, the relief is inadequate because of the express refusal to allow interest. . . . While I have been referred to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong." *Id.*, at 166.

The Court seems to assume that the nonpayment of interest has no effect on the amount of time that will be spent in processing refund claims.[24] In my opinion the Court is quite wrong. When no interest is paid—or when the rate of interest on judgments is significantly lower than the prevailing market rate—the law rewards the dilatory defendant who can postpone the ultimate day of reckoning for as long as possible. The same powerful market forces are at work when a public body is the defendant. Whether or not one agrees with the opinion of the Court of Appeals that the payment of interest is an essential ingredient of any adequate refund remedy, it seems perfectly clear that, given the factors disclosed by this record, the remedy afforded by Illinois is indeed inadequate.[25]

It follows that federal jurisdiction is not defeated by the Tax Injunction Act and the judgment of the Court of Appeals should therefore be affirmed.

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[24] "The payment of interest might make the wait more tolerable, but it would not affect the amount of time necessary to adjudicate respondent's federal claims." *Ante,* at 520–521.

[25] Because I would rely on the cumulative effect of the four factors discussed, and not on the failure to pay interest alone, to hold that the state remedy is inadequate, there is no need to respond to the Court's point, *ante,* at 523, that Congress must have been aware that many States did not pay interest on tax refunds. Congress may have been aware that some States did not pay interest on refunds and may have even sanctioned the practice, but there is no reason to believe that Congress implicitly approved the inadequate remedy provided by Cook County in this case.

MONTANA ET AL. *v.* UNITED STATES ET AL.

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

No. 79-1128. Argued December 3, 1980—Decided March 24, 1981

By a tribal regulation, the Crow Tribe of Montana sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its purported ownership of the bed of the Big Horn River, on treaties which created its reservation, and on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on lands within the reservation owned in fee simple by non-Indians Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation The First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute In 1868, the Second Treaty of Fort Laramie established the Crow Reservation, including land through which the Big Horn River flows, and provided that the reservation "shall be . . set apart for the absolute and undisturbed use and occupation" of the Tribe, and that no non-Indians except Government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. To resolve the conflict between the Tribe and the State, the United States, proceeding in its own right and as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment quieting title to the riverbed in the United States as trustee for the Tribe and establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and an injunction requiring Montana to secure the Tribe's permission before issuing hunting or fishing licenses for use within the reservation. The District Court denied relief, but the Court of Appeals reversed. It held that the bed and banks of the river were held by the United States in trust for the Tribe; that the Tribe could regulate hunting and fishing within the reservation by nonmembers, except for hunting and fishing on fee lands by resident nonmember owners of those lands; and that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

Held:

1. Title to the bed of the Big Horn River passed to Montana upon

its admission into the Union, the United States not having conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868. As a general principle, the Federal Government holds lands under navigable waters in trust for future States, to be granted to such States when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States. The 1851 treaty failed to overcome this presumption, since it did not by its terms formally convey any land to the Indians at all. And whatever property rights the 1868 treaty created, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. Cf. *United States* v. *Holt State Bank,* 270 U. S. 49. Moreover, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. Pp. 550–557.

2. Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or held by the United States in trust for the Tribe, it has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Pp. 557–567.

(a) The 1851 treaty nowhere suggested that Congress intended to grant such power to the Tribe. And while the 1868 treaty obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, thereby arguably conferring upon the Tribe authority to control fishing and hunting on those lands, that authority can only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation" and cannot apply to subsequently alienated lands held in fee by non-Indians. Cf. *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165. Nor does the federal trespass statute, 18 U. S. C. § 1165, which prohibits trespassing to hunt or fish, "augment" the Tribe's regulatory powers over non-Indian lands. That statute is limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians, and Congress deliberately excluded fee-patented lands from its scope. Pp. 557–563.

(b) The Tribe's "inherent sovereignty" does not support its regulation of non-Indian hunting and fishing on non-Indian lands within the reservation. Through their original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. *United States* v. *Wheeler,* 435 U. S. 313. Exercise of tribal power beyond what

is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Here, regulation of hunting and fishing by nonmembers of the Tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Tribe so as to subject themselves to tribal civil jurisdiction. And nothing suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. Pp. 563–567.

604 F. 2d 1162, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 567. BLACKMUN, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 569.

Urban L. Roth, Special Assistant Attorney General of Montana, argued the cause for petitioners. With him on the briefs were *Michael T. Greely,* Attorney General, *Clayton R. Herron* and *F. Woodside Wright,* Special Assistant Attorneys General, *James E. Seykora,* and *Douglas Y. Freeman.*

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Harlon L. Dalton, Robert L. Klarquist,* and *Steven E. Carroll.*

Thomas J. Lynaugh argued the cause for respondent Crow Tribe of Indians. With him on the brief was *Charles A. Hobbs.**

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*Briefs of *amici curiae* urging reversal were filed by *Warren Spannaus,* Attorney General, *James M. Schoessler,* and *Tom D Tobin* for the State of Minnesota et al.; by *Slade Gorton,* Attorney General, and *Timothy R. Malone,* Assistant Attorney General, for the State of Washington, joined by the Attorneys General for their respective States as follows: *Robert Corbin* of Arizona, *Robert T. Stephan* of Kansas, *John Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, and *Robert B. Hansen* of Utah;

JUSTICE STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation, and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, 445 U. S. 960, to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

I

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the

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and by *Paul A. Lenzini* for the International Association of Fish and Wildlife Agencies.

Briefs of *amici curiae* urging affirmance were filed by *Robert D. Dellwo* for the Coeur D'Alene Tribe of Indians et al.; and by *Barry D. Ernstoff, Steven S. Anderson, Reid Peyton Chambers, Carl V. Ullman,* and *Arthur Lazarus, Jr.,* for the Confederated Tribes of the Colville Indian Reservation et al.

A brief of *amici curiae* was filed by officials for their respective States as follows: *David H. Leroy,* Attorney General of Idaho, and *Robie G. Russell, Phillip J. Rassier, Steven V. Goddard,* and *Leslie L. Goddard,* Deputy Attorneys General; *Robert K. Corbin,* Attorney General of Arizona; *George Deukmejian,* Attorney General of California, and *R. H. Connett,* Assistant Attorney General; *Thomas J. Miller,* Attorney General of Iowa; *Robert T. Stephan,* Attorney General of Kansas; *Richard H. Bryan,* Attorney General of Nevada; *Jeff Bingaman,* Attorney General of New Mexico; *Allen I. Olson,* Attorney General of North Dakota; *Mark V. Meirhenry,* Attorney General of South Dakota; *Robert B. Hansen,* Attorney General of Utah; *Chauncey H. Browning,* Attorney General of West Virginia; and *Bronson C. La Follette,* Attorney General of Wisconsin.

signatory tribes acknowledged various designated lands as their respective territories. See 11 Stat. 749 and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler). The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established a Crow Reservation of roughly 8 million acres, including land through which the Big Horn River flows. 15 Stat. 649. By Article II of the treaty, the United States agreed that the reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Several subsequent Acts of Congress reduced the reservation to slightly fewer than 2.3 million acres. See 22 Stat. 42 (1882); § 31, 26 Stat. 1039–1040 (1891); ch. 1624, 33 Stat. 352 (1904); ch. 890, 50 Stat. 884 (1937). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years. Today, roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

Since the 1920's, the State of Montana has stocked the waters of the reservation with fish, and the construction of a dam by the United States made trout fishing in the Big Horn River possible. The reservation also contains game, some of it stocked by the State. Since the 1950's, the Crow Tribal

Council has passed several resolutions respecting hunting and fishing on the reservation, including Resolution No. 74–05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. 457 F. Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in *United States* v. *Holt State Bank,* 270 U. S. 49, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing, the court found that "[i]mplicit in the Supreme Court's decision in *Oliphant* [v. *Suquamish Indian Tribe,* 435 U. S. 191,] is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress." 457 F. Supp., at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held

that the Tribe could not exercise such authority except by granting or withholding authority to trespass on tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U. S. C. § 1165 (which makes it a federal offense to trespass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F. 2d 1162. Relying on its opinion in *United States* v. *Finch*, 548 F. 2d 822, vacated on other grounds, 433 U. S. 676, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by nonmembers, although the court noted that the Tribe could not impose criminal sanctions on those nonmembers. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident nonmember owners of those lands. Finally, the court held that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.[1] The question is whether the United States

[1] According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. Moreover, although the complaint in this case sought to quiet title only to the bed of the Big Horn River, we note the concession of the United States that if the bed of the river passed to

conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. *Choctaw Nation* v. *Oklahoma,* 397 U. S. 620, 627–628.

Though the owners of land riparian to *nonnavigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed. *Packer* v. *Bird,* 137 U. S. 661, 672; *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 289; 33 U. S. C. § 10; 43 U. S. C. § 931. Rather, the ownership of land under navigable waters is an incident of sovereignty. *Martin* v. *Waddell,* 16 Pet. 367, 409–411. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee* v. *Hagan,* 3 How. 212, 222–223, 229. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States* v. *Oregon,* 295 U. S. 1, 14. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water,

> "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively* v. *Bowlby,* 152 U. S. 1, 48.

Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States* v. *Oregon*, *supra*, at 14, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States* v. *Holt State Bank*, 270 U. S., at 55. See also *Shively* v. *Bowlby*, *supra*, at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States* v. *Oregon*, *supra*, at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States* v. *Holt State Bank*, *supra*, at 55, or was rendered "in clear and especial words," *Martin* v. *Waddell*, *supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer* v. *Bird*, *supra*, at 672.[2]

In *United States* v. *Holt State Bank*, *supra*, this Court applied these principles to reject an Indian Tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withhold from sale, for the use of" the Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389.[3] The Court concluded that there was nothing in the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a pur-

[2] Congress was, of course, aware of this presumption once it was established by this Court. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U S. 584, 588.

[3] The *Hitchcock* decision expressly stated that the Red Lake Reservation was "a reservation within the accepted meaning of the term." 185 U. S., at 389.

pose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." *United States* v. *Holt State Bank*, 270 U. S., at 58–59. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58.

The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, Art. 5, 2 Kappler 594–595. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article II of the treaty described the reservation land in detail [4] and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650. The treaty then stated:

> "[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to

[4] "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning . . . ." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650.

> do so, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." *Ibid.*

Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, *Packer* v. *Bird,* 137 U. S., at 672, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin* v. *Waddell,* 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States* v. *Holt State Bank,* 270 U. S., at 55. Rather, as in *Holt,* "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.,* at 58.

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' *Finch* decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusivity in the 1868 treaty as granting to the Indians all the lands, including the riverbed, within the described boundaries. *United States* v. *Finch,* 548 F. 2d, at 829. Such a construction, however, cannot survive examina-

tion. As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons, except those herein designated . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it.[5]

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[5] In one recent case, *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles *Choctaw Nation* more than it resembles the established line of cases to which *Choctaw Nation* is a singular exception. But the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. *Id.*, at 622–628. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw Tribes, reserving them lands in Georgia and Mississippi. In succeeding years, the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the Tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the Tribes' members refused to leave their eastern lands, doubting the reliability of the Government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the Tribes and distribute the tribal lands. The Choctaws and Cherokees

Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively* v. *Bowlby,* 152 U. S., at 48, justifying a congressional conveyance of a riverbed, see, *e. g., Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively* v. *Bowlby, supra,* at 48. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. 1 App. 74. Cf., *Alaska Pacific Fisheries* v. *United States, supra,* at 88; *Skokomish Indian Tribe* v. *France,* 320 F. 2d 205, 212 (CA9).

For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its

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finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept 27, 1830, 7 Stat. 333–334, quoted in *Choctaw Nation* v. *Oklahoma,* 397 U S., at 625 In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id*, at 626 In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, the *Choctaw* Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any State *Id*, at 634–635. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

admission into the Union, and that the Court of Appeals was in error in holding otherwise.

III

Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F. 2d, at 1165–1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. *Ibid.* What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by nonmember resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.*

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U. S. C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

The purposes of the 1851 treaty were to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of iden-

tifying Indians who committed depredations against non-Indians. As noted earlier, the treaty did not even create a reservation, although it did designate tribal lands. See *Crow Tribe* v. *United States*, 151 Ct. Cl. 281, 285–286, 289, 292–293, 284 F. 2d 361, 364, 366, 368. Only Article 5 of that treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595.[6] The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands. Indeed, the Court of Appeals acknowledged that after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F. 2d, at 1167.

The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 treaty. Article II of the treaty established a reservation for the Crow Tribe, and provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . . ," (emphasis added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe

[6] The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

the authority to control fishing and hunting on those lands.[7] But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, and the Crow Allotment Act of 1920, 41 Stat. 751.[8] If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.[9]

[7] Article IV of the treaty addressed hunting rights specifically. But that Article referred only to "unoccupied lands of the United States," *viz.*, lands outside the reservation boundaries, and is accordingly not relevant here.

[8] The 1920 Crow Allotment Act was one of the special Allotment Acts Congress passed from time to time pursuant to the policy underlying the General Allotment Act. See S. Rep. No. 219, 66th Cong., 1st Sess., 5 (1919). The Senate Committee Report on the Crow Allotment bill stated that it "is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the [General Allotment Act]." *Ibid.*

[9] The Court of Appeals discussed the effect of the Allotment Acts as follows:

"While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F. 2d 1162, 1168 (footnote omitted).

But nothing in the Allotment Acts supports the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by nonresident fee owners. The policy of the Acts was the eventual assimilation of the Indian population, *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 72, and the "gradual extinction of Indian reservations and Indian titles." *Draper* v. *United States*, 164 U. S. 240, 246. The Secretary of

In *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (*Puyallup III*), the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart, and, so far

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the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. See, *e. g.*, Secretary of the Interior Ann. Rep., vol 1, pp 25–28 (1885); Secretary of the Interior Ann. Rep, vol. 1, p. 4 (1886); Commissioner of Indian Affairs Ann. Rep, vol. 1, pp. IV–X (1887); Secretary of the Interior Ann. Rep., vol. 1, pp. XXIX–XXXII (1888); Commissioner of Indian Affairs Ann. Rep. 3–4 (1889); Commissioner of Indian Affairs Ann. Rep. VI, XXXIX (1890); Commissioner of Indian Affairs Ann. Rep., vol. 1, pp. 3–9, 26 (1891); Commissioner of Indian Affairs Ann. Rep. 5 (1892); Secretary of the Interior Ann Rep., vol. 1, p. IV (1894). And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. See, *e. g*, 11 Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783–784 (Sen. Saunders), 875 (Sens. Morgan and Hoar), 881 (Sen. Brown), 905 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064, 1065 (Sen. Plumb), 1067 (Sen. Williams) (1881).

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, *e. g*, *id.*, at 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

as necessary, surveyed and marked out for their exclusive use . . . [and no] white man [was to] be permitted to reside upon the same without permission of the tribe . . . ." See *id.*, at 174. The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of state interference. But this Court rejected that argument, finding, in part, that it "clashe[d] with the subsequent history of the reservation . . . ," *ibid.*, notably two Acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. Thus, "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use.' " *Ibid.* *Puyallup III* indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.

The Court of Appeals also held that the federal trespass statute, 18 U. S. C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F. 2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. The statute provides:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined . . . ."

The statute is thus limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use

by Indians.[10] If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U. S. C. § 1151: "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so in a letter dated May 23, 1958. The Department pointed out that a previous congressional Report, H. R. Rep. No. 2593, 85th Cong., 2d Sess. (1958),[11] had made clear that the bill contained no implication that it would apply to land other than that held or controlled by Indians or the United States.[12]

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[10] See *United States* v *Bouchard*, 464 F. Supp. 1316, 1336 (WD Wis.); *United States* v. *Pollmann*, 364 F. Supp. 995 (Mont.).

[11] House Report No. 2593 stated that the purpose of the bill that became 18 U. S C. § 1165 was to make it unlawful to enter Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe:

"Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity.

. . . . .

"Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers" H. R. Rep. No. 2593, 85th Cong., 2d Sess., at 2.

[12] Subsequent Reports in the House and Senate, H. R. Rep. No 625, 86th Cong., 1st Sess. (1959); S. Rep. No. 1686, 86th Cong, 2d Sess. (1960), also refer to "Indian lands" and "Indian property owners" rather than "Indian country." In *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, this Court referred to S Rep. No. 1686, which stated that "the legislation [18 U. S. C. § 1165] will give to the Indian tribes and to *individual Indian owners* certain rights that now exist as to others, and fills a gap in the

The Committee on the Judiciary then adopted the present language, which does not reach fee-patented lands within the boundaries of an Indian reservation.

B

Beyond relying on the Crow treaties and 18 U. S. C. § 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation. 604 F. 2d, at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74–05 to non-Indian lands.

This Court most recently reviewed the principles of inherent sovereignty in *United States* v. *Wheeler*, 435 U. S. 313. In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," *id.*, at 323, the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. *Id.*,

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present law for the protection of *their property*." 435 U. S., at 206. (Emphasis added.)

Before the Court of Appeals decision, several other courts interpreted § 1165 to be confined to lands owned by Indians, or held in trust for their benefit. *State* v. *Baker*, 464 F. Supp. 1377 (WD Wis.); *United States* v. *Bouchard*, 464 F. Supp. 1316 (WD Wis.); *United States* v *Pollmann*, *supra*; *Donahue* v. *California Justice Court*, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310. Cf. *United States* v. *Sanford*, 547 F. 2d 1085, 1089 (CA9) (holding that § 1165 was designed to prevent encroachments on Indian lands, rejecting the argument that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation, and noting that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations").

at 326. The Court distinguished between those inherent powers retained by the tribes and those divested:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe.* . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.* But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.* (Emphasis added.)

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 148; *Williams* v. *Lee,* 358 U. S. 217, 219–220; *United States* v. *Kagama,* 118 U. S. 375, 381–382; see *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 171. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations,[13]

[13] Any argument that Resolution No. 74–05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation, and that the

the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74–05.

The Court recently applied these general principles in *Oliphant* v. *Suquamish Indian Tribe,* 435 U. S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher* v. *Peck,* 6 Cranch 87, 147—the first Indian case to reach this Court—that the Indian tribes have lost any "right of governing every person within their limits except themselves." 435 U. S., at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters,[14] the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams* v. *Lee, supra,* at 223; *Morris* v. *Hitchcock,* 194 U. S.

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parties to this case had accommodated themselves to the state regulation. 457 F. Supp. 599, 610. The Court of Appeals left these findings unaltered and indeed implictly reaffirmed them, adding that the record reveals no attempts by the Tribe at the time of the Crow Allotment Act to forbid non-Indian hunting and fishing on reservation lands. 604 F. 2d, at 1168, and n. 11A.

[14] By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforcement on the federal criminal trespass statute, 18 U. S. C. § 1165, since that statute does not apply to fee patented lands. See *supra,* at 561–563, and nn. 10–12.

384; *Buster* v. *Wright,* 135 F. 947, 950 (CA8); see *Washington* v. *Confederated Tribes of Colville Indian Reservation,* 447 U. S. 134, 152–154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher* v. *District Court,* 424 U. S. 382, 386; *Williams* v. *Lee, supra,* at 220; *Montana Catholic Missions* v. *Missoula County,* 200 U. S. 118, 128–129; *Thomas* v. *Gay,* 169 U. S. 264, 273.[15]

No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.[16] Furthermore, the District Court made express findings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation. 457 F. Supp., at 609–610. And the District Court found that Montana's statutory and regulatory scheme does not prevent the Crow Tribe from limiting

[15] As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona* v. *California,* 373 U. S. 546, 599.

[16] Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the Crow Indians' treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State. Cf. *United States* v. *Washington,* 384 F. Supp. 312, 410–411 (WD Wash.), aff'd, 520 F. 2d 676 (CA9).

or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members. *Id.*, at 609.

IV

For the reasons stated in this opinion, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

JUSTICE STEVENS, concurring.

In its opinion in *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, the Court repeatedly pointed out that ambiguities in the governing treaties should be resolved in favor of the Indian tribes.[1] That emphasis on a rule of construction favoring the tribes might arguably be read as having been intended to indicate that the strong presumption against dispositions

[1] The Court described this rule of construction, and explained the reasoning underlying it:

"[T]hese treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, *e. g*, *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See *Alaska Pacific Fisheries* v *United States*, 248 U. S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that 'in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.' 7 Stat. 336." 397 U. S., at 630–631.

The Court went on to base its decision on this rule of construction:

"[T]he court in [*United States* v.] *Holt State Bank* [270 U. S. 49] itself examined the circumstances in detail and concluded 'the reservation was not intended to effect such a disposal.' 270 U. S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor." *Id.*, at 634.

by the United States of land under navigable waters in the territories is not applicable to Indian reservations. However, for the following reasons, I do not so read the *Choctaw Nation* opinion.

In *United States* v. *Holt State Bank,* 270 U. S. 49, the Court unanimously and unequivocally had held that the presumption applied to Indian reservations. Although the references to *Holt State Bank* in the Court's opinion in *Choctaw Nation* can hardly be characterized as enthusiastic, see 397 U. S., at 634, the *Choctaw Nation* opinion did not purport to abandon or to modify the rule of *Holt State Bank.* Indeed, Justice Douglas, while joining the opinion of the Court, wrote a separate opinion to explain why he had concluded that the *Choctaw Nation* record supplied the "exceptional circumstances" required under the *Holt State Bank* rule.[2]

Only seven Justices participated in the *Choctaw Nation* decision.[3] JUSTICE WHITE, joined by THE CHIEF JUSTICE and Justice Black in dissent, relied heavily on the *Holt State Bank* line of authority, see 397 U. S., at 645–648, and, as I noted above, Justice Douglas, in his concurrence, also appears to have accepted the *Holt State Bank* rule. Because only four Justices, including Justice Douglas, joined the Court's opinion, I do not believe it should be read as having made a substantial change in settled law.

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[2] Before reviewing the history of the Cherokee and Choctaw Reservations, Justice Douglas wrote:

"[W]hile the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in *Holt State Bank* that purpose is 'not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' 270 U. S., at 55 Such exceptional circumstances are present here." 397 U. S., at 639.

[3] When *Choctaw Nation* was decided, the Court consisted of only eight active Justices Justice Harlan did not participate in the consideration or decision of *Choctaw Nation.*

Finally, it is significant for me that JUSTICE STEWART, who joined the *Choctaw Nation* opinion, is the author of the Court's opinion today. Just as he is, I am satisfied that the circumstances of the *Choctaw Nation* case differ significantly from the circumstances of this case. Whether I would have voted differently in the two cases if I had been a Member of the Court when *Choctaw Nation* was decided is a question I cannot answer. I am, however, convinced that unless the Court is to create a broad exception for Indian reservations, the *Holt State Bank* presumption is controlling. I therefore join the Court's opinion.

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

Only two years ago, this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed " 'in the sense in which they would naturally be understood by the Indians.' " *Washington* v. *Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979), quoting from *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899). In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction. Because I believe that the United States intended, and the Crow Nation understood, that the bed of the Big Horn was to belong to the Crow Indians, I dissent from so much of the Court's opinion as holds otherwise.[1]

I

As in any case involving the construction of a treaty, it is necessary at the outset to determine what the parties in-

[1] While the complaint in this case sought to quiet title only to the bed of the Big Horn River, see *ante*, at 550, n 1, I think it plain that if the bed of the river was reserved to the Crow Indians before statehood, so also were the banks up to the high-water mark.

tended. *Washington* v. *Fishing Vessel Assn.*, 443 U. S., at 675. With respect to an Indian treaty, the Court has said that "the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Id.*, at 675–676. Obviously, this rule is applicable here. But before determining what the Crow Indians must have understood the Treaties of Fort Laramie to mean, it is appropriate to ask what the United States intended, for our inquiry need go no further if the United States meant to convey the bed of the Big Horn River to the Indians.

The Court concedes that the establishment of an Indian reservation can be an "appropriate public purpose" justifying a congressional conveyance of a riverbed. *Ante*, at 556. It holds, however, that no such public purpose or exigency could have existed here, since at the time of the Fort Laramie Treaties the Crow were a nomadic tribe dependent chiefly upon buffalo, and fishing was not important to their diet or way of life. *Ibid.* The factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found that fish were not "a central part of the Crow diet," 457 F. Supp. 599, 602 (Mont. 1978), there was evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in time of scarcity.[2]

Even if it were true that fishing was not important to the Crow Indians at the time the Fort Laramie Treaties came into being, it does not necessarily follow that there was no public purpose or exigency that could have led Congress to

[2] See 1 App. 39–40 (testimony of Joe Medicine Crow, Tribal Historian). See also *id*, at 90, 97 (testimony of Henry Old Coyote). Thus, while one historian has stated that "I have never met a reference to eating of fish" by the Crow Indians, R. Lowie, The Crow Indians 72 (1935), it is clear that such references do exist. See 457 F. Supp., at 602. See also n. 7, *infra*.

convey the riverbed to the Crow. Indeed, history informs us that the very opposite was true. In negotiating these treaties, the United States was actuated by two somewhat conflicting purposes: the desire to provide for the Crow Indians, and the desire to obtain the cession of all Crow territory not within the ultimate reservation's boundaries. Retention of ownership of the riverbed for the benefit of the future State of Montana would have been inconsistent with each of these purposes.

First: It was the intent of the United States that the Crow Indians be converted from a nomadic, hunting tribe to a settled, agricultural people.[3] The Treaty of Fort Laramie of Sept. 17, 1851, see 11 Stat. 749, and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler), was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers who crossed the lands of the Plains Indians on their way to California. Aggrieved by these depredations, the Indians had opposed that passage, sometimes by force.[4] In order to ensure safe passage for the settlers, the United States in 1851 called together at Fort Laramie eight Indian Nations, including the Crow. The pronouncement made at that time by the United States Commissioner emphasized the Government's concern over the destruction of the game upon which the Indians depended.[5] The treaty's Art. 5, which set speci-

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[3] See generally *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 380, n. 11 (1980) (discussing federal reservation policy).

[4] The history of the events leading up to the Fort Laramie Treaty of 1851 is recounted in detail in *Crow Tribe of Indians* v. *United States*, 151 Ct. Cl. 281, 284 F. 2d 361 (1960), cert. denied, 366 U. S. 924 (1961); *Crow Nation* v. *United States*, 81 Ct. Cl. 238 (1935); and *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308 (1930).

[5] According to an account published in the Saint Louis Republican, Oct. 26, 1851, Treaty Commissioner Mitchell stated:

"The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game

fied boundaries for the Indian Nations, explicitly provided that the signatory tribes "do not surrender the privilege of hunting, *fishing*, or passing over any of the tracts" described in the treaty, 2 Kappler, at 595 (emphasis added), and, further, its Art. 7 stated that the United States would provide an annuity in the form of "provisions, merchandise, domestic animals, and agricultural implements." *Ibid.*

The intent of the United States to provide alternative means of subsistence for the Plains Indians is demonstrated even more clearly by the subsequent Fort Laramie Treaty of May 7, 1868, between the United States and the Crow Nation. 15 Stat. 649. United States Commissioner Taylor, who met with the Crow Indians in 1867, had acknowledged to them that the game upon which they relied was "fast disappearing," and had stated that the United States proposed to furnish them with "homes and cattle, to enable you to begin to raise a supply or stock with which to support your families when the game was disappeared." [6] Proceedings of the Great Peace Commission of 1867–1868, pp. 86–87 (Institute for the Development of Indian Law (1975)) (hereinafter Proceedings). Given this clear recognition by the United States that the traditional mainstay of the Crow Indians' diet was disappearing, it is inconceivable that the United States intended by the 1868 treaty to deprive the Crow of "potential control over a source of food on their

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are driven off and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you." Quoted in *Crow Tribe of Indians* v. *United States*, 151 Ct. Cl, at 290, 284 F. 2d, at 366.

The same concern was expressed in internal communications of the Government. See, *e. g.*, *id*, at 287–288, 284 F 2d, at 365 (letter of W. Medill, Commissioner of Indian Affairs to the Secretary of the Interior).

[6] The 1868 treaty provided that members of the Crow Tribe who commenced farming would be allotted land and given agricultural supplies, it also provided that subsistence rations for a period of four years would be supplied to every Indian who agreed to settle on the reservation See Arts. VI, VIII, and IX of the treaty, 15 Stat. 650–652.

reservation." [7] *United States* v. *Finch*, 548 F. 2d 822, 832 (CA9 1976), vacated on other grounds, 433 U. S. 676 (1977). See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918).[8]

Second: The establishment of the Crow Reservation was

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[7] It is significant that in 1873 the United States Commissioners who sought to negotiate a further diminishment of the Crow Reservation were instructed by the very Act of Mar 3, 1873, ch. 321, 17 Stat. 626, that "if there is upon such reservation a locality where fishing could be valuable to the Indians, [they should] include the same [in the diminished reservation] if practicable . . . ."

That those fishing rights would have been valuable to the Crow Indians is suggested by the statement of Chief Blackfoot at the 1867 Fort Laramie Conference:

"There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. *There is plenty of fish too.* I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming." Proceedings, at 91. (Emphasis added.)

Edwin Thompson Denig, a white fur trader who resided in Crow territory from approximately 1833 until 1856, also remarked:

"Every creek and river teems with beaver, and good fish and fowl can be had at any stream in the proper season." E. Denig, Of the Crow Nation 21 (1980).

[8] In *Alaska Pacific Fisheries*, the United States sued to enjoin a commercial fishing company from maintaining a fish trap in navigable waters off the Annette Islands in Alaska, which had been set aside for the Metlakahtla Indians. The lower courts granted the relief sought, and this Court affirmed. The Court noted: "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement." 248 U. S., at 87. This was because the reservation was a setting aside of public property "for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States." *Id.*, at 88. The Court observed that "[t]he Indians naturally looked on the fishing grounds as part of the islands," and it found further support for its conclusion "in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.*, at 89.

necessitated by the same "public purpose" or "exigency" that led to the creation of the Choctaw and Cherokee Reservations discussed in *Choctaw Nation* v. *Oklahoma,* 397 U. S. 620 (1970). In both cases, Congress responded to pressure for Indian land by establishing reservations in return for the Indians' relinquishment of their claims to other territories.[9] Just as the Choctaws and the Cherokees received their reservation in fee simple " 'to inure to them while they shall exist as a nation and live on it,' " *id.,* at 625, so the Crow were assured in 1867 that they would receive "a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." Proceedings, at 86. Indeed, during the negotiations of both the 1851 and 1868 Treaties of Fort Laramie the United States repeatedly referred to the land as belonging to the Indians, and the treaties reflect this understanding.[10]

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[9] That the Choctaws and Cherokees were forced to leave their original homeland entirely, while the Crow were forced to accept repeated diminishments of their territory, does not distinguish *Choctaw Nation* from this case; indeed, if anything, that distinction suggests that the Crow Indians would have had an even greater expectancy than did the Choctaws and Cherokees that the rivers encompassed by their reservation would continue to belong to them. The "public purpose" behind the creation of these reservations in each case was the same: "to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations." *Choctaw Nation* v. *Oklahoma,* 397 U. S., at 623 While the Fort Laramie Treaty of 1851 may have been designed primarily to assure safe passage for settlers crossing Indian lands, by 1868 settlers and miners were remaining in Montana. See N. Plummer, Crow Indians 109–114 (1974). Accordingly, whereas the signatory tribes, by Art. 5 of the 1851 treaty, did not "abandon or prejudice any rights or claims they may have to other lands," see 2 Kappler, at 595, by Art. II of the 1868 treaty the Crow Indians "relinquish[ed] all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the [reservation] limits aforesaid." 15 Stat. 650.

[10] See *Crow Tribe of Indians* v. *United States,* 151 Ct. Cl., at 288–291, 284 F. 2d, at 365–367; Proceedings, at 86. The Court suggests that the

Finally, like the Cherokee Reservation, see 397 U. S., at 628, the Crow Reservation created by Art. II of the 1868 treaty consisted of "one undivided tract of land described merely by exterior metes and bounds." 15 Stat. 650.

Since essentially the same "public purpose" led to the creation of both reservations, it is highly appropriate that the analysis of *Choctaw Nation* be applied in this case. As the State of Montana does here, the State of Oklahoma in *Choctaw Nation* claimed a riverbed that was surrounded on both sides by lands granted to an Indian tribe. This Court in *Choctaw Nation* found Oklahoma's claim to be "at the least strained," and held that all the land inside the reservation's exterior metes and bounds, *including the riverbed,* "seems clearly encompassed within the grant," even though no mention had been made of the bed. 397 U. S., at 628. The Court found that the "natural inference" to be drawn from the grants to the Choctaws and Cherokees was that "all the land within their metes and bounds was conveyed, including the banks and bed of rivers." *Id.*, at 634. See also *Donnelly* v. *United States,* 228 U. S. 243, 259 (1913). The

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1851 treaty was simply "a covenant among several tribes which recognized specific boundaries for their respective territories." *Ante,* at 553. But this interpretation of the treaty consistently has been rejected by the Court of Claims, which has held that the treaty recognized title in the signatory Indian Nations See *Crow Tribe of Indians,* 151 Ct. Cl., at 291, 284 F. 2d, at 367; *Crow Nation* v. *United States,* 81 Ct Cl., at 271–272; *Fort Berthold Indians* v. *United States,* 71 Ct Cl. 308 (1930) Further, the Court's interpretation is contrary to the analysis of the 1851 treaty made in *Shoshone Indians* v. *United States,* 324 U S. 335, 349 (1945) ("the circumstances surrounding the execution of the Fort Laramie treaty [of 1851] indicate a purpose to recognize the Indian title to the lands described").

In any event, as the Court concedes, *ante,* at 553, it is beyond dispute that the 1868 treaty set apart a reservation "for the absolute and undisturbed use and occupation" of the Crow Indians. Cf. *United States* v. *Sioux Nation of Indians,* 448 U. S., at 374–376 (discussing the similar provisions of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, between the United States and the Sioux Nation).

Court offers no plausible explanation for its failure to draw the same "natural inference" here.[11]

In *Choctaw Nation*, the State of Oklahoma also laid claim to a portion of the Arkansas River at the border of the Indian reservation. The Court's analysis of that claim lends weight to the conclusion that the bed of the Big Horn belongs to the Crow Indians. Interpreting the treaty language setting the boundary of the Cherokee Reservation "down the main channel of the Arkansas river," the *Choctaw* Court noted that such language repeatedly has been held to convey title to the midpoint of the channel, relying on *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77 (1922).[12] 397 U. S., at 631–633. Here, Art. II of the 1868 Treaty of

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[11] As noted above, neither the "special historical origins" of the Choctaw and Cherokee treaties, nor the provisions of those treaties granting Indian lands in fee simple, serve to distinguish this case from *Choctaw Nation*. Equally unpersuasive is the suggestion that in *Choctaw* the Court placed "special emphasis on the Government's promise that the reserved lands would never become part of any State." *Ante*, at 556, n. 5. Rather than placing "special emphasis" on this promise, the *Choctaw* Court indicated only that the promise reinforced the conclusion that the Court drew from an analysis of the language of conveyance contained in the treaties. 397 U. S., at 635.

[12] In *Brewer-Elliott*, the United States established a reservation for the Osage Indians that was bounded on one side "by . . . the main channel of the Arkansas river." 260 U. S., at 81. This Court held that the portion of the Arkansas River in question was nonnavigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant *expressly carry the title to that line*." *Id.*, at 87. (Emphasis added.) While the Court purported to reserve the question whether vesting ownership of the riverbed in the Osage Indians would have constituted an appropriate "public purpose" within the meaning of *Shively* v. *Bowlby*, 152 U. S. 1 (1894), if the stream had been navigable, that question essentially had been resolved four years earlier in *Alaska Pacific Fisheries*. See n. 8, *supra*. In any event, *Choctaw Nation* clearly holds, and the Court concedes, *ante*, at 556, that the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively* v. *Bowlby*.

Fort Laramie established the boundary of the Crow Reservation as running in part up the "mid-channel of the Yellowstone river." 15 Stat. 650. Thus, under *Brewer-Elliott* and *Choctaw Nation,* it is clear that the United States intended to grant the Crow the bed of the Yellowstone to the midpoint of the channel; it follows *a fortiori* that it was the intention of the United States to grant the Crow Indians the bed of that portion of the Big Horn that was totally encompassed by the reservation.[13]

II

But even assuming, *arguendo,* that the United States intended to retain title to the bed of the Big Horn River for the benefit of the future State of Montana, it defies common sense to suggest that the Crow Indians would have so understood the terms of the Fort Laramie Treaties.[14] In negotiating the 1851 treaty, the United States repeatedly referred to the territories at issue as "your country," as "your land," and as "your territory." See *Crow Tribe of Indians* v. *United States,* 151 Ct. Cl. 281, 287–291, 284 F. 2d 361, 364–367 (1960). Further, in Art. 3 of the treaty itself the Government undertook to protect the signatory tribes "against the commission of all depredations by the people of the said United States," and to compensate the tribes for any damages

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[13] Later events confirm this conclusion. In 1891, the Crow Indians made a further cession of territory. See Act of Mar 3, 1891, § 31, 26 Stat. 1040. This cession was bounded in part by the Big Horn River. Significantly, the Act described the boundary of the cession as the "mid-channel" of the river; that language necessarily indicates that the Crow owned the entire bed of the Big Horn prior to the cession, and that by the Act they were ceding half the bed in the affected stretch of the river, while retaining the other half in that stretch and the whole of the bed in the portion of the river that remained surrounded by their lands.

[14] Counsel for the State of Montana acknowledged at oral argument that the Crow Indians did not understand the meaning of the equal-footing doctrine at the times they entered into the Fort Laramie Treaties. Tr. of Oral Arg. 13–14.

they suffered thereby; in return, in Art. 2, the United States received the right to build roads and military posts on the Indians' territories. 2 Kappler, at 594.

The history of the treaty of 1868 is even more telling. By this time, whites were no longer simply passing through the Indian territories on their way to California. Instead, in the words of United States Commissioner Taylor, who addressed the Crow representatives gathered at Fort Laramie in 1867:

> "We learn that valuable mines have been discovered in *your country* which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through *your land,* that settlements have been made upon *your lands,* that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under these circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties." Proceedings, at 86. (Emphasis added.)

It is hardly credible that the Crow Indians who heard this declaration would have understood that the United States meant to retain the ownership of the riverbed that ran through the very heart of the land the United States promised to set aside for the Indians and their children "forever." Indeed, Chief Blackfoot, when addressed by Commissioner Taylor, responded: "The Crows used to own all this Country *including all the rivers of the West.*" *Id.,* at 88. (Emphasis added.) The conclusion is inescapable that the Crow Indians understood that they retained the ownership of at least those rivers within the metes and bounds of the reservation

granted them.[15] This understanding could only have been strengthened by the reference in the 1868 treaty to the mid-channel of the Yellowstone River as part of the boundary of the reservation; the most likely interpretation that the Crow could have placed on that reference is that half the Yellowstone belonged to them, and it is likely that they accordingly deduced that all of the rivers within the boundary of the reservation belonged to them.

In fact, any other conclusion would lead to absurd results. Gold had been discovered in Montana in 1858, and sluicing operations had begun on a stream in western Montana in 1862; hundreds of prospectors were lured there by this news, and some penetrated Crow territory. N. Plummer, Crow Indians 109–110 (1974). As noted, Commissioner Taylor remarked in 1867 that whites were mining in Indian territory, and he specifically indicated that the United States intended to protect the Indians from such intrusions. Yet the result reached by the Court today indicates that Montana or its licensees would have been free to enter upon the Big Horn River for the purpose of removing minerals from its bed or banks; further, in the Court's view, they remain free to do so in the future. The Court's answer to a similar claim made by the State of Oklahoma in *Choctaw Nation* is fully applicable here: "We do not believe that [the Indians] would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise." [16] 397 U. S., at 635.

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[15] Statements made by Chief Blackfoot during the treaty negotiations of 1873 buttress this conclusion. See, *e. g.*, 3 App. 136 ("The Great Spirit made these mountains and rivers for us, and all this land"); *id.*, at 171 ("On the other side of the river all those streams belong to the Crows").

[16] The Court suggests that the fact the United States retained a navigational easement in the Big Horn River indicates that the 1868 treaty

III

In *Choctaw Nation,* the Court was confronted with a claim almost identical to that made by the State of Montana in this case. There, as here, the argument was made that the silence of the treaties in question with regard to the ownership of the disputed riverbeds was fatal to the Indians' case. In both cases, the state claimant placed its principal reliance on this Court's statement in *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926), that the conveyance of a riverbed "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." The Court flatly rejected this argument in *Choctaw Nation,* pointing out that "nothing in the *Holt State Bank* case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor." [17] 397 U. S., at

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could not have granted the Crow the exclusive right to occupy all the territory within the reservation boundary *Ante,* at 555. But the retention of a navigational easement obviously does not preclude a finding that the United States meant to convey the land beneath the navigable water. See, *e. g , Choctaw Nation, supra; Alaska Pacific Fisheries, supra*

[17] The Court's reliance on *Holt State Bank* is misplaced for other reasons as well. At issue in that case was the bed of Mud Lake, a once navigable body of water in the Red Lake Reservation in Minnesota. Prior to the case, most of the reservation, and all the tracts surrounding the lake, had been "relinquished and ceded" by the Indians and sold off to homesteaders. 270 U. S., at 52–53. No such circumstances are present here. See n. 18, *infra.*

Moreover, a critical distinction between this case and *Holt State Bank* arises from the questionable status of the Red Lake Reservation before Minnesota became a State. The Court in *Holt State Bank* concluded that in the treaties preceding statehood there had been, with respect to the Red Lake area—unlike other areas—"no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein . . . ." 270 U. S., at 58 (footnote omitted). Thus, *Holt State Bank* clearly does not control a case, such as this one, in which, prior to

634. Since I believe that the Court has so blinded itself today, I respectfully dissent from its holding that the State of Montana has title to the bed of the Big Horn River.[18]

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statehood, the United States set apart by formal treaty a reservation that included navigable waters. See n. 10, *supra.*

Finally, the Court fails to recognize that it is *Holt State Bank,* not *Choctaw Nation,* that stands as "a singular exception" to this Court's established line of cases involving claims to submerged lands adjacent to or encompassed by Indian reservations. See *Choctaw Nation; Brewer-Elliott; Alaska Pacific Fisheries; Donnelly* v. *United States,* all *supra.*

[18] I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. I note only that nothing in the Court's disposition of that issue is inconsistent with the conclusion that the bed of the Big Horn River belongs to the Crow Indians. There is no suggestion that any parcels alienated in consequence of the Indian General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751, included portions of the bed of the Big Horn River. Further, the situation here is wholly unlike that in *Puyallup Tribe* v. *Washington Game Dept*, 433 U. S. 165 (1977). As the Court recognizes, *ante,* at 561, the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. 433 U. S., at 173–174, and n. 11. This is not such a case.

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.

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

No. 79–824. Argued November 3, 1980—Decided March 24, 1981*

Sections 309 (a) and 310 (d) of the Communications Act of 1934 (Act) empower the Federal Communications Commission (FCC) to grant an application for renewal or transfer of a radio broadcast license only if it determines that "the public interest, convenience, and necessity" will be served thereby. In implementation of these provisions, the FCC, pursuant to its rulemaking authority, issued a Policy Statement concluding, with respect to ruling on applications for license renewal or transfer, that the public interest is best served by promoting diversity in a radio station's entertainment formats through market forces and competition among broadcasters and that review of an applicant station's format changes was not compelled by the Act's language or history, would not advance the radio-listening public's welfare, and would deter innovation in radio programming. On respondent citizen groups' petition for review of the Policy Statement, the Court of Appeals held that it violated the Act, concluding that the FCC's reliance on market forces to develop diversity in programming was an unreasonable interpretation of the Act's public-interest standard, and that in certain circumstances the FCC is required to regard a change in entertainment format as a substantial and material fact requiring a hearing to determine whether a license renewal or transfer is in the public interest.

Held: The FCC's Policy Statement is not inconsistent with the Act and is a constitutionally permissible means of implementing the Act's public-interest standard. Pp. 593–604.

(a) The FCC has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. It has assessed the benefits and the harm likely to flow from Government review of entertainment programming

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*Together with No. 79–825, *Insilco Broadcasting Corp. et al.* v. *WNCN Listeners Guild et al.;* No. 79–826, *American Broadcasting Cos., Inc., et al.* v. *WNCN Listeners Guild et al.;* and No. 79–827, *National Association of Broadcasters et al.* v. *WNCN Listeners Guild et al.,* also on certiorari to the same court.

and has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. Pp. 595–596

(b) The FCC's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 810. Here, the FCC's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. P. 596.

(c) The Policy Statement is consistent with the legislative history of the Act and with the FCC's traditional view that the public interest is best served by promoting diversity in entertainment programming through market forces. Pp. 597–599.

(d) The Policy Statement does not conflict with the First Amendment rights of listeners, since the FCC seeks to further the interests of the listening public as a whole and the First Amendment does not grant individual listeners the right to have the FCC review the abandonment of their favorite entertainment programs Pp. 603–604.

197 U. S App. D. C. 319, 610 F. 2d 838, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 604.

David J. Saylor argued the cause for petitioners in No. 79–824. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Claiborne, Stephen M. Shapiro,* and *C. Grey Pash, Jr. Timothy B. Dyk* argued the cause for petitioners in Nos. 79–826 and 79–827. With him on the briefs were *James A. McKenna, Jr., Carl R. Ramey, J. Roger Wollenberg, J. Laurent Scharff, Jack N. Goodman, Ralph E. Goldberg, Eleanor S. Applewhaite,* and *Erwin G. Krasnow. B. Dwight Perry* and *Richard D. Marks* filed briefs for petitioners in No. 79–825.

Kristin Booth Glen argued the cause for respondents WNCN Listeners Guild et al. *Wilhelmina Reuben Cooke* argued the cause for respondents Office of Communication

of United Church of Christ et al. With them on the brief were *David M. Rice, Jeffrey H. Olson,* and *Earle K. Moore.*†

JUSTICE WHITE delivered the opinion of the Court.

Sections 309 (a) and 310 (d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.* (Act), empower the Federal Communications Commission to grant an application for license transfer [1] or renewal only if it determines that "the public interest, convenience, and necessity" will be served thereby.[2] The issue before us is

†*Daniel J Popeo* and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed (1) by the Attorneys General and other officials for their respective States as follows: *Robert Abrams,* Attorney General of New York, *Shirley Adelson Siegel,* Solicitor General, and *Robert J. Schack,* Assistant Attorney General; *Richard S. Gebelein,* Attorney General of Delaware, and *Regina Mullen Small,* State Solicitor; *Warren Spannaus,* Attorney General of Minnesota; *Richard H. Bryant,* Attorney General of Nevada; *Jeff Bingaman,* Attorney General of New Mexico, and *Robert Hilgendorf,* Deputy Attorney General; *Dennis J Roberts II,* Attorney General of Rhode Island, and *Susan E. McGuirl,* Deputy Attorney General; *Mark Meierhenry,* Attorney General of South Dakota, and *Judith Atkinson,* Assistant Attorney General; *Slade Gorton,* Attorney General of Washington, and *Thomas L. Boeder,* Senior Assistant Attorney General; (2) by *Andrew Jay Schwartzman* for the American Symphony Orchestra et al ; and (3) by *Charles M. Firestone* for the Consumer Federation of America et al.

[1] We shall refer to transfers and assignments of licenses as "transfers."

[2] Title 47 U S C § 309 (a) provides:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Title 47 U. S. C. § 310 (d) provides in part:

"No construction permit or station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or

whether there are circumstances in which the Commission must review past or anticipated changes in a station's entertainment programming when it rules on an application for renewal or transfer of a radio broadcast license. The Commission's present position is that it may rely on market forces to promote diversity in entertainment programming and thus serve the public interest.

This issue arose when, pursuant to its informal rulemaking authority, the Commission issued a "Policy Statement" concluding that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters and that a change in entertainment programming is therefore not a material factor that should be considered by the Commission in ruling on an application for license renewal or transfer. Respondents, a number of citizen groups interested in fostering and preserving particular entertainment formats, petitioned for review in the

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involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

The Act requires broadcasting station licensees to apply for license renewal every three years 47 U. S. C. § 307 (d). It provides that the Commission shall grant the application for renewal if it determines that the public interest, convenience, and necessity will be served thereby. §§ 307 (a), (d), 309 (a)

Section 309 (d) (1) of the Act provides that any party in interest may petition the Commission to deny an application for license transfer or renewal, but the petition must contain specific allegations of fact sufficient to show that granting the application would be "prima facie inconsistent" with the public interest If the Commission determines on the basis of the application, the pleadings filed, or other matters which it may officially notice that no substantial and material questions of fact are presented, it may grant the application and deny the petition without conducting a hearing § 309 (d) (2) However, if a substantial and material question of fact is presented or if the Commission is unable to determine that granting the application would be consistent with the public interest, the Commission must conduct a hearing on the application. § 309 (d) (2).

Court of Appeals for the District of Columbia Circuit. That court held that the Commission's Policy Statement violated the Act. We reverse the decision of the Court of Appeals.

I

Beginning in 1970, in a series of cases involving license transfers,[3] the Court of Appeals for the District of Columbia Circuit gradually developed a set of criteria for determining when the "public-interest" standard requires the Commission to hold a hearing to review proposed changes in entertainment formats.[4] Noting that the aim of the Act is "to secure the maximum benefits of radio to all the people of the United States," *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 217 (1943), the Court of Appeals ruled in 1974 that "preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Citizens Committee to Save WEFM* v. *FCC,* 165 U. S. App. D. C. 185, 207, 506 F. 2d 246, 268 (en banc). It concluded that a change in format would not present "substantial and material questions of fact" requiring a hearing if (1) notice of the change had not precipitated "significant public grumbling"; (2) the segment of the population preferring the format was too small to be accommodated by available frequencies; (3) there was an adequate substitute

[3] *Citizens Committee to Save WEFM* v. *FCC,* 165 U. S. App. D C. 185, 506 F. 2d 246 (1974) (en banc); *Citizens Committee to Keep Progressive Rock* v. *FCC,* 156 U. S. App. D. C. 16, 478 F. 2d 926 (1973); *Lakewood Broadcasting Service, Inc.* v. *FCC,* 156 U. S. App. D. C. 9, 478 F. 2d 919 (1973); *Hartford Communications Committee* v *FCC,* 151 U. S. App. D. C. 354, 467 F. 2d 408 (1972); *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC,* 141 U. S. App. D. C. 109, 436 F. 2d 263 (1970).

[4] We shall refer to the Court of Appeals' views on when the Commission must review changes in entertainment format as the "format doctrine," and we shall often refer to a change in entertainment programming by a radio broadcaster as a change in format.

in the service area for the format being abandoned; [5] or (4) the format would be economically unfeasible even if the station were managed efficiently.[6] The court rejected the Commission's position that the choice of entertainment formats should be left to the judgment of the licensee,[7] stating that the Commission's interpretation of the public-interest standard was contrary to the Act.[8]

In January 1976, the Commission responded to these decisions by undertaking an inquiry into its role in reviewing format changes.[9] In particular, the Commission sought public

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[5] In *Citizens Committee to Save WEFM* v. *FCC,* for example, the court directed the Commission to consider whether a "fine arts" format was a reasonable substitute for a classical music format. 165 U S. App. D C., at 203–204, 506 F 2d, at 264–265. The court observed that 19th-century classical music and 20th-century classical music could be classified as different formats, since "the loss of either would unquestionably lessen diversity." *Id.,* at 204, n. 28, 506 F. 2d, at 265, n. 28.

[6] These criteria were summarized by the Court of Appeals in the opinion below. 197 U. S. App. D. C. 319, 323–324, 610 F 2d 838, 842–843 (1979). It was also stated that the format doctrine logically applies to renewal as well as transfer applications The court noted that a midterm format change would not be considered until the broadcaster applied for license renewal. *Id.,* at 330, and n. 29, 610 F 2d, at 849, and n. 29. See also *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC, supra,* at 118, 436 F. 2d, at 272.

[7] See *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC, supra,* at 113, 436 F. 2d, at 267. See also 197 U. S. App. D. C., at 330, n. 31, 610 F. 2d, at 849, n. 31.

[8] *Citizens Committee to Save WEFM* v. *FCC, supra,* at 207, and n. 34, 506 F. 2d, at 268, and n. 34.

Although the issue before the Court of Appeals in each of the format cases was whether a hearing was required, the court warned the Commission in *Citizens Committee to Keep Progressive Rock* that its public-interest determination would also be subject to judicial review:

"[F]ailure to render a reasoned decision will be, as always, reversible error. No more is required, no less is accepted." 156 U. S. App. D. C., at 24, 478 F. 2d, at 934.

[9] *Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations,* 57 F. C. C. 2d 580 (1976).

comment on whether the public interest would be better served by Commission scrutiny of entertainment programming or by reliance on the competitive marketplace.[10]

Following public notice and comment, the Commission issued a Policy Statement [11] pursuant to its rulemaking authority under the Act.[12] The Commission concluded in the Policy Statement that review of format changes was not compelled by the language or history of the Act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovation in radio programming. In support of its position, the Commission quoted from *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475 (1940): "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public." [13] The Commission also emphasized that a broad-

[10] The Commission also invited interested parties to consider the impact of the format doctrine on First Amendment values.

[11] *Memorandum Opinion and Order*, 60 F. C. C. 2d 858 (1976) (*Policy Statement*), reconsideration denied, 66 F. C. C. 2d 78 (1977).

[12] Section 303 (r) of the Act, 47 U. S. C. § 303 (r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."

[13] The Commission observed that radio broadcasters naturally compete in the area of program formats, since there is virtually no other form of competition available. A staff study of program diversity in major markets supported the Commission's view that competition is effective in promoting diversity in entertainment formats. *Policy Statement, supra,* at 861.

The *Notice of Inquiry* also explained the Commission's reasons for relying on competition to provide diverse entertainment formats:

"Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that . . . [f]requently,

caster is not a common carrier [14] and therefore should not be subjected to a burden similar to the common carrier's obligation to continue to provide service if abandonment of that service would conflict with public convenience or necessity.[15]

The Commission also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats. Such regulation would require the Commission to categorize the formats of a station's prior and subsequent programming to determine whether

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when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format." 57 F. C. C 2d, at 583.

[14] Section 3 (h) of the Act provides that "a person engaged in radio broadcasting shall not . . be deemed a common carrier." 47 U. S. C. § 153 (h) See also, *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474 (1940) ("[B]roadcasters are not common carriers and are not to be dealt with as such Thus the [Communications] Act recognizes that the field of broadcasting is one of free competition") (footnote omitted).

[15] The Commission discussed the problems arising from "the obligation to continue service" created by the Court of Appeals' format doctrine. The Commission apparently used this phrase to describe those cases in which it thought the Court of Appeals would hold that an application for license transfer or renewal should have been denied because the abandonment of a unique entertainment format was inconsistent with the public interest. Although the format cases only addressed whether a hearing was required, the Court of Appeals implied that in some situations the Commission would be required to deny an application because of a change in entertainment format. See *Citizens Committee to Keep Progressive Rock* v *FCC,* 156 U. S. App. D C., at 24, 478 F 2d, at 934.

The Commission also addressed the "constitutional dimension" of the format doctrine. It concluded that the doctrine would be likely to deter many licensees from experimenting with new forms of entertainment programming, since the licensee could be burdened with the expense of participating in a hearing before the Commission if for some reason it wished to abandon the experimental format. Thus, "[t]he existence of the obligation to continue service . . . inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." *Policy Statement, supra,* at 865.

a change in format had occurred; to determine whether the prior format was "unique"; [16] and to weigh the public detriment resulting from the abandonment of a unique format against the public benefit resulting from that change. The Commission emphasized the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format.[17]

Finally, the Commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment formats.[18] Second, format allocation by market forces accommodates listeners' desires for diversity within a given format and also produces a variety of formats.[19] Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that "the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners." [20]

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[16] In the *Notice of Inquiry,* the Commission discussed the difficult task of categorizing formats, noting that the Court of Appeals had suggested in the *WEFM* case that 19th-century classical music should be distinguished from 20th-century classical music. *Notice of Inquiry, supra,* at 583, and n. 2.

[17] *Policy Statement,* 60 F. C C. 2d, at 862–864.

[18] *Id.,* at 863.

[19] The Commission pointed out that a significant segment of the public may strongly prefer one station to another even if both stations play the same type of music. Although it would be difficult for the Commission to compare the strength of intraformat preferences to the strength of interformat preferences, market forces would naturally respond to intraformat preferences, albeit in an imperfect manner. *Id.,* at 863–864.

[20] *Id.,* at 866, n. 8.

The Court of Appeals, sitting en banc, held that the Commission's policy was contrary to the Act as construed and applied in the court's prior format decisions. 197 U. S. App. D. C. 319, 610 F. 2d 838 (1979). The court questioned whether the Commission had rationally and impartially reexamined its position [21] and particularly criticized the Commission's failure to disclose a staff study on the effectiveness of market allocation of formats before it issued the Policy Statement.[22] The court then responded to the Commission's criticisms of the format doctrine. First, although conceding that market forces generally lead to diversification of formats, it concluded that the market only imperfectly reflects listener preferences [23] and that the Commission is statutorily obli-

[21] The court was of the view that the Commission's "Notice of Inquiry" revealed a substantial bias against the *WEFM* decision, and that the Commission had overstated the administrative problems created by the format doctrine.

[22] The study was released prior to the Commission's denial of reconsideration of its Policy Statement The court questioned whether the public had had an adequate opportunity to comment on the study but found it unnecessary to consider whether the Policy Statement should be set aside on that ground:

"Petitioners urge this defect as an independent ground for overturning the Commission. We agree that the study does raise serious questions about the overall rationality and fairness of the Commission's decision. However, because certain broader defects, of which the study is symptomatic, are fatal to the Commission's action, we need not decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*." 197 U. S. App. D. C., at 328, n. 24, 610 F. 2d, at 847, n. 24.

Respondents urge the Court to set aside the Policy Statement because of this alleged procedural error if the Court determines that the Commission's views do not conflict with the Act or the First Amendment. We have considered the submissions of the parties and do not consider the action of the Commission, even if a procedural lapse, to be a sufficient ground for reopening the proceedings before the Commission.

[23] The court observed, as it had in *WEFM*, that because broadcasters rely on advertising revenue they tend to serve persons with large discretionary incomes. 197 U. S. App. D. C., at 332, 610 F. 2d, at 851. The

gated to review format changes whenever there is "strong prima facie evidence that the market has in fact broken down." *Id.*, at 332, 610 F. 2d, at 851. Second, the court stated that the administrative problems posed by the format doctrine were not insurmountable. Hearings would only be required in a small number of cases, and the Commission could cope with problems such as classifying radio format by adopting "a rational classification schema." *Id.*, at 334, 610 F. 2d., at 853. Third, the court observed that the Commission had not demonstrated that the format doctrine would deter innovative programming.[24] Finally, the court explained that it had not directed the Commission to engage in censorship or to impose common carrier obligations on licensees: *WEFM* did not authorize the Commission to interfere with licensee programming choices or to force retention of an existing format; it merely stated that the Commission had the power to consider a station's format in deciding whether license renewal or transfer would be consistent with the public interest. 197 U. S. App. D. C., at 332–333, 610 F. 2d, at 851–852.

Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the Court of Appeals asserted that the format doctrine was "law," not "policy," [25] and was of the view that the Commission had not disproved the factual assumptions underlying the format

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dissenting opinion noted that the Commission had not rejected this assumption. *Id.*, at 341, 610 F. 2d, at 861.

[24] The court stated that the Commission's staff study demonstrated that licensees had continued to develop diverse entertainment formats after the *WEFM* decision.

[25] The court acknowledged that Congress had entrusted to the Commission the task of ensuring that license grants are used in the public interest. Nevertheless, the Commission's position on review of entertainment format changes "could not be sustained even when all due deference was given that construction." 197 U. S. App. D. C., at 336, n. 51, 610 F. 2d, at 855, n. 51.

doctrine.[26] Accordingly, the court declared that the Policy Statement was "unavailing and of no force and effect." *Id.*, at 339, 610 F. 2d, at 858.[27]

II

Rejecting the Commission's reliance on market forces to develop diversity in programming as an unreasonable interpretation of the Act's public-interest standard, the Court of Appeals held that in certain circumstances the Commission is required to regard a change in entertainment format as a substantial and material fact in deciding whether a license renewal or transfer is in the public interest. With all due respect, however, we are unconvinced that the Court of Appeals' format doctrine is compelled by the Act and that the Commission's interpretation of the public-interest standard must therefore be set aside.

It is common ground that the Act does not define the term "public interest, convenience, and necessity."[28] The Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). Although it was declared in *National Broad-*

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[26] The Court of Appeals was not satisfied that the market functioned adequately in every case; nor was it persuaded that the loss of a unique format is comparable to the loss of a favorite station within a particular format.

[27] Two judges dissented, arguing that the Policy Statement should have been upheld, since the Commission had made a reasonable judgment that the format doctrine was unnecessary to further the public interest. A third judge agreed with the dissenters that the majority had not accorded sufficient deference to the Commission's judgment, but concluded that the Commission's order should be vacated so that the record could be reopened to permit public comment on the staff study.

[28] The Act provides in general terms that the Commission shall perform administrative functions "as public convenience, interest, or necessity requires." 47 U. S. C. § 303.

casting Co. v. *United States,* that the goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," 319 U. S., at 217, it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved. The Court accordingly declined to substitute its own views on the best method of encouraging effective use of the radio for the views of the Commission. *Id.,* at 218. Similarly, in *FCC* v. *National Citizens Committee for Broadcasting,* 436 U. S. 775 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment, *id.,* at 795, but emphasized the Commission's broad power to regulate in the public interest. We noted that the Act permits the Commission to promulgate "such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act]," [29] and that this general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *Id.,* at 793.[30] Furthermore, we recognized that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate con-

[29] See 47 U. S. C. § 303 (r), quoted in n. 12, *supra.*

[30] Section 10 (e) of the Administrative Procedure Act provides in part: "The reviewing court shall—

. . . . . .

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

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U. S. C. § 706 (2) (A).

In *FCC* v. *National Citizens Committee for Broadcasting,* we observed that a reviewing court applying this standard "'is not empowered to substitute its judgment for that of the agency.'" 436 U. S., at 803, quoting *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 416 (1971).

clusions is not required since " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " [31]

The Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. The Court of Appeals and the Commission agree that in the vast majority of cases market forces provide sufficient diversity. The Court of Appeals favors Government intervention when there is evidence that market forces have deprived the public of a "unique" format, while the Commission is content to rely on the market, pointing out that in many cases when a station changes its format, other stations will change their formats to attract listeners who preferred the discontinued format. The Court of Appeals places great value on preserving diversity among formats, while the Commission emphasizes the value of intraformat as well as interformat diversity. Finally, the Court of Appeals is convinced that review of format changes would result in a broader range of formats, while the Commission believes that Government intervention is likely to deter innovative programming.

In making these judgments, the Commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from Government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. This decision was in major part based on predictions as to the probable conduct of licensees and the functioning of the broadcasting market and on the Commission's assessment of its capacity to make the determinations required by the format doctrine. The Commission concluded that " '[e]ven after

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[31] *FCC* v. *National Citizens Committee for Broadcasting, supra,* at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1, 29 (1961).

all relevant facts ha[d] been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.'" *Policy Statement,* 60 F. C. C. 2d 858, 865 (1976). It did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission.

Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. See, *e. g., FCC* v. *National Citizens Committee for Broadcasting, supra; FCC* v. *WOKO, Inc.,* 329 U. S. 223, 229 (1946). Furthermore, diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC* v. *National Citizens Committee for Broadcasting, supra,* at 810. The Commission's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. As we see it, the Commission's Policy Statement is in harmony with cases recognizing that the Act seeks to preserve journalistic discretion while promoting the interests of the listening public.[32]

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[32] See, *e. g., FCC* v. *Midwest Video Corp.,* 440 U. S. 689, 705 (1979) (recognizing the "policy of the Act to preserve editorial control of pro-

Relying on *McDaniel*,[20] respondent argues that it must be assumed that no statutory relief is available to him, and that therefore the implication of a private right of action is necessary to effectuate the purpose of Congress in passing the Act. But as the Court's recent opinions have made clear, the question whether a statute creates a private right of action is ultimately "one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979). See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979). In order to determine whether Congress intended to create the private right of action asserted here, we consider three factors set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), that we have "traditionally relied upon in determining legislative intent": the "language and focus of the statute, its legislative history, and its purpose." See *Touche Ross*, 442 U. S., at 575–576. We conclude that each of these factors points to the conclusion that Congress did not intend to create a private right of action in favor of an employee under a contract that does not contain prevailing wage stipulations.[21]

"QUESTION: But you didn't raise that in the 7th Circuit?

"MR. MANN: That's correct.

"QUESTION: Or in the trial court?

"MR. MANN: In the trial court the question of the private right of action per se was raised in the context of the jurisdiction of the court to revise the contract. That is, we didn't really address the issue whether in general there is a private right to enforce a specific clause, but whether there is a private right to obtain the court determination of the fundamental issues of coverage, of classification, of rate, that was the issue

The Policy Statement is also consistent with the legislative history of the Act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming.[33] Similarly, one of the bills submitted prior to passage of the Radio Act of 1927[34] included a provision requiring stations to comply with programming priorities based on subject matter.[35] This provision was eventually deleted since it was considered to border on censorship.[36] Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication."[37] That section was retained in the Communications Act.[38] As we read the legislative history of the

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gramming in the licensee"); *Columbia Broadcasting System, Inc.* v *Democratic National Committee*, 412 U. S. 94, 120 (1973) (discussing the Commission's duty to chart a workable "middle course" to preserve "essentially private broadcast journalism held only broadly accountable to public interest standards").

[33] Congress rejected a proposal to allocate 25% of all radio stations to educational, religious, agricultural, and similar nonprofit associations. See 78 Cong. Rec. 8843–8846 (1934).

[34] 44 Stat. 1162. The Radio Act of 1927 was the predecessor to the Communications Act.

[35] This bill would have required the administrative agency created by the Radio Act of 1927 to prescribe "priorities as to subject matter to be observed by each class of licensed stations." H. R. 7357, 68th Cong., 1st Sess., § 1 (B) (1924).

[36] Hearings on H. R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., 39 (1926).

[37] 44 Stat. 1172–1173. See Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926); H. R. Conf. Rep. No. 1886, 69th Cong., 2d Sess., 16–19 (1927).

[38] Section 326 of the Act provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere

Act, Congress did not unequivocally express its disfavor of entertainment format review by the Commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

In the past we have stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." [39] Prior to 1970, the Commission consistently stated that the choice of programming formats should be left to the licensee.[40] In 1971, the Commission restated that position but announced that any application for license transfer or renewal involving a substantial change in program format would have to be reviewed in light of the Court of Appeals' decision in *Citizens Committee to Preserve the Voice of the Arts in Atlanta,* 141 U. S. App. D. C. 109, 436 F. 2d 267 (1970), in which the Court of Appeals first articulated the format doctrine.[41] In 1973, in a statement accompanying

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with the right of free speech by means of radio communication." 47 U. S. C. § 326.

In *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978), the Court concluded that although this section prohibits the Commission from editing proposed broadcasts in advance, it does not preclude subsequent review of program content *Id.,* at 735, 737.

[39] *Red Lion Broadcasting Co.* v *FCC,* 395 U. S. 367, 381 (1969). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* at 121.

[40] See, *e g., En Banc Programming Inquiry,* 44 F. C. C. 2303, 2308–2309 (1960); *Bay Radio, Inc.,* 22 F. C. C. 1351, 1364 (1957).

[41] *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 F. C. C. 2d 650, 679–680 (1971).

The Commission explained:

"Our view has been that the station's program format is a matter best left to the discretion of the licensee or applicant, since as a matter of public acceptance and economic necessity he will tend to program to meet the

the grant of the transfer application that was later challenged in *WEFM*, a majority of the Commissioners joined in a commitment to "take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." [42] However, the Commission's later Policy Statement concluded that this approach was "neither administratively tenable nor necessary in the public interest." [43] It is thus apparent that although the Commission was obliged to modify its policies to conform to the Court of Appeals' format doctrine, the Policy Statement reasserted the Commission's traditional preference for achieving diversity in entertainment programming through market forces.

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preferences of the area and fill whatever void is left by the programming of other stations." *Id.*, at 679.

The Commission noted that this policy only applied to entertainment programming. "It does not include matters such as an increase in commercial matter or decrease in the amount of non-entertainment programming, both of which are subjects of review and concern, and have been for some time." *Id.*, at 679, n. 15.

The Commission continues to review nonentertainment programming to some degree. In its memorandum opinion denying reconsideration of the Policy Statement, the Commission explained that it has limited its review of programming to preserve licensee discretion in this area:

"To the extent that the Commission exercises some direct control of programming, it is primarily through the fairness doctrine and political broadcasting rules pursuant to Section 315. In both cases the Commission's role is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community. . . . These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day. In contrast, [under the format doctrine] we would be faced with the prospect of rejecting virtually the entire broadcast schedule proposed by the private licensee . . . ." 66 F. C. C. 2d, at 83.

[42] *Zenith Radio Corp.*, 40 F. C. C. 2d 223, 231 (1973) (additional views of Chairman Burch).

[43] *Policy Statement*, 60 F. C. C. 2d, at 866, n. 8.

III

It is contended that rather than carrying out its duty to make a particularized public-interest determination on every application that comes before it, the Commission, by invariably relying on market forces, merely assumes that the public interest will be served by changes in entertainment format. Surely, it is argued, there will be some format changes that will be so detrimental to the public interest that inflexible application of the Commission's Policy Statement would be inconsistent with the Commission's duties. But radio broadcasters are not required to seek permission to make format changes. The issue of past or contemplated entertainment format changes arises in the courses of renewal and transfer proceedings; if such an application is approved, the Commission does not merely assume but affirmatively determines that the requested renewal or transfer will serve the public interest.

Under its present policy, the Commission determines whether a renewal or transfer will serve the public interest without reviewing past or proposed changes in entertainment format. This policy is based on the Commission's judgment that market forces, although they operate imperfectly, not only will more reliably respond to listener preference than would format oversight by the Commission but also will serve the end of increasing diversity in entertainment programming. This Court has approved of the Commission's goal of promoting diversity in radio programming, *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 699 (1979), but the Commission is nevertheless vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it. The Act itself, of course, does not specify how the Commission should make its public-interest determinations.

A major underpinning of its Policy Statement is the Commission's conviction, rooted in its experience, that renewal

and transfer cases should not turn on the Commission's presuming to grasp, measure, and weigh the elusive and difficult factors involved in determining the acceptability of changes in entertainment format. To assess whether the elimination of a particular "unique" entertainment format would serve the public interest, the Commission would have to consider the benefit as well as the detriment that would result from the change. Necessarily, the Commission would take into consideration not only the number of listeners who favor the old and the new programming but also the intensity of their preferences. It would also consider the effect of the format change on diversity within formats as well as on diversity among formats. The Commission is convinced that its judgments in these respects would be subjective in large measure and would only approximately serve the public interest. It is also convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming. Those who would overturn the Commission's Policy Statement do not take adequate account of these considerations.[44]

It is also contended that since the Commission has re-

[44] It is asserted that the Policy Statement violates the Act because it does not contain a "safety valve" procedure. The dissent relies primarily on *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956). In *National Broadcasting Co.* v *United States*, the Court noted that license applicants had been advised by the Commission that they could call to its attention any reason why the challenged chain broadcasting rule should be modified or held inapplicable to their situations. 319 U. S., at 207. In *United States* v. *Storer Broadcasting Co.*, the Court observed that under the Commission's regulations, an applicant who alleged "adequate reasons why the [Multiple Ownership] Rules should be waived or amended" would be granted a hearing. 351 U. S., at 205. In each case the Court considered the validity of the challenged rules in light of the flexibility provided by the procedures However, it did not hold that the Commission may never adopt a rule that lacks a waiver provision.

sponded to listener complaints about nonentertainment programming, it should also review challenged changes in entertainment formats.[45] But the difference between the Commission's treatment of nonentertainment programming and its treatment of entertainment programming is not as pronounced as it may seem. Even in the area of nonentertainment programming, the Commission has afforded licensees broad discretion in selecting programs. Thus, the Commission has stated that "a substantial and material question of fact [requiring an evidentiary hearing] is raised *only* when it appears that the licensee has abused its broad discretion by acting unreasonably or in bad faith." *Mississippi Authority for Educational TV*, 71 F. C. C. 2d 1296, 1308 (1979). Furthermore, we note that the Commission has recently reexamined its regulation of commercial radio broadcasting in light of changes in the structure of the radio industry. See *Notice of Inquiry and Proposed Rulemaking, In the Matter of Deregulation of Radio*, 73 F. C. C. 2d 457 (1979). As a result of that re-examination, it has eliminated rules requiring maintenance of comprehensive program logs, guidelines on

[45] The Commission in the past has sought to promote "balanced" radio programming, but these efforts did not involve Commission review of changes in entertainment format. For example, in the *En Banc Programming Inquiry*, 44 F. C. C. 2303 (1960), relied on by the dissent, the Commission identified 14 types of programming that it considered "major elements usually necessary to meet the public interest." *Id*, at 2314. One of these categories was "entertainment programs." The Commission suggested only that a licensee should usually provide some entertainment programming: it did not require licensees to provide specific types of entertainment programming. Moreover, the Commission emphasized that a licensee is afforded broad discretion in determining what programs should be offered to the public:

"The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee." *Ibid.*

the amount of nonentertainment programming radio stations must offer, formal requirements governing ascertainment of community needs, and guidelines limiting commercial time. See *Deregulation of Radio,* 46 Fed. Reg. 13888 (1981) (to be codified at 47 CFR Parts 0 and 73).

These cases do not require us to consider whether the Commission's present or past policies in the area of nonentertainment programming comply with the Act. We attach some weight to the fact that the Commission has consistently expressed a preference for promoting diversity in entertainment programming through market forces, but our decision ultimately rests on our conclusion that the Commission has provided a reasonable explanation for this preference in its Policy Statement.

We decline to overturn the Commission's Policy Statement, which prefers reliance on market forces to its own attempt to oversee format changes at the behest of disaffected listeners. Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully. As we stated in *National Broadcasting Co.* v. *United States:*

> "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." 319 U. S., at 225.

IV

Respondents contend that the Court of Appeals' judgment should be affirmed because, even if not violative of the Act, the Policy Statement conflicts with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390 (1969). *Red Lion* held that the Commission's "fairness doctrine" was consistent with the public-interest standard of the Communica-

tions Act and did not violate the First Amendment, but rather enhanced First Amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public." *Id.*, at 385. Although observing that the interests of the people as a whole were promoted by debate of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs. The Commission seeks to further the interests of the listening public as a whole by relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners.[46] This policy does not conflict with the First Amendment.[47]

Contrary to the judgment of the Court of Appeals, the Commission's Policy Statement is not inconsistent with the Act. It is also a constitutionally permissible means of implementing the public-interest standard of the Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Under §§ 309 (a) and 310 (d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*

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[46] Respondents place particular emphasis on the role of foreign language programming in providing information to non-English-speaking citizens. However, the Policy Statement only applies to entertainment programming. It does not address the broadcaster's obligation to respond to community needs in the area of informational programming. See Tr of Oral Arg 81 (remarks of counsel for the Commission).

[47] Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973) (the First Amendment does not require the Commission to adopt a "fairness doctrine" with respect to paid editorial advertisements).

(Act), the Federal Communications Commission (Commission) may not approve an application for a radio license transfer, assignment, or renewal unless it finds that such change will serve "the public interest, convenience, and necessity." [1] Any party in interest may petition the Commission to deny the application, § 309 (d)(1), and the Commission must hold a hearing if "a substantial and material question of fact is presented," § 309 (d)(2). In my judgment, the Court of Appeals correctly held that in certain limited circumstances, the Commission may be obliged to hold a hearing to consider whether a proposed change in a licensee's entertainment program format is in the "public interest." [2] Accordingly, I would affirm the judgment of the Court of Appeals insofar as it vacated the Commission's "Policy Statement." [3]

I

At the outset, I should point out that my understanding of the Court of Appeals' format cases is very different from the Commission's.[4] Both in its Policy Statement and in its brief before this Court, the Commission has insisted that the format doctrine espoused by the Court of Appeals "favor[s] a system of pervasive governmental regulation," [5] requiring " 'comprehensive, discriminating, and continuing state surveil-

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[1] The pertinent portions of 47 U. S. C. §§ 309 (a) and 310 (d) are quoted in the majority opinion, *ante*, at 584–585, n. 2.

[2] I will follow the majority, see *ante*, at 586, n. 4, in referring to a broadcaster's change in entertainment programming as a format change.

[3] *Memorandum Opinion and Order*, 60 F. C. C. 2d 858 (1976) (*Policy Statement*), reconsideration denied, 66 F. C. C. 2d 78 (1977) (*Denial of Reconsideration*).

[4] The opinion of the Court traces the development of the Court of Appeals' "format doctrine" and the Commission's "Policy Statement," see *ante*, at 586–593. I will not repeat that discussion here.

[5] *Notice of Inquiry, Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F. C. C. 2d 580, 582 (1976) (*Notice of Inquiry*).

lance.' " [6] The Commission further contends that enforcement of the format doctrine would impose "common carrier" obligations on broadcasters and substitute for "the imperfect system of free competition . . . a system of broadcast programming by government decree." [7] Were this an accurate description of the format doctrine I would join the Court in reversing the judgment below.[8] However, I agree with the Court of Appeals that "the actual features of [its format doctrine] are scarcely visible in [the Commission's] highly-colored portrait." 197 U. S. App. D. C. 319, 332, 610 F. 2d 838, 851 (1979).

In fact, the Court of Appeals accepted the Commission's conclusion that entertainment program formats should ordinarily be left to competitive forces. The court emphasized that the format doctrine "was *not* intended as an alternative to format allocation by market forces," and "fully recognized that market forces do generally provide diversification of formats." *Ibid.* (Emphasis in original.) It explained that "the Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down," *ibid.*, and suggested that a breakdown in the market may be inferred when notice of a format change "precipitate[s] an outpouring of protest," *id.*, at 323, 610 F. 2d, at 842, or "significant public grumbling," *ibid.* The Court of Appeals further stated that "[n]o public interest issue is raised if (1) there is an adequate substitute in the service area for the format being abandoned, (2) there

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[6] *Policy Statement, supra,* at 865 (quoting *Lemon* v. *Kurtzman,* 403 U. S. 602, 619–620 (1971)).

[7] *Denial of Reconsideration, supra,* at 81.

[8] Even the Court of Appeals agreed that "[t]here would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance, dictated programming choices, forced broad access obligations, or imposed an obligation to continue in service under any and all circumstances." 197 U. S. App. D. C. 319, 331–332, 610 F. 2d 838, 850–851 (1979).

is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable." *Id.*, at 332, 610 F. 2d, at 851. Finally, the Court of Appeals indicated that the Commission's obligation to hold an evidentiary hearing is limited to those situations in which the record presents substantial questions of material fact. *Id.*, at 324, 610 F. 2d, at 843.

The Court of Appeals thus made clear that the format doctrine comes into play only in a few limited situations. Consequently, the issue presented by these cases is not whether the Commission may adopt a general policy of relying on licensee discretion and market forces to ensure diversity in entertainment programming formats. Rather, the question before us is whether the Commission may apply its general policy on format changes indiscriminately and without regard to the effect in particular cases.

II

Although the Act does not define "public interest, convenience, and necessity," it is difficult to quarrel with the basic premise of the Court of Appeals' format cases that the term includes "a concern for diverse entertainment programming." *Id.*, at 323, 610 F. 2d, at 842.[9] This Court has indicated that one of the Act's goals is "to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217 (1943).[10]

[9] See D. Ginsburg, Regulation of Radio Broadcasting 294 (1979) ("An argument against the desirability of 'diversity' in broadcast programming is difficult to imagine"). See generally Note, A Regulatory Approach to Diversifying Commercial Television Entertainment, 89 Yale L. J. 694 (1980).

[10] Section 303 (g) of the Act, 47 U. S. C. § 303 (g), directs the Commission to "encourage the larger and more effective use of radio in the public interest."

And we have recognized "the long-established regulatory goals of . . . diversification of programming." *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 699 (1979). At the same time, our cases have acknowledged that the Commission enjoys broad discretion in determining how best to accomplish this goal. See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775 (1978); *National Broadcasting Co.* v. *United States, supra.* The Commission has concluded that a general policy of relying on market forces is the best method for promoting diversity in entertainment programming formats. As the majority notes, *ante,* at 595, this determination largely rests on the Commission's predictions about licensee behavior and the functioning of the radio broadcasting market.

I agree with the majority that predictions of this sort are within the Commission's institutional competence. I am also willing to assume that a general policy of disregarding format changes in making the "public interest" determination required by the Act is not inconsistent with the Commission's statutory obligation to give individualized consideration to each application. The Commission has broad rulemaking powers under the Act,[11] and we have approved efforts by the Commission to implement the Act's "public interest" requirement through rules and policies of general application. See, *e. g.*, *FCC* v. *National Citizens Committee for Broadcasting, supra; United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956); *National Broadcasting Co.* v. *United States, supra.*

The problem with the particular Policy Statement challenged here, however, is that it lacks the flexibility we have required of such general regulations and policies. See, *e. g.*, *United States* v. *Storer Broadcasting Co., supra; National*

[11] The Commission is authorized to promulgate "such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." 47 U. S. C. § 303 (r).

Broadcasting Co. v. *United States, supra.* The Act imposes an affirmative duty on the Commission to make a particularized "public interest" determination for each application that comes before it. As we explained in *National Broadcasting Co.* v. *United States, supra,* at 225, the Commission must, in each case, "exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" The Policy Statement completely forecloses any possibility that the Commission will re-examine the validity of its general policy on format changes as it applies to particular situations. Thus, even when it can be conclusively demonstrated that a particular radio market does not function in the manner predicted by the Commission, the Policy Statement indicates that the Commission will blindly assume that a proposed format change is in the "public interest." This result would occur even where reliance on the market to ensure format diversity is shown to be misplaced, and where it thus appears that action by the Commission is necessary to promote the public interest in diversity. This outcome is not consistent with the Commission's statutory responsibilities.

Moreover, our cases have indicated that an agency's discretion to proceed in complex areas through general rules is intimately connected to the existence of a "safety valve" procedure that allows the agency to consider applications for exemptions based on special circumstances. See *E. I. du Pont de Nemours & Co.* v. *Train,* 430 U. S. 112, 128 (1977); *Permian Basin Area Rate Cases,* 390 U. S. 747, 771–772 (1968); *FPC* v. *Texaco Inc.,* 377 U. S. 33, 40–41 (1964); *United States* v. *Storer Broadcasting Co., supra,* at 204–205; *National Broadcasting Co.* v. *United States, supra,* at 207, 225. See also *WAIT Radio* v. *FCC,* 135 U. S. App. D. C. 317, 321, 418 F. 2d 1153, 1157 (1969); *American Airlines* v. *CAB,* 123 U. S. App. D. C. 310, 359 F. 2d 624 (en banc), cert. denied, 385 U. S. 843 (1966); *WBEN, Inc.* v. *United States,* 396 F. 2d 601, 618 (CA2), cert. denied, 393 U. S. 914 (1968).

For example, in *National Broadcasting Co.* v. *United States*, *supra*, we upheld the Commission's Chain Broadcasting Regulations, but we emphasized the need for flexibility in administering the rules. We noted that the "Commission provided that 'networks will be given full opportunity, on proper application . . . to call our attention to any reasons why the principle should be modified or held inapplicable.' " *Id.*, at 207. And we concluded:

> "The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.*, at 225.

Similarly, in upholding the Commission's Multiple Ownership Rules in *United States* v. *Storer Broadcasting Co.*, *supra*, we noted that the regulations allowed an opportunity for a "full hearing" for applicants "that set out adequate reasons why the Rules should be waived or amended." *Id.*, at 205.[12]

[12] The majority argues, *ante*, at 601, n. 44, that although the Court considered the presence of a "safety valve" procedure in upholding the rules challenged in *National Broadcasting Co.* v. *United States* and *United States* v. *Storer Broadcasting Co.*, the Court "did not hold that the Commission may never adopt a rule that lacks a waiver provision." Since this general question was not before the Court in those cases, it is hardly surprising that it did not render an advisory opinion to this effect. What is instructive, however, is the majority's inability to explain why a waiver provision was necessary in those cases, but is not required in the instant situation. As the cases cited in text make clear, this Court and the lower federal courts have insisted on a "safety valve" feature in upholding general rules promulgated by a variety of agencies. I believe it is incumbent on those who would depart from this practice to explain their reasoning.

This "safety valve" feature is particularly essential where, as here, the agency's decision that a general policy promotes the public interest is based on predictions and forecasts that by definition lack complete factual support. As the Court of Appeals admonished the Commission in a related context:

> "The Commission is charged with administration in the 'public interest.' That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases. A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for a waiver of the rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest." *WAIT Radio* v. *FCC, supra,* at 321, 418 F. 2d, at 1157.

In my judgment, this requirement of flexibility compels the Commission to provide a procedure through which listeners can attempt to show that a particular radio market differs from the Commission's paradigm, and thereby persuade the Commission to give particularized consideration to a proposed format change. Indeed, until the Policy Statement was published, the Commission had resolved to "take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." [13] As I see it, the Court of Appeals' format doctrine was merely an attempt by that court to de-

[13] *Zenith Radio Corp*, 40 F. C. C. 2d 223, 231 (1973) (additional views of Chairman Burch) (joined by a majority of the Commissioners).

lineate the circumstances in which the Commission must temper its general policy in view of special circumstances. Perhaps the court would have been better advised to leave the task of defining these situations to the Commission.[14] But one need not endorse every feature of the Court of Appeals' approach to conclude that the court correctly invalidated the Commission's Policy Statement because of its omission of a "safety valve" procedure.

This omission is not only a departure from legal precedents; it is also a departure both from the Commission's consistent policies and its admissions here. For the Commission concedes that the radio market is an imperfect reflection of listener preferences,[15] and that listeners have programming interests that may not be reflected in the marketplace. The Commission has long recognized its obligation to examine program formats in making the "public interest" determination required by the Act. As early as 1929, the Commission's predecessor, the Federal Radio Commission, adopted the position that licensees were expected to provide a balanced program schedule designed to serve all substantial groups in their communities. *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 34, rev'd on other grounds, 37 F. 2d 993, cert. dism'd, 281 U. S. 706 (1929). The Commission's famous "Blue Book," [16] published in 1946, reaffirmed the emphasis on a well-balanced program structure and declared that the Commission has "an affirmative duty, in its public interest determinations, to give full consideration to program service." [17] As the Commission explained:

> "It has long been an established policy of broadcasters themselves and of the Commission that the American

[14] Confronted as it was by the Commission's resistance to its format doctrine, it is easy to understand why the Court of Appeals felt compelled to undertake this task.

[15] *Policy Statement*, 60 F. C. C. 2d, at 863.

[16] Public Service Responsibility of Broadcast Licensees (1946).

[17] *Id.*, at 12.

> system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time." [18]

This theme was reiterated in the Commission's 1960 Program Statement,[19] which set forth 14 specific categories of programming that were deemed "major elements usually necessary to meet the public interest, needs and desires of the community," [20] and which emphasized the necessity of each broadcaster's programming serving the "tastes and needs" of its local community.[21] To ensure that licensee programming serves the needs of the community, the Commission has, for example, decreed that licensees have a special obligation to provide programs for children, even going so far as to declare that licensees must provide "a reasonable amount of [children's] programming which is designed to educate and inform—and not simply to entertain." [22]

Moreover, in examining renewal applications, the Commission has considered claims that a licensee does not provide adequate children's programming,[23] or programming for women and children,[24] or for a substantial Spanish-American community,[25] or that the licensee has ignored issues of significance to the Negro community,[26] or has not provided programming of specific interest to residents of a particular

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[18] *Id.*, at 15.

[19] *En Banc Programming Inquiry*, 44 F. C. C. 2303 (1960).

[20] *Id.*, at 2314

[21] *Id.*, at 2312.

[22] *Children's Television Report and Policy Statement*, 50 F. C. C. 2d 1, 6 (1974).

[23] *Channel 20, Inc*, 70 F. C. C. 2d 1770 (1979).

[24] *Community Television of Southern California*, 72 F. C. C. 2d 349 (1979)

[25] *Central California Communications Corp.*, 70 F. C. C. 2d 1947 (1979).

[26] *Mississippi Authority for Educational TV*, 71 F. C. C. 2d 1296 (1979); *Alabama Educational Television Comm'n*, 33 F. C. C. 2d 495 (1971), renewal denied, 50 F. C. C. 2d 461 (1975).

area.[27] In each case, the Commission reviewed submissions ranging from general summaries to transcripts of programs, to determine whether the licensee's programming met the public-interest standard.

There is an obvious inconsistency between the Commission's recognition that the "public interest" standard requires it to consider licensee programming in the situations described above and its Policy Statement on review of entertainment program formats. Indeed, the sole instance in which the Commission will not consider listener complaints about programming is when they pertain to proposed changes in entertainment program formats. The Policy Statement attempts to explain this exceptional treatment of format changes by drawing a distinction between entertainment and nonentertainment programming. The Policy Statement suggests that the Commission reviews only nonentertainment programming, and even then, only in special circumstances. Thus, the Policy Statement argues that the fairness doctrine and political broadcasting rules issued pursuant to § 315, 47 U. S. C. § 315, allow the Commission to exercise direct con-

[27] *Educational Broadcasting Corp.*, 70 F. C. C. 2d 2204 (1979).

As the majority notes, *ante*, at 602–603, the Commission recently voted to reduce its role in regulating several aspects of commercial radio broadcasting, including regulation of nonentertainment programming Thus, the Commission has announced its intention of eliminating its current guideline on the amounts of nonentertainment programming that radio stations should air. And the Commission has indicated that petitions to deny license renewals based on only the quantity of a licensee's nonentertainment programming will no longer be sufficient to support a challenge. For example, a petitioner would have to show that a licensee is doing little or no programming responsive to community issues in order to successfully challenge renewal of the license. Nonetheless, the Commission reiterated that nonentertainment programming is still a relevant issue for petitions to deny, that licensees have an obligation to offer nonentertainment programming addressing issues facing the community, and that the Commission will continue to inquire into the reasonableness of licensee programming decisions. See *Deregulation of Radio*, 46 Fed. Reg. 13888, 13890–13897 (1981) (to be codified at 47 CFR Parts 0 and 73).

trol of programming. In these areas, reasons the Statement, the Commission's role "is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community." [28] This "limited involvement in licensee decisionmaking in the area of news and public affairs" [29] is contrasted, in the Commission's view, to "the pervasive, censorial nature of the involvement in format regulation." [30] The majority presumably concludes that the Commission has provided a rational explanation for distinguishing between entertainment and nonentertainment programming. With all due respect, I disagree.

In the first place, the distinction the Commission tries to draw between entertainment and nonentertainment programming is questionable. It is not immediately apparent, for example, why children's programming necessarily falls on the "nonentertainment" side of the spectrum, and the Commission has provided no explanation of how it decides the category to which particular programming belongs. Second, I see no reason why the Commission's review of entertainment programming cannot be as limited as its review of nonentertainment programming. Nothing prevents the Commission from limiting its role in reviewing format changes to "directing the licensee to broadcast additional material," thereby ensuring that the viewpoints of listeners who complain about a proposed format change are not completely ignored. Third, and most important, neither the fairness doctrine nor the political broadcasting rules have anything to do with the various situations described above in which the Commission has not hesitated to consider program formats in making the "public interest" determination. The fairness doctrine imposes an obligation on licensees to devote a "reasonable per-

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[28] *Denial of Reconsideration,* 66 F. C. C. 2d, at 83 (emphasis in original).

[29] *Ibid.*

[30] *Ibid.*

centage" of broadcast time to controversial issues of public importance, and it requires that the coverage be fair in that it accurately reflect the opposing views. See *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969). The political broadcasting rules regulate broadcasts by candidates for federal and nonfederal public office. See *The Law of Political Broadcasting and Cablecasting,* 69 F. C. C. 2d 2209 (1978). The Commission's examination of whether a broadcaster's format includes programming directed at women or at residents of the local community, or its requirement that licensees provide programming designed to serve the unique needs of children, simply has nothing to do with either the fairness doctrine or the political broadcasting rules. Thus, the Commission's purported justification for its inconsistency is no explanation at all, and I am puzzled by the majority's apparent conclusion that it provides a rational basis for the Commission's policy.

The majority attempts to minimize the inconsistency in the Commission's treatment of entertainment and nonentertainment programming by postulating that the difference "is not as pronounced as it may seem," *ante,* at 602. This observation, even if accurate, is simply beside the point. What is germane is the Commission's failure to consider listener complaints about entertainment programming to the same extent and in the same manner as it reviews complaints about nonentertainment programming. Thus, whereas the Commission will hold an evidentiary hearing to review complaints about nonentertainment programming where " 'it appears that the licensee has . . . act[ed] unreasonably or in bad faith,' " *ibid.* (quoting *Mississippi Authority for Educational TV,* 71 F. C. C. 2d 1296, 1308 (1979)), the Commission will not consider an identical complaint about a licensee's change in its entertainment programming. As I have indicated, see *supra,* at 614–616, neither the Commission nor the majority is able to offer a satisfactory explanation for this inconsistency.

Nor can the Commission find refuge in its claim that "'[e]ven after all relevant facts [h]ad been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.'" *Policy Statement*, 60 F. C. C. 2d 858, 865 (1976), quoting *Notice of Inquiry*, 57 F. C. C. 2d 580, 586 (1976). The same must be true of the decisions the Commission makes after reviewing listener complaints about nonentertainment programming, and I do not see why the Commission finds this result acceptable in one situation but not in the other. Much the same can be said for the majority's suggestion that the Commission should be spared the burden of "presuming to grasp, measure and weigh . . . elusive and difficult factors" such as determining the number of listeners who favor a particular change and measuring the intensity of their preferences, *ante*, at 601. But insofar as the Commission confronts these same "elusive and difficult factors" in reviewing nonentertainment programming, it need only apply the expertise it has acquired in dealing with these problems to review of entertainment programming.

III

Since I agree with the Court of Appeals that there may be situations in which the Commission is obliged to consider format changes in making the "public interest" determination mandated by the Act, it seems appropriate to comment briefly on the Commission's claim that the "'acute practical problem[s]' inherent in format regulation render entirely speculative any benefits that such regulation might produce."[31] One of the principal reasons given in the Policy Statement for rejecting entertainment format regulation is that it would be "administratively a fearful and comprehen-

[31] Brief for Federal Communications Commission and United States 35.

sive nightmare," [32] that would impose "enormous costs on the participants and the Commission alike." [33] But at oral argument before the Court of Appeals, Commission counsel conceded that the " 'administrative nightmare' " argument was an " 'exaggeration' " which was not " 'very significant at all' " to the Commission's ultimate conclusion. 197 U. S. App. D. C., at 330, 610 F. 2d, at 849. The Commission's reliance on claims that its own counsel later concedes to lack merit hardly strengthens one's belief in the rationality of its decisionmaking.

Although it has abandoned the "administrative nightmare" argument before this Court, the Commission nonetheless finds other "intractable" administrative problems in format regulation. For example, it insists that meaningful classification of radio broadcasts into format types is impractical, and that it is impossible to determine whether a proposed format change is in the public interest because the intensity of listener preferences cannot be measured.[34] Moreover, the Commission argues that format regulation will discourage licensee innovation and experimentation with formats, and that its effect on format diversity will therefore be counterproductive.

None of these claims has merit. Broadcasters have operated under the format doctrine during the past 10 years, yet the Commission is unable to show that there has been no innovation and experimentation with formats during this period. Indeed, a Commission staff study on the effectiveness of market allocation of formats indicates that licensees have been aggressive in developing diverse entertainment formats under the format-doctrine regime.[35] This "evidence"—

[32] *Policy Statement*, 60 F. C. C. 2d, at 865.

[33] *Id.*, at 864.

[34] The Commission also insists that any findings about the financial viability of a particular format would be entirely speculative.

[35] See *Policy Statement*, *supra*, at 873–881.

a welcome contrast to the Commission's speculation—undermines the Commission's claim that format regulation will disserve the "public interest" because it will inhibit format diversity.

The Commission's claim that it is impossible to classify formats, is largely overcome by the Court of Appeals' suggestion that the Commission could develop "a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational." [36] 197 U. S. App. D. C., at 334, 610 F. 2d, at 853. Even more telling is the staff study relied on by the Commission to show that there is broad format diversity in major radio markets, for the study used a format classification based on industry practice.[37] As the Court of Appeals noted, it is somewhat ironic that the Commission had no trouble "endorsing the validity of a study largely premised on classifications it claims are impossible to make." *Ibid.*[38] To be sure, courts do not sit to second-guess the as-

[36] There have been a number of comments and suggestions about how the Commission might best accomplish this task. See, *e. g.*, 57 F. C. C. 2d, at 587–589 (concurring statement of Commissioner Hooks); D. Ginsburg, *supra* n. 9, at 316; Note, Judicial Review of FCC Program Diversity Regulation, 75 Colum. L. Rev. 401, 436–437 (1975).

The Court of Appeals suggested that the Commission could consider an alternative approach of "dispensing altogether with the need for classifying formats by simply taking the existence of significant and bona fide listener protest as sufficient evidence that the station's endangered programming has certain unique features for which there are no ready substitutes." 197 U. S. App. D. C., at 334, n. 47, 610 F. 2d, at 853, n. 47. The court indicated that "this approach would focus attention on the essentials of the format doctrine, namely, that when a significant sector of the populace is aggrieved by a planned programming change, this fact raises a legitimate question as to whether the proposed change is in the public interest." *Id.*, at 334–335, n. 47, 610 F. 2d, at 853–854, n. 47.

[37] See *Policy Statement, supra,* at 875–880.

[38] Nor do I find merit in the Commission's claim that there are serious First Amendment problems with format regulation. In the first place, I see no reason to find constitutional defect in limited review of entertainment formats when no such defect arises with review of nonentertainment

sessments of specialized agencies like the Commission. But where, as here, the agency's position rests on speculations that are refuted by the agency's own administrative record, I am not persuaded that deference is due.[39]

IV

The Commission's Policy Statement is defective because it lacks a "safety valve" procedure that would allow the necessary flexibility in the application of the Commission's general policy on format changes to particular cases. In my judgment, the Court of Appeals' format doctrine was a permissible attempt by that court to provide the Commission with some guidance regarding the types of situations in which a re-examination of general policy might be necessary. Even if one were to conclude that the Court of Appeals described these situations too specifically, a view I do not share, I still think that the Court of Appeals correctly held that the Commission's Policy Statement must be vacated.

I respectfully dissent.

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programming. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 395 (1969), we held that the Commission does not transgress the First Amendment "in interesting itself in general program format and the kinds of programs broadcast by licensees." Indeed, First Amendment principles, if anything, would support format review as requested by listeners, for as we indicated in *Red Lion* "[i]t is the [First Amendment] right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*, at 390.

[39] All this suggests that the "practical difficulties" the Commission has identified are not intractable, and that these problems could be solved if the Commission channelled as much energy into devising workable standards as it has devoted to mischaracterizing the Court of Appeals' format doctrine.

Syllabus

SAN DIEGO GAS & ELECTRIC CO. *v.* CITY OF SAN DIEGO ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 79–678. Argued December 1, 1980—Decided March 24, 1981

Appellant owns land in appellee city that when purchased as a possible site for a nuclear power plant was mostly zoned for industrial or agricultural use The city rezoned parts of the property, reducing the acreage for industrial use, and also established an open-space plan that included appellant's property and proposed that the city acquire the property to preserve it as a parkland. A bond issue to provide funds for this acquisition was not approved by the voters, and the property remained in appellant's hands, subject to the new zoning ordinance and the open-space plan. Thereafter, appellant brought an action in California Superior Court, alleging that the city had taken its property without just compensation in violation of the Federal and State Constitutions on the theory that the city had deprived it of the beneficial use of the property through the rezoning and adoption of the open-space plan. Appellant sought damages for inverse condemnation, as well as mandamus and declaratory relief. The Superior Court awarded damages but dismissed the mandamus claim, and the California Court of Appeal affirmed The California Supreme Court vacated the Court of Appeal's judgment and retransferred the case to that court for reconsideration in light of the intervening holding in *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, aff'd on other grounds, 447 U S. 255, that an owner deprived of the beneficial use of his land by a zoning regulation is not entitled to damages for inverse condemnation but that his exclusive remedy is invalidation of the regulation in an action for mandamus or declaratory relief. On reconsideration, the Court of Appeal then reversed the Superior Court's judgment, holding that appellant could not recover compensation through inverse condemnation and that, because the record presented factual disputes not covered by the trial court, mandamus and declaratory relief would be available if appellant desired to retry the case. The California Supreme Court denied further review. Appellant appealed to this Court, claiming that the Fifth and Fourteenth Amendments required that compensation be paid whenever private property is taken for public use.

Held: Since 28 U. S. C. § 1257 permits this Court to review only "[f]inal

judgments or decrees" of a state court, the appeal must be dismissed because of the absence of a final judgment. While the Court of Appeal decided that monetary compensation is not an appropriate remedy, it did not decide whether any other remedy is available because it has not decided whether any taking, in fact, occurred but appeared to have contemplated further proceedings in the trial court on remand to resolve the disputed factual issues Pp. 631–633.

Appeal dismissed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 633 BRENNAN, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined, *post*, p. 636.

Louis E. Goebel argued the cause for appellant. With him on the briefs were *Gordon Pearce* and *Guenter S. Cohn.*

C. Alan Sumption argued the cause for appellees. With him on the brief was *John W. Witt.**

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*Briefs of *amici curiae* urging reversal were filed by *Gus Bauman* for the National Association of Home Builders et al.; by *Gideon Kanner, Thomas J. Houser,* and *Janice S. Amundson* for the National Association of Manufacturers of the United States of America; by *Richard S. Wasserstrom* for the National Forest Products Association; by *Ronald A Zumbrun* and *Thomas E. Hookano* for the San Diego Urban League, Inc.; and by *Daniel J. Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Elinor Hadley Stillman, J Vance Hughes, Ann P Gailis,* and *E. Robert Wright* for the United States; by *J. D. MacFarlane,* Attorney General of Colorado, and *Marshall D Brodsky,* Assistant Attorney General; *Richard S. Gebelein,* Attorney General of Delaware, *Regina M. Small,* State Solicitor, and *June D. McArtor,* Deputy Attorney General; *Wayne Minami,* Attorney General of Hawaii; *Tyrone C. Fahner,* Attorney General of Illinois, and *George W. Wolff,* Assistant Attorney General; *William J Guste, Jr.,* Attorney General of Louisiana, and *Gary Keyser,* Assistant Attorney General; *Richard S Cohen,* Attorney General of Maine, and *Cabanne Howard,* Assistant Attorney General; *Stephen H. Sachs,* Attorney General of Maryland, and *Paul F. Strain* and *Thomas A. Deming,* Deputy Attorneys General; *Francis X. Bellotti,* Attorney General of Massachu-

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellant San Diego Gas & Electric Company, a California corporation, asks this Court to rule that a State must provide a monetary remedy to a landowner whose property allegedly has been "taken" by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment.[1] This question was left open last Term in *Agins* v. *City of Tiburon*, 447 U. S. 255, 263 (1980). Because we conclude that we lack jurisdiction in this case, we again must leave the issue undecided.

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setts, and *Stephen M Leonard*, Assistant Attorney General; *Warren Spannaus*, Attorney General of Minnesota, and *Kent Harbison*, Special Assistant Attorney General, *Richard H. Bryan*, Attorney General of Nevada, and *Stephen C. Balkenbush*, Deputy Attorney General; *Robert Abrams*, Attorney General of New York; *William J. Brown*, Attorney General of Ohio, and *Colleen Nissl*, Assistant Attorney General; *John M. Brown*, Attorney General of Oregon, *John R. McCulloch, Jr.*, Solicitor General, and *William F. Gary*, Deputy Solicitor General; *M. Jerome Diamond*, Attorney General of Vermont, and *Benson D. Scotch*, Assistant Attorney General; *Slade Gorton*, Attorney General of Washington, and *Charles B. Roe, Jr.*, Senior Assistant Attorney General; *Bronson C. La Follette*, Attorney General of Wisconsin, and *Linda Bochert*, Assistant Attorney General, for the State of Colorado et al.; by *John J. Degnan*, Attorney General, *Stephen Skillman*, Assistant Attorney General, and *Deborah T. Poritz*, and *Richard M. Hluchan*, Deputy Attorneys General, for the State of New Jersey; by *John H. Larson* and *Paul T. Hanson* for the County of Los Angeles; by *Robert J. Logan* for the City of San Jose, California, et al ; by *E. Clement Shute, Jr.*, for the California Coastal Commission et al.; by *David Bonderman, Christopher J. Duerksen*, and *Antonio Rossmann* for the Conservation Foundation et al.; and by *Peter Van N. Lockwood* and *Edward P. Thompson, Jr.*, for the National Trust for Historic Preservation et al.

[1] "[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment's prohibition applies against the States through the Fourteenth Amendment. *Chicago, B., & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239 (1897); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 160 (1980).

I

Appellant owns a 412-acre parcel of land in Sorrento Valley, an area in the northwest part of the city of San Diego, Cal. It assembled and acquired the acreage in 1966, at a cost of about $1,770,000, as a possible site for a nuclear power plant to be constructed in the 1980's. Approximately 214 acres of the parcel lie within or near an estuary known as the Los Penasquitos Lagoon.[2] These acres are low-lying land which serves as a drainage basin for three river systems. About a third of the land is subject to tidal action from the nearby Pacific Ocean. The 214 acres are unimproved, except for sewer and utility lines.[3]

When appellant acquired the 214 acres, most of the land was zoned either for industrial use or in an agricultural "holding" category.[4] The city's master plan, adopted in 1967, designated nearly all the area for industrial use.

Several events that occurred in 1973 gave rise to this litigation. First, the San Diego City Council rezoned parts of the property. It changed 39 acres from industrial to agricultural, and increased the minimum lot size in some of the agricultural areas from 1 acre to 10 acres. The Council

[2] Appellant claims that only the 214 acres have been taken by the city of San Diego. Throughout this opinion, "the property" and any similar phrase refers to this smaller portion of the 412 acres owned by appellant.

[3] Apparently other portions of the 412-acre parcel have been developed to some extent, and some parts sold.

[4] The city had classified 116 acres as M–1A (industrial) and 112 acres as A–1–1 (agricultural). The latter classification was reserved for "undeveloped areas not yet ready for urbanization and awaiting development, those areas where agricultural usage may be reasonably expected to persist or areas designated as open space in the general plan." San Diego Ordinance No. 8706 (New Series) § 101.0404 (1962), reproduced in Brief for Appellees C–1. A small amount of the land was zoned for residential development. (These figures total more than 214 acres. When the California courts described the zoning of the property, they did not distinguish between the 214 acres that allegedly were taken and 15 other acres that the trial court found had been damaged by the severance.)

recommended, however, that 50 acres of the agricultural land be considered for industrial development upon the submission of specific development plans.

Second, the city, pursuant to Cal. Gov't Code Ann. § 65563 (West Supp. 1981), established an open-space plan. This statute required each California city and county to adopt a plan "for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction." The plan adopted by the city of San Diego placed appellant's property among the city's open-space areas, which it defined as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." App. 159. The plan acknowledged appellant's intention to construct a nuclear power plant on the property, stating that such a plant would not necessarily be incompatible with the open-space designation.[5] The plan proposed, however, that the city acquire the property to preserve it as parkland.

Third, the City Council proposed a bond issue in order to obtain funds to acquire open-space lands. The Council identified appellant's land as among those properties to be acquired with the proceeds of the bond issue. The proposition, however, failed to win the voters' approval. The open-space plan has remained in effect, but the city has made no attempt to acquire appellant's property.

On August 15, 1974, appellant instituted this action in the Superior Court for the County of San Diego against the city and a number of its officials. It alleged that the city had

[5] The portion of the plan that discussed the Los Penasquitos Lagoon area stated: "[T]he San Diego Gas & Electric Company has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. . [S]uch a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem, however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality." App. 160.

taken its property without just compensation, in violation of the Constitutions of the United States and California. Appellant's theory was that the city had deprived it of the entire beneficial use of the property through the rezoning and the adoption of the open-space plan. It alleged that the city followed a policy of refusing to approve any development that was inconsistent with the plan, and that the only beneficial use of the property was as an industrial park, a use that would be inconsistent with the open-space designation.[6] The city disputed this allegation, arguing that appellant had never asked its approval for any development plan for the property. It also contended that, as a charter city, it was not bound by the open-space plan, even if appellant's proposed development would be inconsistent with the plan, citing Cal. Gov't Code Ann. §§ 65700, 65803 (West 1966 and Supp. 1981).

Appellant sought damages of $6,150,000 in inverse condemnation, as well as mandamus and declaratory relief. Prior to trial, the court dismissed the mandamus claim, holding that "mandamus is not the proper remedy to challenge the validity of a legislative act." Clerk's Tr. 42. After a nonjury trial on the issue of liability, the court granted judgment for appellant, finding that:

> "29. [Due to the] continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space . . . , plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage with respect to the balance of the subject property.

[6] Appellant abandoned its plan to construct a nuclear power plant after the discovery of an off-shore fault that rendered the project unfeasible. Tr. 73. Its witnesses acknowledged that only about 150 acres were usable as an industrial park, and that 1.25 million cubic yards of fill would be needed to undertake such a development. *Id.*, at 711, 905.

"30. No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space.

"31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space.

"32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property.

"33. Since the actions of the defendant City in June of 1973, the property designated as open space and the remainder of the larger parcel is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value." App. 41–42.

The court concluded that these findings established that the city had taken the property and that just compensation was required by the Constitutions of both the United States and California. A subsequent jury trial on the question of damages resulted in a judgment for appellant for over $3 million.

On appeal, the California Court of Appeal, Fourth District, affirmed. App. to Juris. Statement B–1; see 146 Cal. Rptr. 103 (1978). It held that neither a change in zoning nor the adoption of an open-space plan automatically entitled a property owner to compensation for any resulting diminution in the value of the property. In this case, however, the record revealed that the city followed the policy of enacting and enforcing zoning ordinances that were consistent with its

open-space plan. The Court of Appeal also found that the evidence supported the conclusion that industrial use was the only feasible use for the property and that the city would have denied any application for industrial development because it would be incompatible with the open-space designation. Appellant's failure to present a plan for developing the property therefore did not preclude an award of damages in its favor. The Court of Appeal, with one judge dissenting, denied the city's petition for rehearing. See 146 Cal. Rptr., at 118.

The Supreme Court of California, however, on July 13, 1978, granted the city's petition for a hearing. This action automatically vacated the Court of Appeal's decision, depriving it of all effect. *Knouse* v. *Nimocks,* 8 Cal. 2d 482, 483–484, 66 P. 2d 438 (1937). See also Cal. Rules of Court 976 (d) and 977 (West 1981). Before the hearing, the Supreme Court in June 1979 retransferred the case to the Court of Appeal for reconsideration in light of the intervening decision in *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P. 2d 25 (1979), aff'd, 447 U. S. 255 (1980).[7] The California court in *Agins* held that an owner who is deprived of substantially all beneficial use of his land by a zoning regulation is not entitled to an award of damages in an inverse condemnation proceeding. Rather, his exclusive remedy is invalidation of the regulation in an action for mandamus or declaratory relief.[8] *Agins* also

[7] The retransfer order cited *Agins* as 23 Cal. 3d 605. App. to Juris. Statement E–1. The court's opinion, however, later was modified and reprinted with the citations noted in the text.

[8] Contrary to the dissent's argument, the California Supreme Court's *Agins* decision did not hold that a zoning ordinance never could be a "taking" and thus never could violate the Just Compensation Clause. It simply *limited the remedy* available for any such violation to nonmonetary relief. Immediately following the passage quoted by the dissent, *post,* at 640–641, that court stated:

"This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42 (1), pp. 1–116—1–121), who expresses his view in this manner: 'Not only is an

held that the plaintiffs in that case were not entitled to such relief because the zoning ordinance at issue permitted the building of up to five residences on their property. Therefore, the court held, it did not deprive those plaintiffs of substantially all reasonable use of their land.[9]

When the present case was retransferred, the Court of Appeal, in an unpublished opinion, reversed the judgment of the Superior Court. App. 63. It relied upon the California decision in *Agins* and held that appellant could not recover compensation through inverse condemnation. It, however,

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actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.'* " 24 Cal. 3d, at 272, 598 P. 2d, at 28. (Emphasis added by the California court.)

See also *id.*, at 273–274, 598 P. 2d, at 29:

"While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights."

And see *id.*, at 276, 598 P. 2d, at 30:

" 'Determining that a particular land-use control requires compensation is an appropriate function of the judiciary. . . . But it seems a usurpation of legislative power for a court to force compensation,' " quoting Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L. Rev. 1439, 1451 (1974).

When *Agins* was appealed here, we unanimously agreed that "[t]he State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner." 447 U. S., at 263. We believe, therefore, that it is the dissent that "fundamentally mischaracterizes," *post*, at 637, the California ruling.

[9] This Court's affirmance of the California court's judgment in *Agins* was on the ground that there was no taking. 447 U. S., at 263.

did not invalidate either the zoning ordinance or the open-space plan. Instead, it held that factual disputes precluded such relief on the present state of the record:

> "[Appellant] complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked [the] City what development might be permitted. Even assuming no use is acceptable to the City, [appellant's] complaint deals with the alleged overzealous use of the police power by [the] City. Its remedy is mandamus or declaratory relief, not inverse condemnation. [Appellant] did in its complaint seek these remedies asserting that [the] City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should [appellant] elect to retry the case." App. 66.

The Supreme Court of California denied further review. App. to Juris. Statement I–1. Appellant appealed to this Court, arguing that the Fifth and Fourteenth Amendments require that compensation be paid whenever private property is taken for public use. Appellant takes issue with the California Supreme Court's holding in *Agins* that its remedy is limited to invalidation of the ordinance in a proceeding for mandamus or declaratory relief. We postponed consideration of our jurisdiction until the hearing on the merits. 447 U. S. 919 (1980). We now conclude that the appeal must be dismissed because of the absence of a final judgment.[10]

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[10] Title 28 U. S. C. § 1257 grants jurisdiction to this Court to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Because the finality requirement

II

In *Agins*, the California Supreme Court held that mandamus or declaratory relief is available whenever a zoning regulation is claimed to effect an uncompensated taking in violation of the Fifth and Fourteenth Amendments. The Court of Appeal's failure, therefore, to award such relief in this case clearly indicates its conclusion that the record does not support appellant's claim that an uncompensated taking has occurred.[11] Because the court found that the record presented "disputed fact issues not covered by the trial court in its findings and conclusions," App. 66,[12] it held that manda-

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of § 1257 applies to this Court's review of state-court judgments both by appeal and by certiorari, we do not address the city's contention that, inasmuch as the Court of Appeal did not uphold any statute against a constitutional challenge, this is not a proper appeal under § 1257 (2).

[11] We recognize that this is inconsistent with the Court of Appeal's first ruling in this case, but, as has been noted, that decision was deprived of all effect by the Supreme Court's order granting a hearing.

The dissent's statement that the Court of Appeal "concluded as a matter of law that no Fifth Amendment 'taking' had occurred," *post*, at 645, is premised upon its misreading of the *Agins* opinion. See n. 8, *supra*. The Court of Appeal simply refused to award appellant the only remedy held to be available for a "taking" because there were disputed factual issues to be resolved.

[12] Although its initial opinion affirmed the trial court's finding that any application by appellant to develop the property would have been rejected, it is clear that the Court of Appeal reconsidered that finding in the light of *Agins*. In *Agins*, the California Supreme Court held that landowners who had not "made application to use or improve their property" following the passage of a zoning ordinance and had not "sought or received any definitive statement as to how many dwelling units they could build on their land," 24 Cal. 3d, at 271, 598 P. 2d, at 27, had not shown that the ordinance took their property without just compensation, since it permitted up to five residences to be built on the plaintiffs' property. We agreed that no violation of the Fifth and Fourteenth Amendments had been shown, since the landowners were "free to pursue their reasonable investment expectations by submitting a development plan to local officials." 447 U. S., at 262.

In this case, city witnesses testified that some development of appellant's property would be consistent with the open-space plan. App. 134–

mus and declaratory relief would be available "should [appellant] elect to retry the case." *Ibid.* While this phrase appears to us to be somewhat ambiguous, we read it as meaning that appellant is to have an opportunity on remand to convince the trial court to resolve the disputed issues in its favor. We do not believe that the Court of Appeal was holding that judgment *must* be entered for the city. It certainly did not so direct. This indicates that appellant is free to pursue its quest for relief in the Superior Court. The logical course of action for an appellate court that finds unresolved factual disputes in the record is to remand the case for the resolution of those disputes. We therefore conclude that the Court of Appeal's decision contemplates further proceedings in the trial court.[13]

III

Ever since this Court's decision in *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251 (1917), a state court's

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135, 140, 149–150. Indeed, the plan holds out the possibility that a nuclear power plant could be built on the site, see n. 5, *supra*, and the witnesses testified that other forms of industrial development might be permitted as well. App. 140, 149–150. The trial court's opinion does not explain why it concluded in light of this evidence that any attempt to obtain the city's permission for development of the property would be futile.

When the Court of Appeal reconsidered its decision in light of *Agins*, we believe that its reference to "disputed fact issues not covered by the trial court in its findings," App. 66, referred to this controversy. Its opinion states that damages would be unavailable "[e]ven assuming no use is acceptable to the City" *Ibid* The Court of Appeal declined to award mandamus or declaratory relief because it could not make this "assumption" in light of the factual disputes.

[13] Appellant's counsel shares this view:

"QUESTION: Mr. Goebel, your second and third cause of action in your complaint were petitions for mandate and the relief prayed in paragraph 3 of your complaint was that the Court order the City of San Diego to set aside the rezoning and to set aside the adoption of the open space element of its general plan. As I understand it, on remand, the trial court may grant that relief, theoretically.

"MR. GOEBEL: That's correct, Your Honor." Tr. of Oral Arg. 18.

holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 127 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U. S. 156, 163 (1973).

This case presents the reverse aspect of that situation. The Court of Appeal has decided that monetary compensation is not an appropriate remedy for any taking of appellant's property that may have occurred, but it has not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred. Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy—and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly—further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it.

Because § 1257 permits us to review only "[f]inal judgments or decrees" of a state court, the appeal must be, and is, dismissed.

It is so ordered.

JUSTICE REHNQUIST, concurring.

If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U. S. C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting

opinion of JUSTICE BRENNAN. Indeed, the Court's opinion notes that "the federal constitutional aspects of that issue are not to be cast aside lightly. . . ." *Ante,* at 633.

But "the judicial Power of the United States" which is vested in this Court by Art. III of the Constitution is divided by that article into original jurisdiction and appellate jurisdiction. With respect to appellate jurisdiction, Art. III provides:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The particular "regulation" of our appellate jurisdiction here relevant is found in 28 U. S. C. § 1257, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state 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."

The principal case construing § 1257 is *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), from which I dissented on the issue of finality. In *Cox,* the Court said:

> "The Court has noted that '[c]onsiderations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945). But

> the Court there observed that the rule had not been administered in such a mechanical fashion and that there were circumstances in which there had been 'a departure from this requirement of finality for federal appellate jurisdiction.' *Ibid.*
>
> "These circumstances were said to be 'very few,' *ibid.;* but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision of the federal issue as a final judgment for the purposes of 28 U. S. C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.,* at 477.

In *Cox,* the Court stated that the fourth category of cases which fell within the ambit of § 1257 finality were "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal to immediately review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.,* at 482–483.

I am not sure under how many of the four exceptions of

Cox JUSTICE BRENNAN may view this case as falling, but it seems to me that this case illustrates the problems which arise from a less-than-literal reading of the language "final judgment or decree." The procedural history of this case in the state courts is anomalous, to say the least, and it has resulted in a majority of this Court concluding that the California courts have not decided whether any taking in fact has occurred, *ante,* at 631, n. 11, and JUSTICE BRENNAN concluding that the Court of Appeal has held that the city of San Diego's course of conduct could not effect a "taking" of appellant's property. *Post,* at 661, n. 27. Having read the characterization of the California court proceedings in the opinion of this Court and in the opinion of JUSTICE BRENNAN as carefully as I can, I can only conclude that they disagree as to what issues remain open on remand from the State Court of Appeal to the Superior Court, but agree that such proceedings may occur.

Under these circumstances, it seems to me to be entirely in accord with the language of 28 U. S. C. § 1257, though perhaps not entirely in accord with the above-quoted portion of the opinion in *Cox Broadcasting Corp.* v. *Cohn, supra,* to conclude that this appeal is not from a "final judgment or decree." I would feel much better able to formulate federal constitutional principles of damages for land-use regulation which amounts to a taking of land under the Eminent Domain Clause of the Fifth Amendment if I knew what disposition the California courts finally made of this case. Because I do not, and cannot at this stage of the litigation, know that, I join the opinion of the Court today in which the appeal is dismissed for want of a final judgment.

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

Title 28 U. S. C. § 1257 limits this Court's jurisdiction to review judgments of state courts to "[f]inal judgments or

decrees rendered by the highest court of a State in which a decision could be had." The Court today dismisses this appeal on the ground that the Court of Appeal of California, Fourth District, failed to decide the federal question whether a "taking" of appellant's property had occurred, and therefore had not entered a final judgment or decree on that question appealable under § 1257. Because the Court's conclusion fundamentally mischaracterizes the holding and judgment of the Court of Appeal, I respectfully dissent from the Court's dismissal and reach the merits of appellant's claim.

I

In 1966, appellant assembled a 412-acre parcel of land as a potential site for a nuclear power plant. At that time, approximately 116 acres of the property were zoned for industrial use, with most of the balance zoned in an agricultural holding category. In 1967, appellee city of San Diego adopted its general plan designating most of appellant's property for industrial use. In 1973, the city took three critical actions which together form the predicate of the instant litigation: it down-zoned some of appellant's property from industrial to agricultural; it incorporated a new open-space element in its plan that designated about 233 acres of appellant's land for open-space use;[1] and it prepared a report mapping appellant's property for purchase by the city for open-space use, contingent on passage of a bond issue. App. 49.

Appellant filed suit in California Superior Court alleging, *inter alia*, a "taking" of its property by "inverse condemnation" in violation of the United States and California Consti-

[1] The city's plan defined "open space" as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." App. 52, n. 3.

tutions,[2] and seeking compensation of over $6 million. After a nonjury trial on liability, the court held that appellee city had taken a portion of appellant's property without just compensation, thereby violating the United States and California Constitutions. *Id.*, at 42–43. A subsequent jury trial on damages resulted in a judgment of over $3 million, plus interest as of the date of the "taking," and appraisal, engineering, and attorney's fees. *Id.*, at 46.

The California Court of Appeal, Fourth District, affirmed, holding that there was "substantial evidence to support the court's conclusion [that] there was inverse condemnation." *Id.*, at 54. The California Supreme Court granted the city's petition for a hearing, App. to Juris. Statement D–1, but later transferred the case back to the Court of Appeal for reconsideration in light of *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25 (1979), aff'd, 447 U. S. 255 (1980). App. to Juris. Statement E–1. Expressly relying on *Agins*, the

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[2] The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. *Agins* v. *City of Tiburon*, 447 U. S. 255, 258, n. 2 (1980); *United States* v. *Clarke*, 445 U. S. 253, 257 (1980). See, *e. g.*, Cal. Civ. Proc. Code Ann. § 1245.260 (West Supp. 1981). In the typical condemnation proceeding, the government brings a judicial or administrative action against the property owner to "take" the fee simple or an interest in his property; the judicial or administrative body enters a decree of condemnation and just compensation is awarded. See *ibid.* See generally 6 J. Sackman, Nichols' Law of Eminent Domain § 24.1 (rev. 3d ed. 1980). In an "inverse condemnation" action, the condemnation is "inverse" because it is the landowner, not the government entity, who institutes the proceeding.

"Eminent domain" is the "power of the sovereign to take property for public use without the owner's consent." *Id.*, § 1.11, at 1–7. Formal proceedings initiated by the government are loosely referred to as either "eminent domain" or "condemnation" proceedings. See *Agins* v. *City of Tiburon*, *supra*, at 258, n. 2.

Court of Appeal this time reversed the Superior Court, holding:

> "Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation. . . . A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus. . . ." App. 65–66.

The California Supreme Court denied further review. App. to Juris. Statement I–1.

II

The Court today holds that the judgment below is not "final" within the meaning of 28 U. S. C. § 1257 because, although the California Court of Appeal "has decided that monetary compensation is not an appropriate remedy for any taking of appellant's property that may have occurred, . . . it has not decided whether any other remedy is available because *it has not decided whether any taking in fact has occurred.*" *Ante,* at 633 (emphasis added). With all due respect, this conclusion misreads the holding of the Court of Appeal. In faithful compliance with the instructions of the California Supreme Court's opinion in *Agins* v. *City of Tiburon, supra,* the Court of Appeal held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a "taking" under the Fifth and Fourteenth Amendments, and therefore that there was no "taking" without just compensation in the instant case.

Examination of the Court of Appeal's opinion and the California Supreme Court's *Agins* opinion confirms this reading. As indicated above, the Court of Appeal noted that, "[u]nlike the person whose property is *taken* in eminent domain, the individual who is *deprived* of his property due

to the state's exercise of its police power is not entitled to compensation." App. 65–66 (emphasis added). Under the Court of Appeal's view, there can be no Fifth Amendment "taking" outside of the eminent domain context. Thus, a "local entity's arbitrary unconstitutional exercise of the police power which *deprives* the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus." *Id.*, at 66 (emphasis added).[3]

The Court of Appeal's analysis was required by the California Supreme Court's opinion in *Agins* v. *City of Tiburon*, *supra*. There the court stated:

> "Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiff's] property without payment of just compensation' for which an action in inverse condemnation will lie. *Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument* believing the preferable view to be that, while such governmental action is invalid because of its excess,

[3] One law review article, cited twice by the California Supreme Court in *Agins*, typifies this mode of analysis:

"[T]raditionally eminent domain and the police power have been treated as disjunctive. . . . The Constitution requires that just compensation be paid to landowners whose property has been condemned or taken by a government exercising its eminent domain power; if property is taken and no compensation awarded, the landowner is entitled to bring a so-called inverse condemnation action to compel payment. In contrast, under the police power constitutional requirements relate to the reasonableness of the relation between the means used and the ends sought; a landowner affected by an unreasonable regulation is entitled to bring an action challenging its validity." Note, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 Hastings L. J. 1569, 1570 (1977) (footnotes omitted).

> remedy by way of damages in eminent domain is not thereby made available." 24 Cal. 3d, at 272, 598 P. 2d, at 28 (brackets in original) (emphasis added).[4]

A landowner may not "elect to sue in inverse condemnation and thereby *transmute an excessive use of the police power*

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[4] It is not merely linguistic coincidence that the California Supreme Court in *Agins* never analyzed the Tiburon zoning ordinance to determine whether a Fifth Amendment *"taking"* without just compensation had occurred. Instead, the court noted that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to *deprive* the landowner of substantially all reasonable use of his property," and that "[t]he ordinance before us had no such effect." 24 Cal. 3d, at 277, 598 P. 2d, at 31 (emphasis added). Throughout the *Agins* opinion as well as the Court of Appeal decision below are references to actions which "deprive" the landowner of property use, indicating that the California courts were proceeding under the Due Process Clauses of the Fifth and Fourteenth Amendments, and not the Just Compensation Clause. *Id.*, at 273, 277, 598 P. 2d, at 28, 31; App. 66. Indeed the California courts are not alone in concluding that a government's exercise of its regulatory police powers can never effect a "taking." Five years ago, the Court of Appeals of New York reached the same conclusion. See *Fred F. French Investing Co.* v. *City of New York*, 39 N. Y 2d 587, 594–596, 350 N. E. 2d 381, 384–386, cert. denied and appeal dism'd, 429 U. S. 990 (1976). This Court described a subsequent New York Court of Appeals decision on review here as

"summarily reject[ing] any claim that the [New York City] Landmarks Law had 'taken' property without 'just compensation,' . . . indicating that there could be no 'taking' since the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. In that circumstance, the Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment." *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 120–121 (1978).

See Marcus, The Grand Slam Grand Central Terminal Decision: A *Euclid* for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasse, 7 Ecology Law Quarterly 731, 749, n. 97 (1978). See generally Comment, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation, 54 Wash. L. Rev. 315, 319–327 (1979).

into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at 28 (emphasis added).[5]

This Court therefore errs, I respectfully submit, when it concludes that the Court of Appeal "has not decided whether any taking in fact has occurred." *Ante,* at 633. For whatever the merits of the California courts' substantive rulings on the federal constitutional issue, see *infra,* at 646–661, it is clear that the California Supreme Court has held that California courts in a challenge, as here, to a police power regulation, are barred from holding that a Fifth Amendment *"taking"* requiring just compensation has occurred.[6] No set of factual

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[5] In so ruling, the California Supreme Court expressly disapproved *Eldridge* v. *City of Palo Alto,* 57 Cal App. 3d 613, 621, 129 Cal. Rptr. 575, 579 (1976), a Court of Appeal decision holding that "a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation."

[6] Appellees agreed with this interpretation at oral argument:

"QUESTION: Well, suppose the California Supreme Court or all the courts in California declare the zoning statute unconstitutional as applied to this piece of property, that the City has unconstitutionally interfered with the use of this property.

"MR. SUMPTION: Yes, Your Honor.

"QUESTION: Now, has the California Supreme Court or the Court of Appeal precluded damages in that situation?

"MR. SUMPTION: Under those facts, without any actual use, without the other factors, denial of access or any direct and special interference with the landowner's attempt to use the property, I think that's a correct assessment, that the California Supreme Court would say, no, your remedy is to set aside the regulations.

"QUESTION: Well, they get set aside but meanwhile the landowner has not been able to use it for the purpose he wanted. The zoning ordinance has effectively precluded his use of the property and the Supreme Court has said so. No damages?

"MR. SUMPTION: No damages, Your Honor.

"QUESTION: *You say that's police power, not Fifth Amendment taking?*

circumstances, no matter how severe, can "transmute" an arbitrary exercise of the city's police power into a Fifth Amendment "taking." *Agins* v. *City of Tiburon, supra,* at 273, 598 P. 2d, at 28. This Court's focus on the last full paragraph of the Court of Appeal decision, *ante,* at 630, to support its conclusion is misplaced, because that paragraph merely raises the possibility that appellant may "elect to retry the case" on a different constitutional theory—an allegation of "overzealous use of the police power," App. 66. Whatever factual findings of the trial court might be relevant to that inquiry, they would have no bearing on a Fifth Amendment "taking" claim.[7] Therefore, the Court's sugges-

"MR. SUMPTION: *In California, that's the rule—*" Tr. of Oral Arg. 54–55 (emphasis added).

This understanding is likewise shared by appellant and *amici.* See, *e. g.,* Brief for Appellant 17, 31, 36; Brief for National Association of Home Builders and California Building Industry as *Amici Curiae* 5, 7.

[7] The Court concludes from the last paragraph of the Court of Appeal's opinion that "appellant is free to pursue its quest for relief in the Superior Court. The logical course of action for an appellate court that finds unresolved factual disputes in the record is to remand the case for the resolution of those disputes." *Ante,* at 632.

It is true that, under California law, an *unqualified* reversal generally operates to remand the cause for a new trial on all remaining issues. *McDonough Power Equipment Co.* v. *Superior Court,* 8 Cal. 3d 527, 532, 503 P. 2d 1338, 1341 (1972); *De Hart v Allen,* 26 Cal. 2d 829, 833, 161 P. 2d 453, 455–456 (1945); 5 Cal. Jur. 3d, Appellate Review § 587, pp. 303–304 (1973); see *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546 (1947). However, a reviewing court may *qualify* its reversal and its intent must be divined from its opinion as a whole. *Stromer* v. *Browning,* 268 Cal. App. 2d 513, 518–519, 74 Cal. Rptr. 155, 158 (1968); 5 Cal. Jur. 3d, *supra,* § 588, at 304.

Here, the Court of Appeal suggested that, if appellee elected to retry the case, "disputed fact issues *not covered by the trial court in its findings and conclusions*" could be "dealt with anew." App. 66 (emphasis added). In the original "Findings of Fact and Conclusions of Law," the trial court unequivocally found a Fifth Amendment "taking" without just compensation:

"The actions of defendant City against plaintiff's property were moti-

tion that "further proceedings are necessary to resolve the federal question whether there has been a taking at all," is plainly wrong. *Ante,* at 633.[8]

The trial court has held expressly that the "actions of defendant City . . . taken as a whole, constitute a *taking* of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions."

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vated to achieve a *public* purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a *taking* of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions. . ." *Id.,* at 42–43 (emphasis added)

By limiting any possible retrial to "disputed fact issues not covered by the trial court in its findings and conclusions," the Court of Appeal plainly indicated that the Fifth Amendment "taking" issue had been finally resolved. This is perfectly consistent, then, with the Court of Appeal's holding that there is no Fifth Amendment "taking" when excessive use of the police power is proved. Therefore, the Court's belief that the "disputed factual issues" involve appellant's failure to apply for a permit *ante,* at 631, n. 11, is beside the point, since under no set of factual circumstances may the court find a Fifth Amendment "taking."

[8] The Court of Appeal's first opinion unequivocally affirmed the Superior Court's finding of a "taking" on the facts of this case. App. 49–50, 60. It is no doubt true that the first opinion was deprived of all legal effect under California law once the California Supreme Court granted the city's petition for a hearing. *Knouse* v. *Nimocks,* 8 Cal. 2d 482, 483–484, 66 P. 2d 438, 438 (1937). Nevertheless, under this Court's view that the second Court of Appeal's opinion left open the "taking" question, this Court must admit, as it does, that the second opinion is inconsistent with the finding of a "taking" in the first. *Ante,* at 631, n. 11. Under my reading, the second is easily reconcilable with the first: because the Court of Appeal was obligated by the terms of the California Supreme Court's transfer order to hold that no regulatory action could effect a "taking," it was forced in its second opinion to abandon its original agreement with the Superior Court's finding of a "taking."

App. 42–43 (emphasis added). The Court of Appeal reversed this holding and concluded as a matter of law that no Fifth Amendment "taking" had occurred. This is indistinguishable, then, from a dismissal of appellant's case for legal insufficiency. In any such dismissal, factual questions are necessarily left unresolved. But when a litigant is denied relief as a matter of law, the judgment is necessarily final within the meaning of § 1257. See, *e. g., Allenberg Cotton Co.* v. *Pittman,* 419 U. S. 20, 24–25 (1974); *Windward Shipping* v. *American Radio Assn.,* 415 U. S. 104, 108 (1974).[9]

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[9] In his concurring opinion, my Brother REHNQUIST, who dissented in *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), writes:

"I am not sure under how many of the four exceptions of *Cox* JUSTICE BRENNAN may view this case as falling, but it seems to me that this case illustrates the problems which arise from a less than literal reading of the language 'final judgment or decree.'" *Ante,* at 635–636.

Then, he assumes that I agree with the Court that further proceedings will occur on remand to the Superior Court, and concludes that this appeal is therefore not final within the literal language of 28 U. S. C. § 1257, even if it may be treated as final under *Cox. Ante,* at 636.

With all respect, my Brother REHNQUIST misreads my position. I view the judgment as final within the literal meaning of § 1257, and therefore do not find it necessary to rely on any "exception" to the finality rule. Appellant alleged and proved a "taking" of its property without just compensation under the Just Compensation Clause of the Fifth Amendment. On review, the California Court of Appeal reversed, holding as a matter of federal law that there was no "taking." Since that time, appellant has continued to press its federal just compensation claim in a petition for rehearing before the Court of Appeal, a petition for hearing before the California Supreme Court, and an appeal to this Court. The Court of Appeal did not direct further proceedings in the Superior Court on appellant's claim. What the Court of Appeal indicated was that appellant was not precluded from "elect[ing] to retry the case," App. 66, on an alternative constitutional theory not based on the Just Compensation Clause. In other words, the Court of Appeal refused to recognize an alleged and proved constitutional violation and proposed that appellent try another and different constitutional theory. But obviously the judgment is final as to the rejected constitutional theory under even the strictest reading of § 1257. I can see no possible reason for refusing to

Since the Court of Appeal held that no Fifth Amendment "taking" had occurred, no just compensation was required. This is a classic final judgment. See *North Dakota Pharmacy Bd.* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 163 (1973); *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U. S. 251, 256 (1917). I therefore dissent from the dismissal of this appeal, and address the merits of the question presented.[10]

III

The Just Compensation Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 160 (1980); see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239, 241 (1897), states in clear and unequivocal terms: "[N]or shall private property be taken for public use, without just compensation." The question presented on the merits in this case is whether a government entity must pay just compensation when a police power regulation has effected a "taking" of "private property" for "public use" within the meaning of that constitutional provision.[11] Implicit in this question is the corollary issue

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decide appellant's claim solely on the basis that the Court of Appeal proposed its own constitutional theory and strategy for retrying the case.

In sum, the accurate statement of my view is that appellant has received a final judgment. That judgment is "subject to no further review or correction in any other state tribunal; it [is] final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It [is] the final word of a final court." *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551 (1945)

[10] Appellees also argue that we may not exercise our appellate jurisdiction under 28 U. S. C. § 1257 (2) because appellant has not drawn in question the validity of a statute. Brief for Appellees 1–3. Even if I were to agree with appellees' contentions, I would treat the jurisdictional statement as a petition for writ of certiorari, and grant the petition. 28 U. S. C. §§ 1257 (3), 2103.

[11] This Court failed to reach this question in last Term's *Agins* v. *City of Tiburon*. In that case, as an alternative holding, the California

whether a government entity's exercise of its regulatory police power can ever effect a "taking" within the meaning of the Just Compensation Clause.[12]

A

As explained in Part II, *supra,* the California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a "taking" within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court. For example, in last Term's *Agins* v. *City of Tiburon,* 447 U. S. 255, 260 (1980), the Court noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land . . . ." [13] Applying that principle, the Court examined whether the Tiburon zon-

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Supreme Court had found on the facts of the case that the Tiburon ordinance "did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value." 24 Cal. 3d, at 277, 598 P. 2d, at 31. This Court affirmed on that ground, thereby not reaching the broader ground that constitutes the sole basis for the opinion of the Court of Appeal in the instant case. 447 U. S., at 262–263.

[12] The question presented in appellant's jurisdictional statement states in pertinent part:

"Can a state court with impunity deny an aggrieved property owner its constitutionally mandated remedy of just compensation when a local government entity has (a) imposed arbitrary, excessive, and unconstitutional land use regulations; (b) commenced, but later abandoned direct acquisitive efforts under its power of eminent domain when its public purpose was satisfied by the restraints of the purported regulations; and (c) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial or economic use of its property; and the property owner has so established as a matter of fact after full trial of the issues?" Juris. Statement 4–5.

[13] The Court of Appeal below rendered its decision almost one year before this Court's decision in *Agins* v. *City of Tiburon, supra.*

ing ordinance effected a "taking" of the Agins' property, concluding that it did not have such an effect. *Id.*, at 262–263.

In *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), the Court analyzed "whether the restrictions imposed by New York City's [Landmarks Preservation] law upon appellants' exploitation of the [Grand Central] Terminal site effect a 'taking' of appellants' property . . . within the meaning of the Fifth Amendment." *Id.*, at 122. Canvassing the appropriate inquiries necessary to determine whether a particular restriction effected a "taking," the Court identified the "economic impact of the regulation on the claimant" and the "character of the governmental action" as particularly relevant considerations. *Id.*, at 124; see *id.*, at 130–131. Although the Court ultimately concluded that application of New York's Landmarks Law did not effect a "taking" of the railroad property, it did so only after deciding that "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.*, at 138 (footnote omitted).

The constitutionality of a local ordinance regulating dredging and pit excavating on a property was addressed in *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962). After observing that an otherwise valid zoning ordinance that deprives the owner of the most beneficial use of his property would not be unconstitutional, *id.*, at 592, the Court cautioned: "That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation," *id.*, at 594. On many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment "taking." See, *e. g., PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States,* 444 U. S. 164,

174 (1979); *Andrus* v. *Allard,* 444 U. S. 51, 65–66 (1979); *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155, 168 (1958).

The principle applied in all these cases has its source in Justice Holmes' opinion for the Court in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415 (1922), in which he stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [14] The determination of a "taking" is "a question of degree—and therefore cannot be disposed of by general propositions." *Id.,* at 416.[15] While ac-

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[14] One interpretation of the *Pennsylvania Coal* opinion insists that the word "taking" was used "metaphorically," and that the "gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the [case was] decided under that rubric." *Fred F. French Investing Co.* v. *City of New York,* 39 N. Y. 2d, at 594, 350 N. E. 2d, at 385; see also Brief for Appellees 37–38 In addition to tampering with the express language of the opinion, this view ignores the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation. Brief for Pennsylvania Coal Company, at 7–8, 16, 19–20, 21, 24, 28–33; Brief for the Mahons, at 73.

[15] More recent Supreme Court cases have emphasized this aspect of "taking" analysis, commenting that the Court has been unable to develop any "set formula to determine where regulation ends and taking begins," *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590, 594 (1962), and that "[it] calls as much for the exercise of judgment as for the application of logic," *Andrus* v. *Allard,* 444 U. S. 51, 65 (1979). See *Penn Central Transp. Co.* v. *New York City,* 438 U. S., at 124 ("ad hoc, factual inquiries"); *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case").

One distinguished commentator has characterized the attempt to differentiate "regulation" from "taking" as "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." C. Haar, Land-Use Planning 766 (3d ed 1976). See generally *id,* at 766–777; Berger, A Policy Analysis of the Taking Problem, 49 N. Y. U. L. Rev. 165 (1974); Michelman, Property, Utility, and Fairness: Comments on

knowledging that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *id.*, at 413, the Court rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment "taking." [16] Indeed, the Court concluded that the Pennsylvania statute forbidding the mining of coal that would cause the subsidence of any house effected a "taking." *Id.*, at 414–416.[17]

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the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964). Another has described a 30-year series of Court opinions resulting from this case-by-case approach as a "crazy-quilt pattern." Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 S. Ct. Rev. 63.

[16] Justice Brandeis, in dissent, argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." 260 U. S., at 417. In partial reliance on Justice Brandeis' dissent, one report urges that the Court overrule the *Pennsylvania Coal* case and hold that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." F. Bosselman, D. Callies, & J. Banta, The Taking Issue 238–255 (1973).

[17] The California Supreme Court, in its opinion in *Agins* v. *City of Tiburon*, 24 Cal. 3d, at 274, 598 P. 2d, at 29, interpreted Justice Holmes' use of the word "taking" to "indicate the *limit* by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain." (Emphasis added.) I find such a reading unpersuasive. The Court specifically indicated that a "regulation [that] goes too far . . . *will be recognized as a taking*," and that this determination is *"a question of degree."* *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415–416 (emphasis added). Clearly, then, the Court contemplated that a regulation could cross the boundary surrounding valid police power exercise and become a Fifth Amendment "taking."

The California court further argued that the Court in *Pennsylvania Coal* "did not attempt . . . to transmute the illegal governmental infringment into an exercise of eminent domain and the possibility of compensation was not even considered." *Agins* v. *City of Tiburon, supra,* at 274, 598 P. 2d, at 29. This overlooks the factual posture in *Penn-*

B

Not only does the holding of the California Court of Appeal contradict precedents of this Court, but it also fails to recognize the essential similarity of regulatory "takings" and other "takings." The typical "taking" occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its sovereign power of eminent domain. See, *e. g., Berman* v. *Parker,* 348 U. S. 26, 33 (1954). However, a "taking" may also occur without a formal condemnation proceeding or transfer of fee simple. This Court long ago recognized that

> "[i]t would be a very curious and unsatisfactory result, if in construing [the Just Compensation Clause] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166, 177–178 (1872) (emphasis in original).

See *Chicago, R. I. & P. R. Co.* v. *United States,* 284 U. S. 80, 96 (1931).

In service of this principle, the Court frequently has found "takings" outside the context of formal condemnation pro-

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sylvania Coal, where the *homeowner,* not the *coal company,* brought an *injunction* action to prevent the company "from mining under their property in such a way as to remove the supports and cause a subsidence of the surface and of their house." *Pennsylvania Coal Co.* v. *Mahon, supra,* at 412. Because no one asked for an award of just compensation, there was no reason for the Court to consider it. The company only sought reversal of the Pennsylvania Supreme Court's decree that enjoined it from mining coal, and this Court granted that request.

ceedings or transfer of fee simple, in cases where government action benefiting the public resulted in destruction of the use and enjoyment of private property. *E. g., Kaiser Aetna* v. *United States,* 444 U. S., at 178–180 (navigational servitude allowing public right of access); *United States* v. *Dickinson,* 331 U. S. 745, 750–751 (1947) (property flooded because of Government dam project); *United States* v. *Causby,* 328 U. S. 256, 261–262 (1946) (frequent low altitude flights of Army and Navy aircraft over property); *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S., at 414–416 (state regulation forbidding mining of coal).

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.[18] From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government *intends* to take property through condemnation or physical invasion whereas it does not through police power regulations. See Brief for Appellees 43. But "the

[18] In the instant case, for example, appellant contended that the city's actions "denied in all practical effect any possible beneficial or economical use of the subject property." Complaint ¶ 15, App. 11. Although the Court of Appeal's first opinion has no legal effect, see n. 8, *supra,* the court did observe that the city's objective was "to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being 'used' by the public. . . ." App. 60.

Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes* v. *Washington*, 389 U. S. 290, 298 (1967) (STEWART, J., concurring) (emphasis in original); see *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301 (1925). It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. *United States* v. *Dickinson, supra*, at 748; *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945).

IV

Having determined that property may be "taken for public use" by police power regulation within the meaning of the Just Compensation Clause of the Fifth Amendment, the question remains whether a government entity may constitutionally deny payment of just compensation to the property owner and limit his remedy to mere invalidation of the regulation instead. Appellant argues that it is entitled to the full fair market value of the property. Appellees argue that invalidation of the regulation is sufficient without payment of monetary compensation. In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend [19] the regulation.[20] This interpretation, I believe, is supported

[19] Under this rule, a government entity is entitled to amend the offending regulation so that it no longer effects a "taking." It may also choose formally to condemn the property.

[20] *Amicus* suggests that the California Supreme Court has not conclusively decided the issue whether interim damages might be awarded to compensate a landowner for economic loss sustained prior to invalidation of the zoning ordinance. Brief for United States as *Amicus Curiae*

by the express words and purpose of the Just Compensation Clause, as well as by cases of this Court construing it.

The language of the Fifth Amendment prohibits the "tak-[ing]" of private property for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and " 'the self-executing character of the constitutional provision with respect to compensation,' " *United States* v. *Clarke*, 445 U. S. 253, 257 (1980), quoting 6 J. Sackman, Nichols' Law of Eminent Domain § 25.41 (rev. 3d ed. 1980), is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded. In *Jacobs* v. *United States*, 290 U. S. 13 (1933), for example, a Government dam project creating intermittent overflows onto petitioners' property resulted in the "taking" of a servitude. Petitioners brought suit against the Government to recover just compensation for the partial "taking." Commenting on the nature of the landowners' action, the Court observed:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary.

23, and n. 24. But since the California courts fail to concede that a regulation can effect a "taking," any award of interim damages would not be justified or determined, as constitutionally required, under the Just Compensation Clause.

> Such a promise was implied because of the duty to pay imposed by the Amendment." *Id.*, at 16.

See also *Griggs* v. *Allegheny County*, 369 U. S. 84, 84–85, 88–90 (1962); *United States* v. *Causby*, 328 U. S., at 268.[21] Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.[22]

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[21] *Amici* suggest that the Court's awards of just compensation in cases involving the United States were premised either on a "theory of implied promise to pay . . . or [on] congressional authorization [to pay] under the Tucker Act, 28 U. S. C. 1346 (a)." Brief for United States as *Amicus Curiae* 27; see Brief for the National Trust for Historic Preservation et al. as *Amici Curiae* 7–8. This suggestion mischaracterizes the import of our cases. As the Court has noted:

"But whether the theory . . . be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, 'nor shall private property be taken for public use, without just compensation.' The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'" *United States* v. *Dickinson*, 331 U. S. 745, 748 (1947).

[22] The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years.

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby* v. *City of San Buenaventura*, 10 C. 3d 110, appears to allow the City to change the

Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. *Armstrong* v. *United States,* 364 U. S. 40, 49 (1960). See *Agins* v. *City of Tiburon,* 447 U. S., at 260; *Andrus* v. *Allard,* 444 U. S., at 65. When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. See *United States* v. *Willow River Co.,* 324 U. S. 499, 502 (1945); *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325 (1893). Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, see *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 395 (1926), it is axiomatic that the public receives a benefit while the offending regulation is in effect.[23] If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the

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regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

. . . . . .

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192–193 (1975) (emphasis in original).

[23] A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no "public use." Although the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless have a damages cause of action under 42 U. S. C. § 1983 for a Fourteenth Amendment due process violation.

regulation and the government entity's rescission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken. *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U. S. 470, 473–474 (1973); *United States* v. *Reynolds,* 397 U. S. 14, 16 (1970).

The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory "taking" render compensation for the time of the "taking" any less obligatory. This Court more than once has recognized that temporary reversible "takings" should be analyzed according to the same constitutional framework applied to permanent irreversible "takings." For example, in *United States* v. *Causby, supra,* at 258–259, the United States had executed a lease to use an airport for a one-year term "ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the national emergency, whichever [was] the earlier." The Court held that the frequent low-level flights of Army and Navy airplanes over respondents' chicken farm, located near the airport, effected a "taking" of an easement on respondents' property. 328 U. S., at 266–267. However, because the flights could be discontinued by the Government at any time, the Court remanded the case to the Court of Claims: "Since on this record *it is not clear whether the easement taken is a permanent or a temporary one,* it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper." *Id.,* at 268 (emphasis added). In other cases where the Government has taken only temporary use of a building, land, or equipment, the Court has not hesitated to determine the appropriate measure of just compensation. See *Kimball Laundry Co.* v. *United States,* 338

U. S. 1, 6 (1949); *United States* v. *Petty Motor Co.*, 327 U. S. 372, 374–375 (1946); *United States* v. *General Motors Corp.*, 323 U. S., at 374–375.

But contrary to appellant's claim that San Diego must formally condemn its property and pay full fair market value, nothing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible and the government wants to halt the "taking." Just as the government may cancel condemnation proceedings before passage of title, see 6 J. Sackman, Nichols' Law of Eminent Domain § 24.113, p. 24–21 (rev. 3d ed. 1980), or abandon property it has temporarily occupied or invaded, see *United States* v. *Dow*, 357 U. S. 17, 26 (1958), it must have the same power to rescind a regulatory "taking." As the Court has noted: "[A]n abandonment does not prejudice the property owner. It merely results in an alteration of the property interest taken—from full ownership to one of temporary use and occupation. . . . In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *Ibid.*; see *Danforth* v. *United States*, 308 U. S. 271, 284 (1939).

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[24] Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and

[24] Contrary to the suggestion of *amici*, see, *e. g.*, Brief for the National Trust for Historic Preservation et al. as *Amici Curiae* 13–16, this is not a case involving implication of a damages remedy—the words of the Just Compensation Clause are express.

temporary "takings" involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory "taking." As a starting point, the value of the property taken may be ascertained as of the date of the "taking." *United States* v. *Clarke*, 445 U. S., at 258; *Almota Farmers Elevator & Warehouse Co.* v. *United States*, *supra*, at 474; *United States* v. *Miller*, 317 U. S. 369, 374 (1943); *Olson* v. *United States*, 292 U. S. 246, 255 (1934). The government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking." [25] Rules of valuation already developed for temporary "takings" may be particularly useful to the courts in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment, see generally *Kimball Laundry Co.* v. *United States*, *supra*; *United States* v. *Petty Motor Co.*, *supra*; *United States* v. *General Motors Corp.*, *supra*, although additional rules may need to be developed, see *Kimball Laundry Co.* v. *United States*, *supra*, at 21–22 (Rutledge, J., concurring); *United States* v. *Miller*, *supra*, at 373–374. Alternatively the government may choose

[25] See generally D. Hagman & D. Misczynski, Windfalls for Wipeouts 296–297 (1978); Bosselman, The Third Alternative in Zoning Litigation, 17 Zoning Digest 113, 114–119 (1965). The general notion of compensating landowners for regulations which go too far has received much attention in land-use planning literature. See, *e. g.*, Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021 (1975); R. Babcock, The Zoning Game 168–172 (1966); Krasnowiecki & Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179, 198–239 (1961). See also American Law Institute, A Model Land Development Code §§ 5–303, 5–304, pp. 202–207 (1975); Town and Country Planning Act, 1947, 10 & 11 Geo. 6, ch. 51, § 19.

formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation. See generally *United States* v. *Fuller,* 409 U. S. 488, 490–492 (1973); *United States ex rel. TVA* v. *Powelson,* 319 U. S. 266, 281–285 (1943).

It should be noted that the Constitution does not embody any specific procedure or form of remedy that the States must adopt: "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *United States* v. *Dickinson,* 331 U. S., at 748. Cf. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67–69 (1933). The States should be free to experiment in the implementation of this rule, provided that their chosen procedures and remedies comport with the fundamental constitutional command. See generally Hill, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev. 181, 191–193 (1969). The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking," and recover just compensation if it does so. He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due. See *United States* v. *Dickinson, supra,* at 749.

V

In *Agins* v. *City of Tiburon,* 24 Cal. 3d, at 275, 598 P. 2d, at 29, the California Supreme Court was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." In particular, the court cited "the need for preserving a degree of freedom in land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy," in reaching its conclusion. *Id.,* at 276, 598 P. 2d, at 31. But

the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches.[26] Nor can the vindication of those rights depend on the expense in doing so. See *Watson* v. *Memphis,* 373 U. S. 526, 537–538 (1963).

Because I believe that the Just Compensation Clause requires the constitutional rule outlined *supra,* I would vacate the judgment of the California Court of Appeal, Fourth District, and remand for further proceedings not inconsistent with this opinion.[27]

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[26] Even if I were to concede a role for policy considerations, I am not so sure that they would militate against requiring payment of just compensation. Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Dunham, From Rural Enclosure to Re-Enclosure of Urban Land, 35 N. Y. U. L. Rev. 1238, 1253–1254 (1960). Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. Cf. *Owen* v. *City of Independence,* 445 U. S. 622, 651–652 (1980). After all, if a policeman must know the Constitution, then why not a planner? In any event, one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners. Cf. *id.,* at 656.

[27] Because the California Court of Appeal, Fourth District, followed the instructions of the California Supreme Court and held that the city's regulation, however arbitrary or excessive, could not effect a "taking," the Court of Appeal did not address the issue whether San Diego's course of conduct *in fact* effected a "taking" of appellant's property. I would not reach that issue here, but leave it open for the Court of Appeal on remand initially to decide that question on its review of the Superior Court's judgment.

KASSEL, DIRECTOR OF TRANSPORTATION, ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE

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

No. 79–1320. Argued November 4, 1980—Decided March 24, 1981

Unlike all other States in the West and Midwest, Iowa by statute generally prohibits the use of 65-foot double-trailer trucks within its borders, allowing the use of 55-foot single-trailer trucks and 60-foot double-trailer trucks. Appellee, a trucking company which carries commodities through Iowa on interstate highways, filed suit alleging that Iowa's statutory scheme unconstitutionally burdens interstate commerce. Because appellee cannot use its 65-foot doubles to move goods through Iowa, it must either use shorter truck units, detach the trailers of a 65-foot double and shuttle each through Iowa separately, or divert 65-foot doubles around Iowa. Iowa defended the law as a reasonable safety measure, asserting that 65-foot doubles are more dangerous than 55-foot singles and that in any event the law promotes safety and reduces road wear within the State by diverting much truck traffic to other States. The District Court found that the evidence established that 65-foot doubles were as safe as the shorter truck units, and held that the state law impermissibly burdened interstate commerce. The Court of Appeals affirmed.

Held: The judgment is affirmed. Pp. 669–679; 679–687.

612 F. 2d 1064, affirmed.

JUSTICE POWELL, joined by JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that the Iowa truck-length limitations unconstitutionally burden interstate commerce. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429. Pp. 669–679.

(a) The Commerce Clause itself, even without congressional implementation, is a limitation upon state power to regulate commerce. While "the Court has been most reluctant to invalidate" state regulations that touch upon safety—especially highway safety—the constitutionality of such regulations nevertheless depends on "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond, supra,* at 443, 441. Pp. 669–671.

(b) Since Iowa's safety interest has not been demonstrated, and since its regulations impair significantly the federal interest in efficient and

safe interstate transportation, the Iowa law cannot be harmonized with the Commerce Clause. The record, including statistical studies, supports the District Court's finding that 65-foot doubles are as safe as 55-foot singles And appellee demonstrated that Iowa's law substantially burdens interstate commerce. In addition to the increased costs of trucking companies in routing 65-foot doubles around Iowa or using smaller truck units through the State, Iowa's law may aggravate, rather than ameliorate, the problem of highway accidents. Iowa's restriction—resulting in either more smaller trucks being driven through Iowa or the same number of larger trucks being driven longer distances to bypass Iowa—requires more highway miles to be driven to transport the same quantity of goods. Other things being equal, accidents are proportional to distance traveled. Thus, if 65-foot doubles are as safe as 55-foot singles, Iowa's law tends to *increase* the number of accidents, and to shift their incidence from Iowa to other States. Pp. 671–675.

(c) While the Court normally accords "special deference" to a state legislature's judgment in enacting highway regulations, *Raymond, supra*, at 444, n. 18, less deference is due where, as here, the local regulation bears disproportionately on out-of-state residents and businesses Exemptions in Iowa's statutory scheme—particularly those permitting single-trailer trucks hauling livestock or farm vehicles to be as long as 60 feet, and permitting cities abutting other States to enact local ordinances to adopt the larger length limitation of the neighboring State and thus allow otherwise oversized trucks within the city limits and in nearby commercial zones—secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use. Moreover, the history of the "border cities exemption" suggests that Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic. A State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it. Pp. 675–678.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, concluded that in considering a Commerce Clause challenge to a state regulation, the judicial task is to balance the burden imposed on commerce against the local benefits sought to be achieved by the State's lawmakers. It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes. Here, the safety advantages and disadvantages of the different types and lengths of trucks involved need not be analyzed, since the record and the legislative history of the Iowa regulation establish that those differences were irrelevant to Iowa's decision to maintain its regulation. Rather, Iowa

sought to discourage interstate truck traffic on its highways This purpose, being *protectionist* in nature, is impermissible under the Commerce Clause. Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways. Pp. 679–687.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 679. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 687.

Mark E. Schantz, Solicitor General of Iowa, argued the cause for appellants. With him on the briefs were *Thomas J. Miller,* Attorney General, *Robert W. Goodwin,* Special Assistant Attorney General, and *Lester A. Paff,* Assistant Attorney General.

John H. Lederer argued the cause for appellee. With him on the brief were *John Duncan Varda* and *Anthony R. Varda.**

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

The question is whether an Iowa statute that prohibits the use of certain large trucks within the State unconstitutionally burdens interstate commerce.

I

Appellee Consolidated Freightways Corporation of Delaware (Consolidated) is one of the largest common carriers in

*Briefs of *amici curiae* urging reversal were filed by *Marshall Coleman,* Attorney General, *Walter A. McFarlane,* Deputy Attorney General, and *John M. McCarthy,* Assistant Attorney General, for the Commonwealth of Virginia; and by *Harry J. Breithhaupt, Jr.,* for the Association of American Railroads.

Albert G. Fuller filed a brief for the City of Auburn, Nebraska, as *amicus curiae* urging affirmance.

the country. It offers service in 48 States under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. Among other routes, Consolidated carries commodities through Iowa on Interstate 80, the principal east-west route linking New York, Chicago, and the west coast, and on Interstate 35, a major north-south route.

Consolidated mainly uses two kinds of trucks. One consists of a three-axle tractor pulling a 40-foot two-axle trailer. This unit, commonly called a single, or "semi," is 55 feet in length overall. Such trucks have long been used on the Nation's highways. Consolidated also uses a two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer. This combination, known as a double, or twin, is 65 feet long overall.[1] Many trucking companies, including Consolidated, increasingly prefer to use doubles to ship certain kinds of commodities. Doubles have larger capacities, and the trailers can be detached and routed separately if necessary. Consolidated would like to use 65-foot doubles on many of its trips through Iowa.

The State of Iowa, however, by statute restricts the length of vehicles that may use its highways. Unlike all other States in the West and Midwest, App. 605, Iowa generally prohibits the use of 65-foot doubles within its borders. Instead, most truck combinations are restricted to 55 feet in length. Doubles,[2] mobile homes,[3] trucks carrying vehicles

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[1] For an illustration of the differences between singles and doubles, see *Raymond Motor Transportation, Inc.* v. *Rice*, 417 F. Supp. 1352, 1363 (WD Wis. 1976) (three-judge court), rev'd, 434 U. S. 429 (1978).

[2] Iowa Code § 321.457 (6) (1979). The 60-foot double is not commonly used anywhere except in Iowa. It consists of a tractor pulling a large trailer, which in turn pulls a dolly attached to a small trailer. The odd-sized trailer used in the 60-foot double is not compatible for interchangeable use in other trailer combinations. See App. 23, 276–277, 353, 354.

[3] Iowa Code § 321.457 (4) (1979).

such as tractors and other farm equipment,[4] and singles hauling livestock,[5] are permitted to be as long as 60 feet. Notwithstanding these restrictions, Iowa's statute permits cities abutting the state line by local ordinance to adopt the length limitations of the adjoining State. Iowa Code § 321.457 (7) (1979). Where a city has exercised this option, otherwise oversized trucks are permitted within the city limits and in nearby commercial zones. *Ibid.*[6]

Iowa also provides for two other relevant exemptions. An Iowa truck manufacturer may obtain a permit to ship trucks that are as large as 70 feet. Iowa Code § 321E.10 (1979). Permits also are available to move oversized mobile homes, provided that the unit is to be moved from a point within Iowa or delivered for an Iowa resident. § 321E.28 (5).[7]

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[4] § 321.457 (5).

[5] § 321.457 (3). After trial, and after the Court of Appeals' decision in this case, Iowa amended its law to permit all singles to be as large as 60 feet. 1980 Iowa Acts, ch 1100.

[6] The Iowa Legislature in 1974 passed House Bill 671, which would have permitted 65-foot doubles. But Iowa Governor Ray vetoed the bill, noting that it "would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." Governor's Veto Message of March 2, 1974, reprinted in App. 626. The "border-cities exemption" was passed by the General Assembly and signed by the Governor shortly thereafter.

The Iowa Transportation Commission, pursuant to authority conferred in Iowa Code § 307.10 (5) (1979), subsequently adopted regulations that would have legalized 65-foot doubles, provided that the legislature enacted a ban on studded snow tires. The Iowa Supreme Court declared these regulations void because their promulgation was impermissibly tied to legislative action. *Motor Club of Iowa* v. *Department of Transportation*, 251 N. W. 2d 510 (1977).

[7] The parochial restrictions in the mobile home provision were enacted after Governor Ray vetoed a bill that would have permitted the interstate shipment of all mobile homes through Iowa. Governor Ray commented, in his veto message:

"This bill . . . would make Iowa a bridge state as these oversized units are moved into Iowa after being manufactured in another state and sold

Because of Iowa's statutory scheme, Consolidated cannot use its 65-foot doubles to move commodities through the State. Instead, the company must do one of four things: (i) use 55-foot singles; (ii) use 60-foot doubles; (iii) detach the trailers of a 65-foot double and shuttle each through the State separately; or (iv) divert 65-foot doubles around Iowa.

Dissatisfied with these options, Consolidated filed this suit in the District Court averring that Iowa's statutory scheme unconstitutionally burdens interstate commerce.[8] Iowa defended the law as a reasonable safety measure enacted pursuant to its police power. The State asserted that 65-foot doubles are more dangerous than 55-foot singles and, in any event, that the law promotes safety and reduces road wear within the State by diverting much truck traffic to other States.[9]

In a 14-day trial, both sides adduced evidence on safety, and on the burden on interstate commerce imposed by Iowa's law. On the question of safety, the District Court found that the "evidence clearly establishes that the twin is as safe as the semi." 475 F. Supp. 544, 549 (SD Iowa 1979). For that reason,

> "there is no valid safety reason for barring twins from Iowa's highways because of their configuration.

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in a third. None of this activity would be of particular economic benefit to Iowa." Governor's Veto Message of March 16, 1972, reprinted in App. 641.

[8] Defendants, appellants in this Court, are Raymond Kassel, Director of the Iowa Department of Transportation, Iowa Governor Robert D. Ray, and state transportation officials Robert Rigler, L. Stanley Schoelerman, Donald Gardner, Jules Busker, Allan Thoms, Barbara Dunn, William McGrath, Jon McCoy, Charles W. Larson, Edward Dickinson, and Richard C. Turner.

[9] See 475 F. Supp. 544, 551 (SD Iowa 1979); 612 F. 2d 1064, 1068, 1069–1070 (CA8 1979). In this Ccurt, Iowa places little or no emphasis on the constitutional validity of this second argument.

"The evidence convincingly, if not overwhelmingly, establishes that the 65 foot twin is as safe as, if not safer than, the 60 foot twin and the 55 foot semi. . . .

. . . . . .

"Twins and semis have different characteristics. Twins are more maneuverable, are less sensitive to wind, and create less splash and spray. However, they are more likely than semis to jackknife or upset. They can be backed only for a short distance. The negative characteristics are not such that they render the twin less safe than semis overall. Semis are more stable but are more likely to 'rear end' another vehicle." *Id.*, at 548–549.

In light of these findings, the District Court applied the standard we enunciated in *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429 (1978), and concluded that the state law impermissibly burdened interstate commerce:

"[T]he balance here must be struck in favor of the federal interests. The *total effect* of the law as a safety measure in reducing accidents and casualties is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it." 475 F. Supp., at 551 (emphasis in original).

The Court of Appeals for the Eighth Circuit affirmed. 612 F. 2d 1064 (1979). It accepted the District Court's finding that 65-foot doubles were as safe as 55-foot singles. *Id.*, at 1069. Thus, the only apparent safety benefit to Iowa was that resulting from forcing large trucks to detour around the State, thereby reducing overall truck traffic on Iowa's highways. The Court of Appeals noted that this was not a constitutionally permissible interest. *Id.*, at 1070. It also commented that the several statutory exemptions identified above, such as those applicable to border cities and the shipment of livestock, suggested that the law in effect benefited Iowa

residents at the expense of interstate traffic. *Id.*, at 1070–1071. The combination of these exemptions weakened the presumption of validity normally accorded a state safety regulation. For these reasons, the Court of Appeals agreed with the District Court that the Iowa statute unconstitutionally burdened interstate commerce.

Iowa appealed, and we noted probable jurisdiction. 446 U. S. 950 (1980). We now affirm.

II

It is unnecessary to review in detail the evolution of the principles of Commerce Clause adjudication. The Clause is both a "prolific sourc[e] of national power and an equally prolific source of conflict with legislation of the state[s]." *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 534 (1949). The Clause permits Congress to legislate when it perceives that the national welfare is not furthered by the independent actions of the States. It is now well established, also, that the Clause itself is "a limitation upon state power even without congressional implementation." *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S. 333, 350 (1977). The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it "trespasses upon national interests," *Great A&P Tea Co.* v. *Cottrell,* 424 U. S. 366, 373 (1976), and the courts will hold the state regulation invalid under the Clause alone.

The Commerce Clause does not, of course, invalidate all state restrictions on commerce. It has long been recognized that, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761,

767 (1945). The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern. *Washington Apple Advertising Comm'n, supra,* at 350. For example, regulations that touch upon safety—especially highway safety—are those that "the Court has been most reluctant to invalidate." *Raymond, supra,* at 443; accord, *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 109 (1949); *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.,* 303 U. S. 177, 187 (1938); *Sproles* v. *Binford,* 286 U. S. 374, 390 (1932); *Hendrick* v. *Maryland,* 235 U. S. 610, 622 (1915). Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Raymond, supra,* at 449 (BLACKMUN, J., concurring). Those who would challenge such bona fide safety regulations must overcome a "strong presumption of validity." *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520, 524 (1959).

But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In the Court's recent unanimous decision in *Raymond,*[10] we declined to "accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." 434 U. S., at 443. This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight

[10] JUSTICE STEVENS took no part in the consideration or decision of *Raymond.*

and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.*, at 441; accord, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970); *Bibb, supra,* at 525–530; *Southern Pacific, supra,* at 770.

III

Applying these general principles, we conclude that the Iowa truck-length limitations unconstitutionally burden interstate commerce.

In *Raymond Motor Transportation, Inc.* v. *Rice,* the Court held that a Wisconsin statute that precluded the use of 65-foot doubles violated the Commerce Clause. This case is *Raymond* revisited. Here, as in *Raymond,* the State failed to present any persuasive evidence that 65-foot doubles are less safe than 55-foot singles. Moreover, Iowa's law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck. In the absence of congressional action to set uniform standards,[11] some burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause.[12]

A

Iowa made a more serious effort to support the safety rationale of its law than did Wisconsin in *Raymond,* but its

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[11] The Senate last year passed a bill that would have pre-empted the field of truck lengths by setting a national limit of 65 feet. See S. 1390, 96th Cong., 2d Sess. (1980) (reprinted in 126 Cong. Rec. 3309, 3303 (1980)). The House took no action before adjournment.

[12] It is highly relevant that here, as in *Raymond,* the state statute contains exemptions that weaken the deference traditionally accorded to a state safety regulation. See Part IV, *infra.*

effort was no more persuasive. As noted above, the District Court found that the "evidence clearly establishes that the twin is as safe as the semi." The record supports this finding.

The trial focused on a comparison of the performance of the two kinds of trucks in various safety categories. The evidence showed, and the District Court found, that the 65-foot double was at least the equal of the 55-foot single in the ability to brake, turn, and maneuver. The double, because of its axle placement, produces less splash and spray in wet weather.[13] And, because of its articulation in the middle, the double is less susceptible to dangerous "off-tracking," [14] and to wind.

None of these findings is seriously disputed by Iowa. Indeed, the State points to only three ways in which the 55-foot single is even arguably superior: singles take less time to be passed and to clear intersections; they may back up for longer distances; and they are somewhat less likely to jackknife.

The first two of these characteristics are of limited relevance on modern interstate highways. As the District Court found, the negligible difference in the time required to pass, and to cross intersections, is insignificant on 4-lane divided highways because passing does not require crossing into oncoming traffic lanes, *Raymond*, 434 U. S., at 444, and interstates have few, if any, intersections. The concern over backing capability also is insignificant because it seldom is necessary to back up

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[13] Twin trailers have single axles; semis, by contrast, have tandem axles. The axle configuration of the semi aggravates splash and spray. The forward tire creates upward wind currents in the same place that the rear tire creates downward wind currents. The confluence of these currents occurs at a point just above and between the tandem axles. The resulting turbulence then is blasted outward, carrying spray with it. App. 95–96.

[14] "Off-tracking" refers to the extent to which the rear wheels of a truck deviate from the path of the front wheels while turning.

on an interstate.[15] In any event, no evidence suggested any difference in backing capability between the 60-foot doubles that Iowa permits and the 65-foot doubles that it bans. Similarly, although doubles tend to jackknife somewhat more than singles, 65-foot doubles actually are less likely to jackknife than 60-foot doubles.

Statistical studies supported the view that 65-foot doubles are at least as safe overall as 55-foot singles and 60-foot doubles. One such study, which the District Court credited, reviewed Consolidated's comparative accident experience in 1978 with its own singles and doubles. Each kind of truck was driven 56 million miles on identical routes. The singles were involved in 100 accidents resulting in 27 injuries and one fatality. The 65-foot doubles were involved in 106 accidents resulting in 17 injuries and one fatality. Iowa's expert statistician admitted that this study provided "moderately strong evidence" that singles have a higher injury rate than doubles. App. 488. Another study, prepared by the Iowa Department of Transportation at the request of the state legislature, concluded that "[s]ixty-five foot twin trailer combinations have *not* been shown by experiences in other states to be less safe than 60 foot twin trailer combinations *or* conventional tractor-semitrailers" (emphasis in original). *Id.*, at 584. Numerous insurance company executives, and transportation officials from the Federal Government and various States, testified that 65-foot doubles were at least as safe as 55-foot singles. Iowa concedes that it can produce no study that establishes a statistically significant difference in safety between the 65-foot double and the kinds of vehicles the State permits. Brief for Appellants 28, 32. Nor, as the District Court noted, did Iowa present a single witness who testified that 65-foot doubles were more dangerous overall than the vehicles permitted under Iowa law. 475 F. Supp., at 549.

[15] Evidence at trial did show that doubles could back up far enough to move around an accident. App. 103.

In sum, although Iowa introduced more evidence on the question of safety than did Wisconsin in *Raymond,* the record as a whole was not more favorable to the State.[16]

B

Consolidated, meanwhile, demonstrated that Iowa's law substantially burdens interstate commerce. Trucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately. Alternatively, trucking companies must use the smaller 55-foot singles or 60-foot doubles permitted under Iowa law. Each of these options engenders inefficiency and added expense. The record shows that Iowa's law added about $12.6 million each year to the costs of trucking companies. Consolidated alone incurred about $2 million per year in increased costs.

In addition to increasing the costs of the trucking companies (and, indirectly, of the service to consumers), Iowa's law may aggravate, rather than ameliorate, the problem of highway accidents. Fifty-five foot singles carry less freight than 65-foot doubles. Either more small trucks must be used to carry the same quantity of goods through Iowa, or the same number of larger trucks must drive longer distances to bypass Iowa. In either case, as the District Court noted,

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[16] In suggesting that Iowa's law actually promotes safety, the dissenting opinion ignores the findings of the courts below and relies on largely discredited statistical evidence. The dissent implies that a statistical study identified doubles as more dangerous than singles. *Post,* at 695. At trial, however, the author of that study—Iowa's own statistician—conceded that his calculations were statistically biased, and therefore "not very meaningful." Tr. 1678; see App. 669–670, Tr. 1742–1747.

The dissenting opinion also suggests that its conclusions are bolstered by the fact that the American Association of State Highway and Transportation Officials (AASHTO) recommends that States limit truck lengths. *Post,* at 693, 699. The dissent fails to point out, however, that AASHTO specifically recommends that States permit 65-foot doubles. App. 602–603.

the restriction requires more highway miles to be driven to transport the same quantity of goods. Other things being equal, accidents are proportional to distance traveled. See App. 604, 615.[17] Thus, if 65-foot doubles are as safe as 55-foot singles, Iowa's law tends to *increase* the number of accidents, and to shift the incidence of them from Iowa to other States.[18]

IV

Perhaps recognizing the weakness of the evidence supporting its safety argument, and the substantial burden on commerce that its regulations create, Iowa urges the Court simply to "defer" to the safety judgment of the State. It argues that the length of trucks is generally, although perhaps imprecisely, related to safety. The task of drawing a line is one that Iowa contends should be left to its legislature.

The Court normally does accord "special deference" to state highway safety regulations. *Raymond,* 434 U. S., at 444, n. 18. This traditional deference "derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Ibid.* Less deference to the legislative judg-

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[17] Moreover, trucks diverted from interstates often must travel over more dangerous roads. For example, east-west traffic diverted from Interstate 80 is rerouted through Missouri on U. S. Highway 36, which is predominantly a 2-lane road.

[18] The District Court, in denying a stay pending appeal, noted that Iowa's law causes "more accidents, more injuries, more fatalities and more fuel consumption." *Id.,* at 579. Appellant Kassel conceded as much at trial. *Id.,* at 281. Kassel explained, however, that most of these additional accidents occur in States other than Iowa because truck traffic is deflected around the State. He noted: "Our primary concern is the citizens of Iowa and our own highway system we operate in this state." *Ibid.*

ment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses. Such a disproportionate burden is apparent here. Iowa's scheme, although generally banning large doubles from the State, nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use.[19]

At the time of trial there were two particularly significant exemptions. First, singles hauling livestock or farm vehicles were permitted to be as long as 60 feet. Iowa Code §§ 321.457 (5), 321.457 (3) (1979). As the Court of Appeals noted, this provision undoubtedly was helpful to local interests. Cf. *Raymond, supra,* at 434 (exemption in Wisconsin for milk shippers). Second, cities abutting other States were permitted to enact local ordinances adopting the larger length limitation of the neighboring State. Iowa Code § 321.457 (7) (1979). This exemption offered the benefits of longer trucks to individuals and businesses in important border cities[20] without burdening Iowa's highways with interstate through traffic.[21] Cf. *Raymond, supra,* at 446–447, and n. 24 (exemption in Wisconsin for shipments from local plants).[22]

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[19] As the District Court noted, diversion of traffic benefits Iowa by holding down (i) accidents in the State, (ii) auto insurance premiums, (iii) police staffing needs, and (iv) road wear. 475 F. Supp., at 550.

[20] Five of Iowa's ten largest cities—Davenport, Sioux City, Dubuque, Council Bluffs, and Clinton—are by their location entitled to use the "border cities exemption." See U. S. Bureau of the Census, U. S. Census of Population: 1970 Number of Inhabitants, Final Report, PC (1)–A1, United States Summary 1–136, 1–137.

[21] The vast majority of the 65-foot doubles seeking access to Iowa's interstate highways carry goods in interstate traffic through Iowa. See App. 175–176, 560.

[22] As noted above, exemptions also are available to benefit Iowa truck makers, Iowa Code § 321E.10 (1979), and Iowa mobile home manufacturers

The origin of the "border cities exemption" also suggests that Iowa's statute may not have been designed to ban dangerous trucks, but rather to discourage interstate truck traffic. In 1974, the legislature passed a bill that would have permitted 65-foot doubles in the State. See n. 6, *supra*. Governor Ray vetoed the bill. He said:

> "I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." App. 626.[23]

After the veto, the "border cities exemption" was immediately enacted and signed by the Governor.

It is thus far from clear that Iowa was motivated primarily by a judgment that 65-foot doubles are less safe than 55-foot singles. Rather, Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic.[24] In the District Court and Court of Appeals, the State explicitly at-

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or purchasers, § 321E.28 (5). Although these exemptions are not directly relevant to the controversy over the safety of 65-foot doubles, they do contribute to the pattern of parochialism apparent in Iowa's statute.

[23] Governor Ray further commented that "if we have thousands more trucks crossing our state, there will be millions of additional miles driven in Iowa and that does create a genuine concern for safety." App. 628.

[24] The dissenting opinion insists that we defer to Iowa's truck-length limitations because they represent the collective judgment of the Iowa Legislature. See *post*, at 691–692, 696–697, 699, 700. This position is curious because, as noted above, the Iowa Legislature approved a bill legalizing 65-foot doubles. The bill was vetoed by the Governor, primarily for parochial rather than legitimate safety reasons. The dissenting opinion is at a loss to explain the Governor's interest in deflecting interstate truck traffic around Iowa.

temped to justify the law by its claimed interest in keeping trucks out of Iowa. See n. 9 and accompanying text, *supra*. The Court of Appeals correctly concluded that a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it. 612 F. 2d, at 1070.

V

In sum, the statutory exemptions, their history, and the arguments Iowa has advanced in support of its law in this litigation, all suggest that the deference traditionally accorded a State's safety judgment is not warranted. See *Raymond, supra,* at 444, and n. 18, 446–447.[25] The controlling factors thus are the findings of the District Court, accepted by the Court of Appeals, with respect to the relative safety of the types of trucks at issue, and the substantiality of the burden on interstate commerce.

Because Iowa has imposed this burden without any significant countervailing safety interest,[26] its statute violates the

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[25] *Locomotive Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129 (1968), in its result, although perhaps not in all of its language, is consistent with the conclusion we reach today. There, the Arkansas "full-crew" laws were upheld against constitutional challenge because the Court easily perceived that they made nonillusory contributions to safety. See *id.*, at 136–138. Here, as in *Raymond,* there was no such evidence. This case and *Raymond* recognize, as the Court did in *Locomotive Firemen,* that States constitutionally may enact laws that demonstrably promote safety, even when those laws also burden the flow of commerce.

[26] As noted above, the District Court and the Court of Appeals held that the Iowa statutory scheme unconstitutionally burdened interstate commerce. The District Court, however, found that the statute did not discriminate against such commerce. 475 F. Supp., at 553. Because the record fully supports the decision below with respect to the burden on interstate commerce, we need not consider whether the statute also operated to discriminate against that commerce. See *Raymond,* 434 U. S., at 446–447, n. 24. The latter theory was neither briefed nor argued in this Court.

Commerce Clause.[27] The judgment of the Court of Appeals is affirmed.[28]

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

Iowa's truck-length regulation challenged in this case is nearly identical to the Wisconsin regulation struck down in *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U. S. 429 (1978), as in violation of the Commerce Clause. In my view the same Commerce Clause restrictions that dictated that holding also require invalidation of Iowa's regulation insofar as it prohibits 65-foot doubles.

The reasoning bringing me to that conclusion does not require, however, that I engage in the debate between my Brothers POWELL and REHNQUIST over what the District Court record shows on the question whether 65-foot doubles are more dangerous than shorter trucks. With all respect, my Brothers ask and answer the wrong question.

For me, analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.

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[27] JUSTICE REHNQUIST in dissent states that, as he reads the various opinions in this case, "only four Justices invalidate Iowa's law on the basis of the analysis in *Raymond*." *Post,* at 700, n. 10. It should be emphasized that *Raymond,* the analysis of which was derived from the Court's opinion in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), was joined by each of the eight Justices who participated. Today, JUSTICE BRENNAN finds it unnecessary to reach the *Raymond* analysis because he finds the Iowa statute to be flawed for a threshold reason.

[28] Consolidated's complaint sought only a declaration that the Iowa statute was unconstitutional insofar as it precluded the use of 65-foot doubles on major interstate highways and nearby access roads. App. 10–11. We are not asked to consider whether Iowa validly may ban 65-foot doubles from smaller roads on which they might be demonstrably unsafe.

(2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.

I

Both the opinion of my Brother POWELL and the opinion of my Brother REHNQUIST are predicated upon the supposition that the constitutionality of a state regulation is determined by the factual record created by the State's lawyers in trial court. But that supposition cannot be correct, for it would make the constitutionality of state laws and regulations depend on the vagaries of litigation rather than on the judgments made by the State's lawmakers.

In considering a Commerce Clause challenge to a state regulation, the judicial task is to balance the burden imposed on commerce against the local benefits sought to be achieved by the State's *lawmakers*. See *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). In determining those benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment. See generally *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 464, 473 (1981). Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. See *Locomotive Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129, 138–139 (1968); *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 192–193 (1938). It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates

that the regulation is not wholly irrational in light of its purposes. See *Minnesota* v. *Clover Leaf Creamery Co., supra,* at 469, 473.[1]

II

My Brothers POWELL and REHNQUIST make the mistake of disregarding the intention of Iowa's lawmakers and assuming that resolution of the case must hinge upon the argument offered by Iowa's attorneys: that 65-foot doubles are more dangerous than shorter trucks. They then canvass the factual record and findings of the courts below and reach opposite conclusions as to whether the evidence adequately supports that empirical judgment. I repeat: my Brothers POWELL and REHNQUIST have asked and answered the wrong question. For although Iowa's lawyers in this litigation have defended the truck-length regulation on the basis of the safety advantages of 55-foot singles and 60-foot doubles over 65-foot doubles, Iowa's actual rationale for maintaining the regulation had nothing to do with these purported differences. Rather, Iowa sought to discourage interstate truck traffic on Iowa's high-

[1] Moreover, I would emphasize that in the field of safety—and perhaps in other fields where the decisions of state lawmakers are deserving of a heightened degree of deference—the role of the courts is not to balance asserted burdens against intended benefits as it is in other fields. Compare *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U. S. 429, 449 (1978) (BLACKMUN, J., concurring) (safety regulation), with *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 143 (1970) (regulation intended "to protect and enhance the reputation of growers within the State"). In the field of safety, once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests. I therefore disagree with my Brother POWELL when he asserts that the degree of interference with interstate commerce may in the first instance be "weighed" against the State's safety interests:

"Regulations designed [to promote the public health or safety] nevertheless may further the purpose so marginally, *and interfere with commerce so substantially,* as to be invalid under the Commerce Clause." *Ante,* at 670 (emphasis added).

ways.[2] Thus, the safety advantages and disadvantages of the types and lengths of trucks involved in this case are irrelevant to the decision.[3]

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[2] In the District Court and the Court of Appeals, Iowa's attorneys forthrightly defended the regulation in part on the basis of the State's interest in discouraging interstate truck traffic through Iowa 475 F. Supp. 544, 550 (SD Iowa); 612 F 2d 1064, 1069 (CA8 1979).

[3] My Brother REHNQUIST claims that the "argument" that a court should defer to the actual purposes of the lawmakers rather than to the *post hoc* justifications of counsel "has been consistently rejected by the Court in other contexts." *Post*, at 702 Apparently, he has overlooked such cases as *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U S. 522 (1959), where we described the rationale for our earlier decision in *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949):

"The statutes, on their face admittedly discriminatory against nonresidents, themselves declared their purpose. . . . Having themselves specifically declared their purpose, the Ohio statute left no room to conceive of any other purpose for their existence. And the declared purpose having been found arbitrarily discriminatory against nonresidents, the Court could hardly escape the conclusion . . . ." 358 U. S., at 529–530.

And in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975), we said:

"This Court need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (Citing cases.)

And in *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976), we stated that a classification challenged as being discriminatory will be upheld only if it "rationally furthers the purpose identified by the State." See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 463, n. 7 (1981); *Califano* v. *Goldfarb*, 430 U. S. 199, 212–213 (1977) (plurality opinion); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 813, n. 23 (1976); *Johnson* v. *Robison*, 415 U. S. 361, 381–382 (1974).

The extent to which we may rely upon *post hoc* justifications of counsel depends on the circumstances surrounding passage of the legislation. Where there is no evidence bearing on the actual purpose for a legislative classification, our analysis necessarily focuses on the suggestions of counsel, see *Allied Stores of Ohio, Inc.* v. *Bowers*, *supra*, at 528–529 (relied upon by the dissent, *post*, at 703–704, n. 13). Even then, "marginally more demanding scrutiny" is appropriate to "test the plausibility of the tendered

My Brother POWELL concedes that "[i]t is . . . far from clear that Iowa was motivated primarily by a judgment that 65-foot doubles are less safe than 55-foot singles. Rather, Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic." *Ante*, at 677. This conclusion is more than amply supported by the record and the legislative history of the Iowa regulation. The Iowa Legislature has consistently taken the position that size, weight, and speed restrictions on interstate traffic should be set in accordance with uniform national standards. The stated purpose was not to further safety but to achieve uniformity with other States. The Act setting the limitations challenged in

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purpose." *Schweiker* v. *Wilson*, *ante*, at 245 (POWELL, J., dissenting). But where the lawmakers' purposes in enacting a statute are explicitly set forth, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, at 458–459; *Johnson* v. *Robison*, *supra*, at 376, or are clearly discernible from the legislative history, *e. g.*, *Hughes* v. *Alexandria Scrap Corp.*, *supra*, at 813, n. 23; *McGinnis* v. *Royster*, 410 U. S. 263, 274–277 (1973), this Court should not take—and, with the possible exception of *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166 (1980), see *id.*, at 187–193 (BRENNAN, J., dissenting), has not taken—the extraordinary step of disregarding the *actual* purpose in favor of some "imaginary basis or purpose." *McGinnis* v. *Royster*, *supra*, at 277. The principle of separation of powers requires, after all, that we defer to the elected lawmakers' judgment as to the appropriate means to accomplish an end, not that we defer to the arguments of lawyers.

If, as here, the only purpose ever articulated by the State's lawmakers for maintaining a regulation is illegitimate, I consider it contrary to precedent as well as to sound principles of constitutional adjudication for the courts to base their analysis on purposes never conceived by the lawmakers. This is especially true where, as the dissent's strained analysis of the relative safety of 65-foot doubles to shorter trucks amply demonstrates, see *post*, at 694–696, the *post hoc* justifications are implausible as well as imaginary. I would emphasize that, although my Brother POWELL's plurality opinion does not give as much weight to the illegitimacy of Iowa's actual purpose as I do, see Part III, *infra*, both that opinion and this concurrence have found the actual motivation of the Iowa lawmakers in maintaining the truck-length regulation highly relevant to, if not dispositive of, the case. See *ante*, at 677–678.

this case, passed in 1947 and periodically amended since then, is entitled "An Act *to promote uniformity with other states* in the matter of limitations on the size, weight and speed of motor vehicles . . . ." 1947 Iowa Acts, ch. 177 (emphasis added). Following the proposals of the American Association of State Highway and Transportation Officials, the State has gradually increased the permissible length of trucks from 45 feet in 1947 to the present limit of 60 feet.

In 1974, the Iowa Legislature again voted to increase the permissible length of trucks to conform to uniform standards then in effect in most other States. This legislation, House Bill 671, would have increased the maximum length of twin trailer trucks operable in Iowa from 60 to 65 feet. But Governor Ray broke from prior state policy, and vetoed the legislation. The legislature did not override the veto, and the present regulation was thus maintained. In his veto,[4] Governor Ray did not rest his decision on the conclusion that 55-foot singles and 60-foot doubles are any safer than 65-foot doubles, or on any other safety consideration inherent in the type or size of the trucks. Rather, his principal concern was that to allow 65-foot doubles would "basically ope[n] our state to literally thousands and thousands more trucks per year." App. 628. This increase in interstate truck traffic would, in the Governor's estimation, greatly increase highway maintenance costs, which are borne by the citizens of the State, *id.*, at 628–629, and increase the number of accidents and fatalities within the State. *Id.*, at 628. The legislative response was not to override the veto, but to accede to the Governor's action, and in accord with his basic premise, to enact a "border cities exemption." This permitted cities within border areas to allow 65-foot doubles while otherwise maintaining the 60-foot limit throughout the State to discourage interstate truck traffic.

[4] The veto message, printed at App. 626–631, is a complete statement of Governor Ray's reasons for vetoing House Bill 671. App. 172 (deposition of Governor Ray).

Although the Court has stated that "[i]n no field has . . . deference to state regulation been greater than that of highway safety," *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S., at 443, it has declined to go so far as to presume that size restrictions are inherently tied to public safety. *Id.*, at 444, n. 19. The Court has emphasized that the "strong presumption of validity" of size restrictions "cannot justify a court in closing its eyes to uncontroverted evidence of record," *ibid.*—here the obvious fact that the safety characteristics of 65-foot doubles did not provide the motivation for either legislators or Governor in maintaining the regulation.

III

Though my Brother POWELL recognizes that the State's actual purpose in maintaining the truck-length regulation was "to limit the use of its highways by deflecting some through traffic," *ante*, at 677, he fails to recognize that this purpose, being *protectionist* in nature, is *impermissible* under the Commerce Clause.[5] The Governor admitted that he blocked legislative efforts to raise the length of trucks because the change "would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens." App. 626; see also *id.*, at 185–186. Appellant Raymond Kassel, Director of the Iowa Department of Transportation, while admitting that the greater 65-foot length standard would be *safer* overall, defended the more restrictive regulations because of their benefits *within Iowa:*

"Q: Overall, there would be fewer miles of operation, fewer accidents and fewer fatalities?

"A: Yes, on the national scene.

"Q: Does it not concern the Iowa Department of

[5] It is not enough to conclude, as my Brother POWELL does, that "the deference traditionally accorded a State's safety judgment is not warranted." *Ante*, at 678.

Transportation that banning 65-foot twins causes more accidents, more injuries and more fatalities?

"A: Do you mean outside of our state border?

"Q: Overall.

"A: Our primary concern is the citizens of Iowa and our own highway system we operate in this state." *Id.*, at 281.

The regulation has had its predicted effect. As the District Court found:

> "Iowa's length restriction causes the trucks affected by the ban to travel more miles over more dangerous roads in other states which means a greater overall exposure to accidents and fatalities. More miles of highway are subjected to wear. More fuel is consumed and greater transportation costs are incurred." 475 F. Supp. 544, 550 (SD Iowa 1979).

Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways. Such an attempt has all the hallmarks of the "simple . . . protectionism" this Court has condemned in the economic area. *Philadelphia* v. *New Jersey,* 437 U. S. 617, 624 (1978). Just as a State's attempt to avoid interstate competition in economic goods may damage the prosperity of the Nation as a whole, so Iowa's attempt to deflect interstate truck traffic has been found to make the Nation's highways as a whole more hazardous. That attempt should therefore be subject to "a virtually *per se* rule of invalidity." *Ibid.*

This Court's heightened deference to the judgments of state lawmakers in the field of safety, see *ante,* at 670, is largely attributable to a judicial disinclination to weigh the interests of safety against other societal interests, such as the economic interest in the free flow of commerce. Thus, "if safety justifications are not illusory, the Court will not second-

guess legislative judgment about their importance *in comparison with related burdens on interstate commerce.*" *Raymond Motor Transportation, Inc.* v. *Rice, supra,* at 449 (BLACKMUN, J., concurring) (emphasis added). Here, the decision of Iowa's lawmakers to promote *Iowa's* safety and other interests at the direct expense of the safety and other interests of neighboring States merits no such deference. No special judicial acuity is demanded to perceive that this sort of parochial legislation violates the Commerce Clause. As Justice Cardozo has written, the Commerce Clause "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 523 (1935).

I therefore concur in the judgment.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE STEWART join, dissenting.

The result in this case suggests, to paraphrase Justice Jackson, that the only state truck-length limit "that is valid is one which this Court has not been able to get its hands on." *Jungersen* v. *Ostby & Barton Co.,* 335 U. S. 560, 572 (1949) (dissenting opinion). Although the plurality opinion and the opinion concurring in the judgment strike down Iowa's law by different routes, I believe the analysis in both opinions oversteps our "limited authority to review state legislation under the commerce clause," *Locomotive Firemen* v. *Chicago, R. I. & P. R. Co.,* 393 U. S. 129, 136 (1968), and seriously intrudes upon the fundamental right of the States to pass laws to secure the safety of their citizens. Accordingly, I dissent.

I

It is necessary to elaborate somewhat on the facts as presented in the plurality opinion to appreciate fully what the Court does today. Iowa's action in limiting the length of trucks which may travel on its highways is in no sense un-

usual. Every State in the Union regulates the length of vehicles permitted to use the public roads. Nor is Iowa a renegade in having length limits which operate to exclude the 65-foot doubles favored by Consolidated. These trucks are prohibited in other areas of the country as well, some 17 States and the District of Columbia, including all of New England and most of the Southeast.[1] While pointing out that Consolidated carries commodities through Iowa on Interstate 80, "the principal east-west route linking New York, Chicago, and the west coast," *ante*, at 665, the plurality neglects to note that both Pennsylvania and New Jersey, through which Interstate 80 runs before reaching New York, also ban 65-foot doubles. In short, the persistent effort in the plurality opinion to paint Iowa as an oddity standing alone to block commerce carried in 65-foot doubles is simply not supported by the facts.

Nor does the plurality adequately convey the extent to which the lower courts permitted the 65-foot doubles to operate in Iowa. Consolidated sought to have the 60-foot length limit declared an unconstitutional burden on commerce when applied to the seven Interstate Highways in Iowa[2] and "access routes to and from Plaintiff's terminals, and reasonable access from said Interstate Highways to facilities for food, fuel, repairs, or rest." App. 10. The lower courts granted this relief, permitting the 65-foot doubles to travel *off the Interstates* as far as five miles for access to terminal and

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[1] Doubles are prohibited in Maine, New Hampshire, Vermont, Massachusetts (except turnpike), Rhode Island, Connecticut, Pennsylvania, West Virginia, Virginia, Tennessee, North Carolina, South Carolina, Alabama, and the District of Columbia. Doubles are permitted to a maximum length of 55 feet in New York (on designated highways only, longer permitted on turnpike), New Jersey, Mississippi, and Georgia. Sixty-five-foot doubles are restricted to designated highways in Oregon, North Dakota, Minnesota, Wisconsin, Michigan, Illinois, Missouri, Louisiana, Kentucky, Maryland, and Florida. See App. 605, 645.

[2] Interstate Highways 80, 35, 280, 380, 29, 680, and 235.

other facilities, or less if closer facilities were available. 475 F. Supp. 544, 553–554 (SD Iowa 1979). To the extent the plurality relies on characteristics of the Interstate Highways in rejecting Iowa's asserted safety justifications, see *ante,* at 672–673, it fails to recognize the scope of the District Court order it upholds.

With these additions to the relevant facts, we can now examine the appropriate analysis to be applied.

II

Casual readers of this Court's Commerce Clause decisions may be surprised, upon turning to the Constitution itself, to discover that the Clause in question simply provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. Although it is phrased in terms of an affirmative grant of power to the National Legislature, we have read the Commerce Clause as imposing some limitations on the States as well, even in the absence of any action by Congress. See *Philadelphia* v. *New Jersey,* 437 U. S. 617, 623 (1978). The Court has hastened to emphasize, however, that the negative implication it has discerned in the Commerce Clause does not invalidate state legislation simply because the legislation burdens interstate commerce.

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.' " *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440, 443–444 (1960) (quoting *Sherlock* v. *Alling,* 93 U. S. 99, 103 (1876)).

See *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U. S.

429, 440 (1978); *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767 (1945). The Commerce Clause is, after all, a grant of authority to Congress, not to the courts. Although the Court when it interprets the "dormant" aspect of the Commerce Clause will invalidate unwarranted state intrusion, such action is a far cry from simply undertaking to regulate when Congress has not because we believe such regulation would facilitate interstate commerce. Cf. *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292, 302 (1944) (Black, J., concurring) ("The Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution").

It is also well established that "the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond, supra,* at 443 (quoting *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 143 (1970)). The propriety of state regulation of the use of public highways was explicitly recognized in *Morris* v. *Duby,* 274 U. S. 135, 143 (1927), where Chief Justice Taft wrote that "[i]n the absence of national legislation especially covering the subject of interstate commerce, the State may rightfully prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens." The Court very recently reaffirmed the longstanding view that "[i]n no field has . . . deference to state regulation been greater than that of highway safety." *Raymond, supra,* at 443. See *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 111 (1949); *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.,* 303 U. S. 177, 187 (1938); *Sproles* v. *Binford,* 286 U. S. 374, 390 (1932); *Hendrick* v. *Maryland,* 235 U. S. 610, 622 (1915). Those challenging a highway safety regulation must overcome a "strong presumption of validity," *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520, 524 (1959), particularly

when, as here, Congress has not acted in the area and the claim is that "the bare possession of power by Congress" invalidates the state legislation. *Barnwell Brothers, supra,* at 187.[3]

A determination that a state law is a rational safety measure does not end the Commerce Clause inquiry. A "sensitive consideration" of the safety purpose in relation to the burden on commerce is required. *Raymond, supra,* at 441. When engaging in such a consideration the Court does not directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to "outweigh" the former. Such an approach would make an empty gesture of the strong presumption of validity accorded state safety measures, particularly those governing highways. It would also arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures. "[I]n reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected." *Barnwell Brothers, supra,* at 190. See *Locomotive Firemen,* 393 U. S., at 138 ("[T]he question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives"); *Bibb, supra,* at 524 ("If there are alternative ways of solving a problem, we do not sit to determine which of them is best

[3] Congress has considered the question of regulating truck length several times but has consistently left the matter for state regulation. See, *e. g.,* S. Rep. No. 93–1111, p. 10 (1974) ("The Committee believes that truck lengths should remain, as they have been, a matter for State decision").

suited to achieve a valid state objective. Policy decisions are for the state legislature"). These admonitions are peculiarly apt when, as here, the question involves the difficult comparison of financial losses and "the loss of lives and limbs of workers and people using the highways." *Locomotive Firemen, supra,* at 140.[4]

The purpose of the "sensitive consideration" referred to above is rather to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce. We will conclude that it is if the safety benefits from the regulation are demonstrably trivial while the burden on commerce is great. Thus the Court in *Bibb* stated that the "strong presumption of validity" accorded highway safety measures could be overcome only when the safety benefits were "slight or problematical," 359 U. S., at 524. See *Raymond,* 434 U. S., at 449 (BLACKMUN, J., concurring) ("[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce"). The nature of the inquiry is perhaps best illustrated by examining those cases in which state safety laws have been struck down on Commerce Clause grounds. In *Southern Pacific* a law regulating train lengths was viewed by the Court as having "at most slight and dubious advantage, if any, over unregulated train lengths," 325 U. S., at 779; the lower courts concluded the law actually tended to *increase* the number of accidents by increasing the number of trains, *id.,* at 777. In *Bibb* the contoured mudguards re-

[4] It should not escape notice that a majority of the Court goes on record today as agreeing that courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory. See opinion concurring in judgment, *ante,* at 681, n. 1. Even the plurality gives lipservice to this principle, *ante,* at 670. I do not agree with my Brother BRENNAN, however, that only those safety benefits somehow articulated by the legislature as *the* motivation for the challenged statute can be considered in supporting the state law. See *infra,* at 702–703.

quired by Illinois, alone among the States, had *no* safety advantages over conventional mudguards and, as in *Southern Pacific*, actually *increased* hazards. 359 U. S., at 525; *id.*, at 530 (Harlan, J., concurring). In *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 375–376 (1976), the Court struck down a Mississippi "reciprocity clause" concerning milk inspection because it "disserve[d] rather than promote[d] any higher Mississippi milk quality standards." The cases thus demonstrate that the safety benefits of a state law must be slight indeed before it will be struck down under the dormant Commerce Clause.

III

Iowa defends its statute as a highway safety regulation. There can be no doubt that the challenged statute is a valid highway safety regulation and thus entitled to the strongest presumption of validity against Commerce Clause challenges. As noted, all 50 States regulate the length of trucks which may use their highways. Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399 (1937) ("The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it"). The American Association of State Highway and Transportation Officials (AASHTO) has consistently recommended length as well as other limits on vehicles.[5] The Iowa Supreme Court has long viewed the provision in question as intended to promote highway safety, see *Wood Brothers Thresher Co. v. Eicher*, 231 Iowa 550, 559–560, 1 N. W. 2d 655, 660 (1942); *State* v. *United-Buckingham Freight Lines, Inc.*, 211 N. W. 2d 288, 290 (1973), and "[t]his Court has also had occasion to point out that the sizes and weights of automobiles have an important relation

[5] The plurality points out that "AASHTO specifically recommends that States permit 65-foot doubles," *ante*, at 674, n. 16. But in the absence of its adoption by the Iowa legislative process, an AASHTO recommendation as to a particular length limit remains exactly that: a recommendation which no State is bound to follow.

to the safe and convenient use of the highways, which are matters of state control." *Maurer* v. *Hamilton*, 309 U. S. 598, 609 (1940). There can also be no question that the particular limit chosen by Iowa—60 feet—is rationally related to Iowa's safety objective. Most truck limits are between 55 and 65 feet, see App. 645, and Iowa's choice is thus well within the widely accepted range.

Iowa adduced evidence supporting the relation between vehicle length and highway safety. The evidence indicated that longer vehicles take greater time to be passed, thereby increasing the risks of accidents, particularly during the inclement weather not uncommon in Iowa. *Id.*, at 504–505. The 65-foot vehicle exposes a passing driver to visibility-impairing splash and spray during bad weather for a longer period than do the shorter trucks permitted in Iowa.[6] Longer trucks are more likely to clog intersections, *id.*, at 457, and although there are no intersections on the Interstate Highways, the order below went beyond the highways themselves and the concerns about greater length at intersections would arise "[a]t every trip origin, every trip destination, every intermediate stop for picking up trailers, reconfiguring loads, change of drivers, eating, refueling—every intermediate stop would generate this type of situation." *Ibid.* The Chief of the Division of

[6] Although greater passing time was offered as a safety justification in *Raymond*, the Court noted that the trucking companies there "produced *uncontradicted* evidence that the difference in passing time does not pose an appreciable threat to motorists traveling on limited access, four-lane divided highways." 434 U. S., at 444 (emphasis supplied). That is not the case here. Iowa indicated before the trial court the connection between greater passing time and greater hazard, primarily the longer exposure to splash and spray. For a vehicle traveling at 55 miles per hour passing a truck traveling at 52 miles per hour, the additional exposure from a 65-foot truck as opposed to a 60-foot truck would be 92 feet and more than a full second. App. 505. The greater passing distance and time would become even more significant off the Interstates when oncoming traffic is involved, and the District Court order permits the longer trucks to operate off the Interstates.

Patrol in the Iowa Department of Public Safety testified that longer vehicles pose greater problems at the scene of an accident. For example, trucks involved in accidents often must be unloaded at the scene, *id.*, at 400, which would take longer the bigger the load.

In rebuttal of Consolidated's evidence on the relative safety of 65-foot doubles to trucks permitted on Iowa's highways, Iowa introduced evidence that doubles are more likely than singles to jackknife or upset, *id.*, at 507. The District Court concluded that this was so and that singles are more stable than doubles. 475 F. Supp., at 549.[7] Iowa also introduced evidence from Consolidated's own records showing that Consolidated's overall accident rate for doubles exceeded that of semis for three of the last four years, App. 668–675, and that some of Consolidated's own drivers expressed a preference for the handling characteristics of singles over doubles. 475 F. Supp., at 549.

In addition Iowa elicited evidence undermining the probative value of Consolidated's evidence. For example, Iowa established that the more experienced drivers tended to drive doubles, because they have seniority and driving doubles is a higher paying job than driving singles. Since the leading cause of accidents was driver error, Consolidated's evidence of the relative safety record of doubles may have been based in large part not on the relative safety of the vehicles themselves but on the experience of the drivers. App. 27–28. Although the District Court, the Court of Appeals, and the plurality all fail to recognize the fact, Iowa also negated much of Consolidated's evidence by establishing that it considered the relative safety of doubles to singles, and not the question of length alone. Consolidated introduced much

[7] Although the District Court noted that doubles are more maneuverable, it certainly is reasonable for a legislature to conclude that stability is a more critical factor than maneuverability on the straight expanses of the Interstates.

evidence that its doubles were as safe as singles. See, *e. g., id.*, at 23, 32–36, 45, 89, 153, 289, 304, 586, 609. Such evidence is beside the point. The trucks which Consolidated wants to run in Iowa are prohibited because of their length, not their configuration. Doubles are allowed in Iowa, up to a length of 60 feet, and Consolidated in fact operates 60-foot doubles in Iowa. Consolidated's experts were often forced to admit that they could draw no conclusions about the relative safety of 65-foot doubles and 60-foot doubles, as opposed to doubles and singles. See, *e. g., id.*, at 26, 53, 308. Conclusions that the double configuration is as safe as the single do not at all mean the 65-foot double is as safe as the 60-foot double, or that length is not relevant to vehicle safety. For example, one of Consolidated's experts testified that doubles "off track" better than singles, because of their axle placement, but conceded on cross-examination that a 60-foot double would off-track better than a 65-foot double. *Id.*, at 97, 107. In sum, there was sufficient evidence presented at trial to support the legislative determination that length is related to safety, and nothing in Consolidated's evidence undermines this conclusion.

The District Court approached the case as if the question were whether Consolidated's 65-foot trucks were as safe as others permitted on Iowa highways, and the Court of Appeals as if its task were to determine if the District Court's factual findings in this regard were "clearly erroneous." 612 F. 2d, at 1069. The question, however, is whether the Iowa Legislature has acted rationally in regulating vehicle lengths and whether the safety benefits from this regulation are more than slight or problematical. "The classification of the traffic for the purposes of regulation . . . is a legislative, not a judicial, function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard." *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594 (1939). "Since the adoption of one weight or width regula-

tion, rather than another, is a legislative and not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard." *Barnwell Brothers*, 303 U. S., at 191.[8]

The answering of the relevant question is not appreciably advanced by comparing trucks slightly over the length limit with those at the length limit. It is emphatically not our task to balance any incremental safety benefits from prohibiting 65-foot doubles as opposed to 60-foot doubles against the burden on interstate commerce. Lines drawn for safety purposes will rarely pass muster if the question is whether a slight increment can be permitted without sacrificing safety. As Justice Holmes put it:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood

[8] The opinion of my Brother BRENNAN concurring in the judgment mischaracterizes this dissent when it states that I assume "resolution of the case must hinge upon the argument offered by Iowa's attorneys: that 65-foot doubles are more dangerous than shorter trucks." *Ante*, at 681. I assume nothing of the sort. As noted in the immediately preceding paragraph, the point of this dissent is that the District Court and the Court of Appeals erred when they undertook to determine if the prohibited trucks were as safe as the permitted ones on the basis of evidence presented at trial. As I read this Court's opinions, the State must simply prove, aided by a "strong presumption of validity," that the safety benefits of its law are not illusory. I review the evidence presented at trial simply to demonstrate that Iowa made such a showing in this case, not because the validity of Iowa's law depends on its proving by a preponderance of the evidence that the excluded trucks are unsafe. As I thought was made clear, it is my view that Iowa must simply show a relation between vehicle length limits and safety, and that the benefits from its length limit are not illusory. Iowa's arguments on passing time, intersection obstruction, and problems at the scene of accidents have validity beyond a comparison of the 65- and 60-foot trucks. In sum, I fully agree with JUSTICE BRENNAN that the validity of Iowa's length limit does not turn on whether 65-foot trucks are less safe than 60-foot trucks.

> and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 41 (1938) (dissenting opinion).

The question is rather whether it can be said that the benefits flowing to Iowa from a rational truck-length limitation are "slight or problematical." See *Bibb,* 359 U. S., at 524. The particular line chosen by Iowa—60 feet—is relevant only to the question whether the limit is a rational one. Once a court determines that it is, it considers the overall safety benefits *from the regulation* against burdens on interstate commerce, and not any marginal benefits from the scheme the State established as opposed to that the plaintiffs desire. See *Southern Pacific,* 325 U. S., at 779 (train-length law struck down because it "affords at most slight and dubious advantage, if any, *over unregulated train lengths*") (emphasis supplied); *Barnwell Brothers, supra,* at 190–192.

The difficulties with the contrary approach are patent. While it may be clear that there are substantial safety benefits from a 55-foot truck as compared to a 105-foot truck, these benefits may not be discernible in 5-foot jumps. Appellee's approach would permit what could not be accomplished in one lawsuit to be done in 10 separate suits, each challenging an additional five feet.

Any direct balancing of marginal safety benefits against burdens on commerce would make the burdens on commerce the sole significant factor, and make likely the odd result that

similar state laws enacted for identical safety reasons might violate the Commerce Clause in one part of the country but not another. For example, Mississippi and Georgia prohibit trucks over 55 feet. Since doubles are not operated in the Southeast, the demonstrable burden on commerce may not be sufficient to strike down these laws, while Consolidated maintains that it is in this case, even though the doubles here are given an additional five feet. On the other hand, if Consolidated were to win this case it could shift its 65-foot doubles to routes leading into Mississippi or Georgia (both States border States in which 65-foot trucks are permitted) and claim the same constitutional violation it claims in this case. Consolidated Freightways, and not this Court, would become the final arbiter of the Commerce Clause.

It must be emphasized that there is nothing in the laws of nature which make 65-foot doubles an obvious norm. Consolidated operates 65-foot doubles on many of its routes simply because that is the largest size permitted in many States through which Consolidated travels. App. 92, 240, 364–365. Doubles can and do come in smaller sizes; indeed, when Iowa adopted the present 60-foot limit in 1963, it was in accord with AASHTO recommendations. Striking down Iowa's law because Consolidated has made a voluntary business decision to employ 65-foot doubles, a decision based on the actions of other state legislatures, would essentially be compelling Iowa to yield to the policy choices of neighboring States. Under our constitutional scheme, however, there is only one legislative body which can pre-empt the rational policy determination of the Iowa Legislature and that is Congress. Forcing Iowa to yield to the policy choices of neighboring States perverts the primary purpose of the Commerce Clause, that of vesting power to regulate interstate commerce in Congress, where all the States are represented. In *Barnwell Brothers,* the Court upheld a South Carolina width limit of 90 inches even though "all other states permit a width of 96 inches, which is the standard width of trucks engaged in interstate

commerce." 303 U. S., at 184. Then Justice Stone, writing for the Court, stressed:

> "The fact that many states have adopted a different standard is not persuasive. . . . The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. It would hardy be contended that if all the states had adopted a single standard none, in the light of its own experience and in the exercise of its judgment upon all the complex elements which enter into the problem, could change it." *Id.*, at 195–196.

See also *Sproles*, 286 U. S., at 390. Nor is Iowa's policy preempted by Consolidated's decision to invest in 65-foot trucks, particularly since this was done when Iowa's 60-foot limit was on the books. Cf. *id.*, at 390–391.[9]

The Court of Appeals felt compelled to reach the result it did in light of our decision in *Raymond* and the plurality agrees that "[t]his case is *Raymond* revisited," *ante*, at 671.[10] *Raymond*, however, does not control this case. The Court in *Raymond* emphasized that "[o]ur holding is a narrow one, for we do not decide whether laws of other States restricting the operation of trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety

[9] The extent to which the assertion of a violation of the Commerce Clause is simply an effort to compel Iowa to yield to the decisions of its neighbors is clearest if one asks whether Iowa's law would violate the Commerce Clause if the 17 States which currently prohibit Consolidated's 65-foot doubles were not in the East and Southeast but rather surrounded Iowa.

[10] The opinion concurring in the judgment begins by stating that the regulation involved here is "nearly identical" to the one struck down in *Raymond*, *ante*, at 679, but then approaches the case in a completely different manner than the Court in *Raymond*. My Brother BRENNAN votes to strike down Iowa's law not because the safety benefits of Iowa's law are illusory—indeed, he specifically declines to consider the safety benefits—but because he views it as protectionist in nature. As I read the various opinions in this case, therefore, only four Justices invalidate Iowa's law on the basis of the analysis in *Raymond*.

issue were not so overwhelmingly one-sided as in this case." 434 U. S., at 447.[11] The *Raymond* Court repeatedly stressed that the State "made no effort to contradict . . . evidence of comparative safety with evidence of its own," *id.*, at 437, that the trucking companies' evidence was "uncontroverted," *id.*, at 445, n. 19, and that the State "virtually defaulted in its defense of the regulations as a safety measure," *id.*, at 444. By contrast, both the District Court and the Court of Appeals recognized that Iowa "made an all out effort" and "zealously presented arguments" on its safety case. 475 F. Supp., at 548; 612 F. 2d, at 1067–1068. As noted, Iowa has adduced evidence sufficient to support its safety claim and has rebutted much of the evidence submitted by Consolidated.

Furthermore, the exception to the Wisconsin prohibition which the Court specifically noted in *Raymond* finds no parallel in this case. The exception in *Raymond* permitted oversized vehicles to travel from plant to plant in Wisconsin or between a Wisconsin plant and the border. 434 U. S., at 446, and n. 24. As the Court noted, this discriminated on its face between Wisconsin industries and the industries of other States. The border-cities exception to the Iowa length limit does not. Iowa shippers in cities with border-city ordinances may use longer vehicles in interstate commerce, but interstate shippers coming into such cities may do so as well. Cities without border-city ordinances may neither export nor import on oversized vehicles. Nor can the border-cities exception be "[v]iewed realistically," as was the Wisconsin exception, to "be the product of compromise between forces within the State that seek to retain the State's general truck-length limit, and industries within the State that complain that the general limit is unduly burdensome." *Raymond*, 434 U. S., at 447. The Wisconsin exception was available to all Wisconsin industries wanting to ship out of State from Wis-

[11] JUSTICE BLACKMUN filed a concurring opinion, joined by three others, "to emphasize the narrow scope of [the] decision." 434 U. S., at 448.

consin plants. The border-cities exception is of much narrower applicability: only 5 of Iowa's 16 largest cities and only 8 cities in all permit oversized trucks under the border-cities exception. The population of the eight cities with border-city ordinances is only 13 percent of the population of the State.[12]

My Brother BRENNAN argues that the Court should consider only *the* purpose the Iowa legislators *actually* sought to achieve by the length limit, and not the purposes advanced by Iowa's lawyers in defense of the statute. This argument calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it. The argument has been consistently rejected by the Court in other contexts, compare, *e. g.*, *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 187–188 (1980), with *id.*, at 187–188 (BRENNAN, J., dissenting), and *Michael M.* v. *Superior Court of Sonoma County*, *ante*, at 469–470 (plurality opinion), with *ante*, at 494–496 (BRENNAN, J., dissenting), and JUSTICE BRENNAN can cite no authority for the proposition that possible legislative purposes suggested by a State's lawyers should not be considered in Commerce Clause cases. The problems with a view such as that advanced in the opinion concurring in the judgment are apparent. To name just a few, it assumes that individual legislators are motivated by one discernible "actual" purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely

[12] According to 1980 preliminary census data, the population of Iowa is 2,908,797. Cities with border-city ordinances, and their populations, are: Akron, 1,514; Bettendorf, 27,377; Clinton, 32,779; Council Bluffs, 56,269; Davenport, 103,036; Dubuque, 61,932; Hawarden, 2,719; and Sioux City, 81,434. Iowa's largest city and capital, Des Moines, with a population of 190,910, cannot avail itself of the border-cities exception, nor can Cedar Rapids, the second largest city, with a population of 110,124, or Waterloo, the fifth largest city, with a population of 75,535. Census Bureau, Population Division, Preliminary Count.

different reasons. See *Michael M.*, *ante*, at 469–470; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977); *McGinnis* v. *Royster*, 410 U. S. 263, 276–277 (1973). How, for example, would a court adhering to the views expressed in the opinion concurring in the judgment approach a statute, the legislative history of which indicated that 10 votes were based on safety considerations, 10 votes were based on protectionism, and the statute passed by a vote of 40–20? What would the *actual* purpose of the *legislature* have been in that case? This Court has wisely "never insisted that a legislative body articulate its reasons for enacting a statute." *Fritz*, *supra*, at 461.[13]

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[13] It is not a particularly pleasant task for the author of a dissent joined by two other Members of the Court to take issue with a statement made by the author of a concurrence in that same case which is joined by only one Member of the Court. Such fragmentation, particularly between two opinions neither of which command the adherence of a majority of the Court, cannot help but further unsettle what certainty there may be in the legal principles which govern our decision of Commerce Clause cases such as this and lay a foundation for similar uncertainty in other sorts of constitutional adjudication. Nonetheless, I feel obliged to take up the cudgels, however unwillingly, because JUSTICE BRENNAN's concurrence, joined by JUSTICE MARSHALL, is mistaken not only in its analysis but also in its efforts to interpret the meaning of today's decision.

Although both my Brother BRENNAN and I have cited cases from the equal protection area, it is not clear that the analysis of legislative purpose in that area is the same as in the present context. It may be more reasonable to suppose that proffered purposes of a statute, whether advanced by a legislature or *post hoc* by lawyers, cloak impermissible aims in Commerce Clause cases than in equal protection cases. Statutes generally favor one group at the expense of another, and the Equal Protection Clause was not designed to proscribe this in the way that the Commerce Clause was designed to prevent local barriers to interstate commerce. Thus even if my Brother BRENNAN's arguments were supportable in Commerce Clause cases, that analysis would not carry over of its own force into the realm of equal protection generally.

But even in the Commerce Clause area, his arguments are unpersuasive. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), see *ante*, at

Both the plurality and the concurrence attach great significance to the Governor's veto of a bill passed by the Iowa Legislature permitting 65-foot doubles. Whatever

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682–683, n. 3, seems to me to cut against, rather than in favor of, his position. The Court in *Bowers* stated:

"What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor is it important that we should, *Southwestern Oil Co.* v *Texas,* 217 U. S. 114, 126, for a state legislature need not explicitly declare its purpose But it is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by non-residents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the state for storage only, free from taxes, in anticipation of future needs Other similar purposes reasonably may be conceived." 358 U. S., at 528–529.

The statute involved in *Bowers* was upheld on the basis of the various purposes which "reasonably may be conceived," without any effort to determine what the "actual" purpose was or any requirement that the purposes being considered somehow have been articulated by the lawmakers. *Wheeling Steel Corp.* v. *Glander,* 337 U. S 562 (1949), simply did not consider the present question, since the State in *Glander* did not proffer any possible purposes beyond the one stated by the legislature in the statute.

Nor do the more recent decisions cited by my Brother BRENNAN support his argument. For example, the fact that we *"need not* . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not* have been a goal of the legislation," *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 648, n. 16 (1975) (emphasis supplied), hardly supports the proposition that we *cannot* consider assertions of legislative purpose which *could* have been a goal of the legislation, even though such purposes may not have been identified as goals by the legislature. To take another example, the upholding of the law in *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S. 307, 314 (1976), because it "rationally furthers the purpose identified by the State," certainly does not suggest that by "State" this Court meant only "legislature," and not the State's attorneys, or that *only* those purposes identified by the State could be considered in reviewing legislation.

Although JUSTICE BRENNAN "would emphasize" the significance the

views one may have about the significance of legislative motives, it must be emphasized that the law which the Court strikes down today was not passed to achieve the protectionist goals the plurality and the concurrence ascribe to the Governor. Iowa's 60-foot length limit was established in 1963, at a time when very few States permitted 65-foot doubles. See App. to Reply Brief for Appellants 1a, 2a. Striking down legislation on the basis of asserted legislative motives is dubious enough, but the plurality and concurrence strike down the legislation involved in this case because of asserted impermissible motives for *not* enacting *other* legislation, motives which could not possibly have been present when the legislation under challenge here was considered and passed. Such action is, so far as I am aware, unprecedented in this Court's history.

Furthermore, the effort in both the plurality and the concurrence to portray the legislation involved here as protectionist is in error. Whenever a State enacts more stringent safety measures than its neighbors, in an area which affects commerce, the safety law will have the incidental effect of deflecting interstate commerce to the neighboring States. Indeed, the safety and protectionist motives cannot be separated: The whole purpose of safety regulation of vehicles

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plurality opinion attaches to the Governor's articulation of what is viewed as an impermissible purpose, this hardly supports the proposition that permissible purposes cannot be considered by a court unless they were somehow identified by the legislature as goals of the statute. The plurality opinion in fact examines the asserted safety purpose of the Iowa statute at some length. Indeed, JUSTICE BRENNAN criticizes the plurality for examining the safety purpose and "disregarding the intention of Iowa's lawmakers," *ante*, at 681.

Finally, JUSTICE BRENNAN's statement that we have strayed from what he regards as the true faith in our recent decision in *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166 (1980), albeit over his vigorous dissent, does not aid his argument. His dissent, while undoubtedly vigorous, was not sufficiently persuasive to deter six Members of the Court from joining that opinion.

is to *protect* the State from unsafe vehicles. If a neighboring State chooses *not* to protect its citizens from the danger discerned by the enacting State, that is its business, but the enacting State should not be penalized when the vehicles it considers unsafe travel through the neighboring State.

The other States with truck-length limits that exclude Consolidated's 65-foot doubles would not at all be paranoid in assuming that they might be next on Consolidated's "hit list." [14] The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them. For that matter, the decision gives no guidance to Consolidated or other trucking firms either. Perhaps, after all is said and done, the Court today neither says nor does very much at all. We know only that Iowa's law is invalid and that the jurisprudence of the "negative side" of the Commerce Clause remains hopelessly confused.

[14] Consolidated was a plaintiff in *Raymond* as well as this case.

Syllabus

THOMAS v. REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL.

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 79–952. Argued October 7, 1980—Decided April 6, 1981

Petitioner, a Jehovah's Witness, was initially hired to work in his employer's roll foundry, which fabricated sheet steel for a variety of industrial uses, but when the foundry was closed he was transferred to a department that fabricated turrets for military tanks. Since all of the employer's remaining departments to which transfer might have been sought were engaged directly in the production of weapons, petitioner asked to be laid off. When that request was denied, he quit, asserting that his religious beliefs prevented him from participating in the production of weapons. He applied for unemployment compensation benefits under the Indiana Employment Security Act, and testified at an administrative hearing that he believed that contributing to the production of arms violated his religion, although he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms. The hearing referee found that petitioner had terminated his employment because of his religious convictions, but held that petitioner was not entitled to benefits because his voluntary termination was not based upon a "good cause [arising] in connection with [his] work," as required by the Indiana statute. Respondent Review Board affirmed, but the Indiana Court of Appeals reversed, holding that the Indiana statute, as applied, improperly burdened petitioner's right to the free exercise of his religion. The Indiana Supreme Court vacated the Court of Appeals' decision and denied petitioner benefits, holding that he had quit voluntarily for personal reasons, his belief being more "personal philosophical choice" than religious belief. The court also concluded that in any event a termination motivated by religion is not for "good cause" objectively related to the work, as required by the Indiana statute, and that denying benefits created only an indirect burden on petitioner's free exercise right, which burden was justified by legitimate state interests.

Held: The State's denial of unemployment compensation benefits to petitioner violated his First Amendment right to free exercise of religion under *Sherbert* v. *Verner*, 374 U. S. 398. Pp. 713–720.

(a) The Indiana Supreme Court improperly relied on the facts that petitioner was "struggling" with his beliefs and that he was not able

to "articulate" his belief precisely. Courts should not undertake to dissect religious beliefs on such grounds The Indiana court also erred in apparently giving significant weight to the fact that another Jehovah's Witness with whom petitioner consulted had no scruples about working on tank turrets. The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because such work was forbidden by his religion. The record shows that petitioner terminated his employment for religious reasons. Pp 713–716.

(b) A person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. It is true that the Indiana law does not *compel* a violation of conscience, but where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. Pp 716–718

(c) The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, when the inquiry is properly narrowed to focus only on the threat to state interests, neither of the purposes urged to sustain the disqualifying provision of the Indiana statute—to avoid the widespread unemployment and consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons, and to avoid a detailed probing by employers into job applicants' religious beliefs—is sufficiently compelling to justify the burden upon petitioner's religious liberty. Pp. 718–719.

(d) Payment of benefits to petitioner would not involve the State in fostering a religious faith in violation of the Establishment Clause. The extension of benefits reflects no more than the governmental obligation of neutrality, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Pp. 719–720.

271 Ind. ——, 391 N. E. 2d 1127, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Parts I, II, and III of which BLACKMUN, J., joined. BLACKMUN, J.,

filed a statement concurring in part and concurring in the result, *post,* p. 720. REHNQUIST, J., filed a dissenting opinion, *post,* p. 720.

Blanca Bianchi de la Torre argued the cause for petitioner. With her on the briefs were *Seymour H. Moskowitz* and *Michael Martin Mulder.*

William E. Daily argued the cause for respondents. With him on the brief were *Theodore L. Sendak,* Attorney General of Indiana, and *Janis L. Summers* and *Cindy A. Ellis,* Deputy Attorneys General.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the State's denial of unemployment compensation benefits to the petitioner, a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments, constituted a violation of his First Amendment right to free exercise of religion. 444 U. S. 1070 (1980).

I

Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials. The respondent Review Board denied him unemployment compensation benefits by applying disqualifying provisions of the Indiana Employment Security Act.[1]

*Briefs of *amici curiae* urging reversal were filed by *Judith Levin* for the American Civil Liberties Union; by *Nathan Z. Dershowitz* for the American Jewish Congress; and by *Leo Pfeffer* for the Jewish Peace Fellowship et al.

Lee Boothby filed a brief for Americans United for Separation of Church and State Fund, Inc., as *amicus curiae.*

[1] Indiana Code § 22–4–15–1 (Supp. 1978) provides:

"With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual

Thomas, a Jehovah's Witness, was hired initially to work in the roll foundry at Blaw-Knox. The function of that department was to fabricate sheet steel for a variety of industrial uses. On his application form, he listed his membership in the Jehovah's Witnesses, and noted that his hobbies were Bible study and Bible reading. However, he placed no conditions on his employment; and he did not describe his religious tenets in any detail on the form.

Approximately a year later, the roll foundry closed, and Blaw-Knox transferred Thomas to a department that fabricated turrets for military tanks. On his first day at this new job, Thomas realized that the work he was doing was weapons related. He checked the bulletin board where in-plant openings were listed, and discovered that all of the remaining departments at Blaw-Knox were engaged directly in the production of weapons. Since no transfer to another department would resolve his problem, he asked for a layoff. When that request was denied, he quit, asserting that he could not work on weapons without violating the principles of his religion. The record does not show that he was offered any nonweapons work by his employer, or that any such work was available.

Upon leaving Blaw-Knox, Thomas applied for unemployment compensation benefits under the Indiana Employment Security Act.[2] At an administrative hearing where he was

who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be carried forward to an extended benefit period or to the benefit period of a subsequent claim only if the first week of such extended benefit period or subsequent benefit period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim."

[2] Ind. Code § 22–4–1–1 *et seq.* (1976 and Supp. 1978).

not represented by counsel, he testified that he believed that contributing to the production of arms violated his religion. He said that when he realized that his work on the tank turret line involved producing weapons for war, he consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness. The friend advised him that working on weapons parts at Blaw-Know was not "unscriptural." Thomas was not able to "rest with" this view, however. He concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own.

When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry.[3]

The hearing referee found that Thomas' religious beliefs specifically precluded him from producing or directly aiding in the manufacture of items used in warfare.[4] He also found that Thomas had terminated his employment because of these religious convictions. The referee reported:

> "Claimant continually searched for a transfer to another department which would not be so armament related;

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[3] It is reasonable to assume that some of the sheet steel processed in the roll foundry may have found its way into tanks or other weapons; the record, however, contains no evidence or finding on this point.

[4] The referee indicated, App. to Pet. for Cert. 2a:

"The evidence reveals that approximate [*sic*] two to three weeks prior to claimant's date of leaving, the 'Roll Foundry' was closed permanently and claimant was transferred to the terret [*sic*] line. [He], at this time, real [*sic*] realized that all of the other functions at The Blaw-Knox company were engaged in producing arms for the Armament Industry. Claimant's religious beliefs specifically exempts [*sic*] claimants from producing or aiding in the manufacture of items used in the advancement of war."

> however, this did not materialize, and prior to the date of his leaving, claimant requested a layoff, which was denied; and on November 6, 1975, *claimant did quit due to his religious convictions.*" [5]

The referee concluded nonetheless that Thomas' termination was not based upon a "good cause [arising] in connection with [his] work," as required by the Indiana unemployment compensation statute. Accordingly, he was held not entitled to benefits. The Review Board adopted the referee's findings and conclusions, and affirmed the denial of benefits.[6]

The Indiana Court of Appeals, accepting the finding that Thomas terminated his employment "due to his religious convictions," reversed the decision of the Review Board, and held that § 22–4–15–1, as applied, improperly burdened Thomas' right to the free exercise of his religion. Accordingly, it ordered the Board to extend benefits to Thomas. 178 Ind. App. ——, 381 N. E. 2d 888 (1978).

The Supreme Court of Indiana, dividing 3–2, vacated the decision of the Court of Appeals, and denied Thomas benefits. 271 Ind. ——, 391 N. E. 2d 1127 (1979). With reference to the Indiana unemployment compensation statute, the court said:

> "It is not intended to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons. Voluntary unemployment is not compensable under the purpose of the Act, which is to provide benefits for persons unemployed through no fault of their own.
>
> "Good cause which justifies voluntary termination must

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[5] *Id.*, at 2a–3a (emphasis added by petitioner).

[6] The Review Board, like the referee, found that Thomas had left his job for religious reasons, *id.*, at 5a:

"The evidence of record indicates that claimant . . . left his employment voluntarily because his religious beliefs . . . would not allow him to continue to work producing arms . . . ."

be job-related and objective in character." *Id.*, at ——, 391 N. E. 2d, at 1129 (footnotes omitted).

The court held that Thomas had quit voluntarily for personal reasons, and therefore did not qualify for benefits. *Id.*, at ——, 391 N. E. 2d, at 1130.

In discussing the petitioner's free exercise claim, the court stated: "A personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim." *Id.*, at ——, 391 N. E. 2d, at 1131. The court found the basis and the precise nature of Thomas' belief unclear—but it concluded that the belief was more "personal philosophical choice" than religious belief. Nonetheless, it held that, even assuming that Thomas quit for religious reasons, he would not be entitled to benefits: under Indiana law, a termination motivated by religion is not for "good cause" objectively related to the work.

The Indiana court concluded that denying Thomas benefits would create only an indirect burden on his free exercise right and that the burden was justified by the legitimate state interest in preserving the integrity of the insurance fund and maintaining a stable work force by encouraging workers not to leave their jobs for personal reasons.

Finally, the court held that awarding unemployment compensation benefits to a person who terminates employment voluntarily for religious reasons, while denying such benefits to persons who terminate for other personal but nonreligious reasons, would violate the Establishment Clause of the First Amendment.

The judgment under review must be examined in light of our prior decisions, particularly *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

II

Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. *Sherbert* v. *Verner, supra; Wis-*

consin v. *Yoder,* 406 U. S. 205, 215–216 (1972). The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests.[7] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

In support of his claim for benefits, Thomas testified:

> "Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do. . . .
>
> "A. That's right, that's right when . . . I'm daily faced with the knowledge that these are tanks . . . .
>
> . . . . .
>
> "A. I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . . religious principles that . . . I have come to learn . . . ." 271 Ind., at ——, 391 N. E. 2d, at 1132.

Based upon this and other testimony, the referee held that Thomas "quit due to his religious convictions." [8] The Review Board adopted that finding,[9] and the finding is not challenged in this Court.

The Indiana Supreme Court apparently took a different view of the record. It concluded that "although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was." [10] In that court's view, Thomas had made a merely "personal philosophical choice rather than a religious choice." [11]

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[7] See, *e. g., Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961); *United States* v. *Ballard,* 322 U. S. 78 (1944).

[8] See n. 4, and text at n. 5, *supra.*

[9] See n. 6, *supra.*

[10] 271 Ind., at ——, 391 N. E. 2d, at 1133.

[11] *Id.,* at ——, 391 N. E. 2d, at 1131.

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to

> "working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . ." 271 Ind., at —, 391 N. E. 2d, at 1131.

The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members

of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. Not surprisingly, the record before the referee and the Review Board was not made with an eye to the microscopic examination often exercised in appellate judicial review. However, judicial review is confined to the facts as found and conclusions drawn. On this record, it is clear that Thomas terminated his employment for religious reasons.

III

A

More than 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. A state may not

> "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education,* 330 U. S. 1, 16 (1947) (emphasis deleted).

Later, in *Sherbert* the Court examined South Carolina's attempt to deny unemployment compensation benefits to a Sabbatarian who declined to work on Saturday. In sustaining her right to receive benefits, the Court held:

> "The ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose between following the

> precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." 374 U. S., at 404.

The respondent Review Board argues, and the Indiana Supreme Court held, that the burden upon religion here is only the indirect consequence of public welfare legislation that the State clearly has authority to enact. "Neutral objective standards must be met to qualify for compensation." 271 Ind., at ——, 391 N. E. 2d, at 1130. Indiana requires applicants for unemployment compensation to show that they left work for "good cause in connection with the work." *Ibid.*

A similar argument was made and rejected in *Sherbert,* however. It is true that, as in *Sherbert,* the Indiana law does not *compel* a violation of conscience. But, "this is only the beginning, not the end, of our inquiry." 374 U. S., at 403–404. In a variety of ways we have said that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder,* 406 U. S., at 220. Cf. *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970).

Here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert,* where the Court held:

> "[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." 374 U. S., at 404.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies

such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

The respondents also contend that *Sherbert* is inapposite because, in that case, the employee was dismissed by the employer's action. But we see that Mrs. Sherbert was dismissed because she refused to work on Saturdays after the plant went to a 6-day workweek. Had Thomas simply presented himself at the Blaw-Knox plant turret line but refused to perform any assigned work, it must be assumed that he, like Sherbert, would have been terminated by the employer's action, if no other work was available. In both cases, the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions.

B

The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder, supra,* at 215.

The purposes urged to sustain the disqualifying provision of the Indiana unemployment compensation scheme are twofold: (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons; [12] and (2) to

[12] A similar interest—the integrity of the insurance fund—was advanced and rejected in *Sherbert* v. *Verner,* 374 U. S. 398, 407 (1963)

avoid a detailed probing by employers into job applicants' religious beliefs. These are by no means unimportant considerations. When the focus of the inquiry is properly narrowed, however, we must conclude that the interests advanced by the State do not justify the burden placed on free exercise of religion.

There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment—and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas' religious liberty. Accordingly, Thomas is entitled to receive benefits unless, as the respondents contend and the Indiana court held, such payment would violate the Establishment Clause.

IV

The respondents contend that to compel benefit payments to Thomas involves the State in fostering a religious faith. There is, in a sense, a "benefit" to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religious Clauses which the Court resolved in *Sherbert:*

> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion

> in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner,* 374 U. S., at 409.

See also *Wisconsin* v. *Yoder,* 406 U. S., at 220–221; *Walz* v. *Tax Comm'n,* 397 U. S., at 668–669; *O'Hair* v. *Andrus,* 198 U. S. App. D. C. 198, 201–204, 613 F. 2d 931, 934–937 (1979) (Leventhal, J.).

Unless we are prepared to overrule *Sherbert, supra,* Thomas cannot be denied the benefits due him on the basis of the findings of the referee, the Review Board, and the Indiana Court of Appeals that he terminated his employment because of his religious convictions.

Reversed.

JUSTICE BLACKMUN joins Parts I, II, and III of the Court's opinion. As to Part IV thereof, he concurs in the result.

JUSTICE REHNQUIST, dissenting.

The Court today holds that the State of Indiana is constitutionally required to provide direct financial assistance to a person solely on the basis of his religious beliefs. Because I believe that the decision today adds mud to the already muddied waters of First Amendment jurisprudence, I dissent.

I

The Court correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Although the relationship of the two Clauses has been the subject of much commentary, the "tension" is of fairly recent

vintage, unknown at the time of the framing and adoption of the First Amendment. The causes of the tension, it seems to me, are threefold. First, the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses, since such legislation touches the individual at so many points in his life. Second, the decision by this Court that the First Amendment was "incorporated" into the Fourteenth Amendment and thereby made applicable against the States, *Stromberg* v. *California,* 283 U. S. 359 (1931); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), similarly multiplied the number of instances in which the "tension" might arise. The third, and perhaps most important, cause of the tension is our overly expansive interpretation of *both* Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.

None of these developments could have been foreseen by those who framed and adopted the First Amendment. The First Amendment was adopted well before the growth of much social welfare legislation and at a time when the Federal Government was in a real sense considered a government of limited delegated powers. Indeed, the principal argument against adopting the Constitution *without* a "Bill of Rights" was not that such an enactment would be *undesirable,* but that it was *unnecessary* because of the limited nature of the Federal Government. So long as the Government enacts little social welfare legislation, as was the case in 1791, there are few occasions in which the two Clauses may conflict. Moreover, as originally enacted, the First Amendment applied only to the Federal Government, not the government of the States. *Barron* v. *Baltimore,* 7 Pet. 243 (1833). The Framers could hardly anticipate *Barron* being superseded by the "selective incorporation" doctrine adopted by the Court, a decision which greatly expanded the number of stat-

utes which would be subject to challenge under the First Amendment. Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two Clauses.

II

The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the "tension" between the two Clauses, it does little to help resolve that tension or to offer meaningful guidance to other courts which must decide cases like this on a day-by-day basis. Instead, it simply asserts that there is no Establishment Clause violation here and leaves the tension between the two Religion Clauses to be resolved on a case-by-case basis. As suggested above, however, I believe that the "tension" is largely of this Court's own making, and would diminish almost to the vanishing point if the Clauses were properly interpreted.

Just as it did in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), the Court today reads the Free Exercise Clause more broadly than is warranted. As to the proper interpretation of the Free Exercise Clause, I would accept the decision of *Braunfeld* v. *Brown,* 366 U. S. 599 (1961), and the dissent in *Sherbert.* In *Braunfeld,* we held that Sunday closing laws do not violate the First Amendment rights of Sabbatarians. Chief Justice Warren explained that the statute did not make unlawful any religious practices of appellants; it simply made the practice of their religious beliefs more expensive. We concluded that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i. e.* legislation which does not

make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." 366 U. S., at 606. Likewise in this case, it cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits *because* he was a Jehovah's Witness. Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert* v. *Verner, supra:* "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between." *Id.*, at 423. Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations,[1] a State is not constitutionally compelled to do so. *Id.*, at 422–423.[2]

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[1] Even if I were to agree that *Sherbert* was correctly decided, I still would dissent on the grounds that today's decision unjustifiably extends *Sherbert*. The Indiana Employment Security Act, Ind. Code § 22–4–15–1 (Supp. 1978), provides that an "individual who has voluntarily left his employment without good cause in connection with his employment" is disqualified from receiving benefits. In this case, the Supreme Court of Indiana "found the basis and the precise nature of Thomas' belief unclear" and concluded that the belief was more "personal philosophical choice" than religious belief. *Ante,* at 713 The Court's failure to make clear whether it accepts or rejects this finding by the Indiana Supreme Court, the highest court of the State, suggests that a person who leaves his job for purely "personal philosophical choices" will be constitutionally entitled to unemployment benefits. If that is true, the implications of today's decision are enormous. Persons will then be able to quit their jobs, assert they did so for personal reasons, and collect unemployment insurance. We could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted.

In addition, the Court's opinion in *Sherbert,* 374 U. S., at 401, n. 4, seems to suggest by negative implication that where a State makes every "personal reason" for leaving a job a basis for disqualification from unemploy-

[*Footnote 2 is on p. 724*]

The Court's treatment of the Establishment Clause issue is equally unsatisfying. Although today's decision requires a State to provide direct financial assistance to persons solely on the basis of their religious beliefs, the Court nonetheless blandly assures us, just as it did in *Sherbert,* that its decision "plainly" does not foster the "establishment" of religion. *Ante,* at 719. I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana volun-

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ment benefits, the State need not grant an exemption to persons such as Sherbert who do quit for "personal reasons." In this case, the Indiana Supreme Court *has* construed the State's unemployment statute to make every personal subjective reason for leaving a job a basis for disqualification. *E. g., Geckler* v *Review Bd. of the Indiana Employment Security Div.,* 244 Ind. 473, 193 N. E. 2d 357 (1963). This case is thus distinguishable from *Sherbert* Because Thomas left his job for a personal reason, the State of Indiana should not be prohibited from disqualifying him from receiving benefits

[2] To the extent *Sherbert* was correctly decided, it might be argued that cases such as *McCollum* v *Board of Education,* 333 U. S. 203 (1948); *Engel* v. *Vitale,* 370 U. S 421 (1962); *Abington School District* v *Schempp,* 374 U. S. 203 (1963); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); and *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973), were wrongly decided The "aid" rendered to religion in these latter cases may not be significantly different, in kind or degree, than the "aid" afforded Mrs. Sherbert or Thomas. For example, if the State in *Sherbert* could not deny compensation to one refusing work for religious reasons, it might be argued that a State may not deny reimbursement to students who choose for religious reasons to attend parochial schools. The argument would be that although a State need not allocate any funds to education, once it has done so, it may not require any person to sacrifice his religious beliefs in order to obtain an equal education. See *Lemon, supra,* at 665 (opinion of WHITE, J); *Nyquist, supra,* at 798–805 (opinion of BURGER, C. J.). There can be little doubt that to the extent secular education provides answers to important moral questions without reference to religion or teaches that there are no answers, a person in one sense sacrifices his religious belief by attending secular schools. And even if such "aid" were not constitutionally compelled by the Free Exercise Clause, Justice Harlan may well have been right in *Sherbert* when he found sufficient flexibility in the Establishment Clause to permit the States to voluntarily choose to grant such benefits to individuals.

tarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our prior Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a State *did* violate the Establishment Clause.

JUSTICE STEWART noted this point in his concurring opinion in *Sherbert,* 374 U. S., at 414–417. He observed that decisions like *Sherbert,* and the one rendered today, squarely conflict with the more extreme language of many of our prior Establishment Clause cases. In *Everson* v. *Board of Education,* 330 U. S. 1 (1949), the Court stated that the Establishment Clause bespeaks a "government . . . stripped of all power . . . to support, or otherwise to assist any or all religions . . . ," and no State "can pass laws which aid one religion . . . [or] all religions." *Id.,* at 11, 15. In *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961), the Court asserted that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." And in *Abington School District* v. *Schempp,* 374 U. S. 203, 217 (1963), the Court adopted Justice Rutledge's words in *Everson* that the Establishment Clause forbids " 'every form of public aid or support for religion.' " See also *Engel* v. *Vitale,* 370 U. S. 421, 431 (1962).

In recent years the Court has moved away from the mechanistic "no-aid-to-religion" approach to the Establishment Clause and has stated a three-part test to determine the constitutionality of governmental aid to religion. See *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 772–773 (1973). First, the statute must serve a secular legislative purpose. Second, it must have a "primary effect" that neither advances nor inhibits religion. And third, the State and its administration must avoid excessive entanglement with religion. *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970).

It is not surprising that the Court today makes no attempt to apply those principles to the facts of this case. If Indiana were to legislate what the Court today requires—an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons—the statute would "plainly" violate the Establishment Clause as interpreted in such cases as *Lemon* and *Nyquist*. First, although the unemployment statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose. It would grant financial benefits for the sole purpose of accommodating religious beliefs. Second, there can be little doubt that the primary effect of the proviso would be to "advance" religion by facilitating the exercise of religious belief. Third, any statute including such a proviso would surely "entangle" the State in religion far more than the mere grant of tax exemptions, as in *Walz*, or the award of tuition grants and tax credits, as in *Nyquist*. By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is sincerely held. Otherwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it.

It is unclear from the Court's opinion whether it has temporarily retreated from its expansive view of the Establishment Clause, or wholly abandoned it. I would welcome the latter. Just as I think that Justice Harlan in *Sherbert* correctly stated the proper approach to free exercise questions, I believe that JUSTICE STEWART, dissenting in *Abington School District* v. *Schempp, supra*, accurately stated the reach of the Establishment Clause. He explained that the Establishment Clause is limited to "government support of proselytizing activities of religious sects by throwing the weight of secular authorit[ies] behind the dissemination of religious tenets." *Id.*, at 314. See *McCollum* v. *Board of Education*, 333 U. S. 203, 248 (1948) (Reed, J., dissenting)

(impermissible aid is only "purposeful assistance directly to the church itself or to some religious group . . . performing ecclesiastical functions"). Conversely, governmental assistance which does not have the effect of "inducing" religious belief, but instead merely "accommodates" or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment. I would think that in this case, as in *Sherbert*, had the State voluntarily chosen to pay unemployment compensation benefits to persons who left their jobs for religious reasons, such aid would be constitutionally permissible because it redounds directly to the benefit of the individual. Accord, *Wolman* v. *Walter*, 433 U. S. 229 (1977) (upholding various disbursements made to pupils in parochial schools).

In sum, my difficulty with today's decision is that it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases. As such, the decision simply exacerbates the "tension" between the two Clauses. If the Court were to construe the Free Exercise Clause as it did in *Braunfeld* and the Establishment Clause as JUSTICE STEWART did in *Schempp*, the circumstances in which there would be a conflict between the two Clauses would be few and far between. Although I heartily agree with the Court's tacit abandonment of much of our rhetoric about the Establishment Clause, I regret that the Court cannot see its way clear to restore what was surely intended to have been a greater degree of flexibility to the Federal and State Governments in legislating consistently with the Free Exercise Clause. Accordingly, I would affirm the judgment of the Indiana Supreme Court.

BARRENTINE ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

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

No. 79–2006 Argued January 13, 1981—Decided April 6, 1981

Petitioner truckdrivers are not paid for the time spent conducting a required pretrip safety inspection of respondent employer motor carrier's trucks and transporting trucks that fail such inspection to the employer's on-premises repair facility. Petitioners' union submitted a wage claim for petitioners' pretrip inspection and transportation time to a joint grievance committee pursuant to its collective-bargaining agreement with petitioners' employer The joint committee rejected the claim without explanation. Petitioners then filed an action in Federal District Court, alleging that the pretrip safety inspection and transportation time was compensable under § 6 of the Fair Labor Standards Act (FLSA) and that they were therefore entitled to the statutory remedy of actual and liquidated damages, costs, and reasonable attorney's fees. They also alleged that respondent union had breached its duty of fair representation, and sought to have the joint grievance committee's decision set aside and to have proper compensation awarded under the collective-bargaining agreement. The District Court addressed only the fair-representation claim and rejected it. The Court of Appeals affirmed, and also held that the District Court was correct in not addressing the FLSA claim, concluding that petitioners' voluntary submission of their grievances to arbitration barred them from asserting their statutory wage claims in the subsequent court action.

Held: Petitioners' wage claims under the FLSA are not barred by the prior submission of their grievances to the contractual dispute-resolution procedures Pp. 734–746.

(a) The FLSA rights petitioners seek to assert are independent of the collective-bargaining process. Such rights devolve on petitioners as individual workers, not as members of the union, and are not waivable. While courts should "defer to an arbitral decision where the employee's claim is based on rights arising out of a collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute, such as the FLSA, designed to provide minimum substantive guarantees to individual workers Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36. Pp. 734–741.

(b) There are two reasons why an employee's right to a minimum wage and overtime pay under the FLSA might be lost if submission of his wage claim to arbitration precluded him from later bringing an FLSA suit in federal court. First, even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. Second, even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected. Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights. Furthermore, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but also arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs, whereas an arbitrator can award only that compensation authorized by the wage provisions of the collective-bargaining agreement. Pp. 742–745.

615 F. 2d 1194, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 746.

David C. Vladeck argued the cause for petitioners. With him on the briefs were *Alan B. Morrison* and *Arthur L. Fox II*.

S. Walton Maurras argued the cause and filed a brief for respondents.*

JUSTICE BRENNAN delivered the opinion of the Court.

The issue in this case is whether an employee may bring an action in federal district court, alleging a violation of

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Deputy Solicitor General Geller, Barbara E. Etkind, Donald S. Shire, Lois G. Williams*, and *Mary-Helen Mautner* for the United States; and by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations.

the minimum wage provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement.

I

Petitioner truckdrivers are employed at the Little Rock terminal of respondent Arkansas-Best Freight Systems, Inc., an interstate motor carrier of freight. In accordance with federal regulations and Arkansas-Best's employment practices, petitioners are required to conduct a safety inspection of their trucks before commencing any trip, and to transport any truck failing such inspection to Arkansas-Best's on-premises repair facility. See 49 CFR §§ 392.7, 392.8 (1980). Petitioners are not compensated by their employer for the time spent complying with these requirements.[1]

Pursuant to the collective-bargaining agreement between Arkansas-Best and petitioners' union, respondent Local 878 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, petitioner Barrentine and another driver filed a series of grievances against Arkansas-Best.[2] They alleged that Art. 50 of the collective-bargaining agreement, which requires Arkansas-Best to compensate

[1] Upon arriving at the terminal to begin a trip, an Arkansas-Best driver must "punch in" on a timeclock and perform certain preliminary office work He is compensated for this time at an hourly rate. After completing this work, the driver must "punch out," locate his vehicle, and conduct the required pretrip safety inspection If the vehicle passes inspection, the driver proceeds on his trip and is paid at the driving time rate. No claim is made for the pretrip inspection time in these circumstances. If the vehicle does not pass inspection, the driver must take the truck to Arkansas-Best's repair facility and "punch in" on a second timeclock The approximately 15–30 minutes that elapse between the first "punch out" and the second "punch in" are not compensated and are the subject of petitioners' claim.

[2] The second driver, J. N Scates, is no longer a party to this litigation.

its drivers "for all time spent in [its] service," [3] entitled them to compensation for the pretrip inspection and transportation time.[4] Petitioners' union presented these grievances to a joint grievance committee for final and binding decision pursuant to Art. 44 of the collective-bargaining agreement.[5] The joint committee, composed of three representatives of the union and three representatives of the employer, rejected the grievances without explanation. App. 22.

In March 1977, petitioners filed this action in the United States District Court for the Eastern District of Arkansas.[6]

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[3] Article 50 states in part:

"All employees covered by this Agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in and until the time he is effectively released from duty Such payment for employee's time when not driving shall be the hourly rate." App. 27.

[4] Respondents contend that the grievances presented a claim under the FLSA in addition to the claim under the collective-bargaining agreement. See *id.*, at 21. Although neither the District Court nor the Court of Appeals addressed this contention, Judge Heaney, dissenting from the opinion of the Court of Appeals, concluded that petitioners had "no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration." 615 F. 2d 1194, 1203 (CA8 1980). Because we hold that petitioners would not be precluded from bringing their action in federal court in either case, we need not resolve this factual dispute.

[5] Article 44 states in part:

"The Unions and the employers agree that there shall be no strikes, lockouts, tieups, or legal proceedings without first using all possible means of settlement as provided for in this Agreement and in the National Agreement, if applicable, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

"(a) Where a State or Multiple State Committee, by a majority vote, settles a dispute no appeal may be taken to the Southern Conference Area Grievance Committee. Such decision will be final and binding on both parties." App. 24–25.

[6] Plaintiffs included Barrentine, Scates, three drivers whose claims were

In the first count of their complaint, petitioners alleged that the pretrip safety inspection and transportation time was compensable under the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.*,[7] and that they were accordingly entitled to the

later dismissed for failure to answer interrogatories, and four other drivers. Although these last four drivers never formally submitted grievances to the joint committee, the District Court refused to dismiss their complaints for failure to exhaust internal grievance and arbitration procedures, concluding that resort to those procedures would have been futile in light of the joint committee's denial of Barrentine's grievance. The District Court thus "treat[ed] the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." App to Pet. for Cert 6a. The District Court's treatment of those claims was not challenged on appeal 615 F. 2d, at 1197, n 3 Because our holding does not depend on whether petitioners formally filed grievances, we need not address the correctness of the District Court's approach to the exhaustion issue.

[7] Petitioners principally relied upon § 6 (a) of the FLSA, 52 Stat. 1062, as amended, 29 U. S C § 206 (a), which provides:

"Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, . . . wages at the following rates: . . ."

Alternatively, they relied upon § 4 of the Portal-to-Portal Act of 1947 amendments to the FLSA, 61 Stat 86, 29 U. S. C. § 254, which provides:

"(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, . . . on account of the failure of such employer to pay an employee minimum wages, . . . for or on account of any of the following activities. . . .

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur . . . prior to the time on any particular workday at which such employee commences . . . such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect,

statutory remedy of actual and liquidated damages, costs, and reasonable attorney's fees.[8] In the second count, petitioners alleged that the union and its president had breached the union's duty of fair representation, apparently by entering into a "side deal" with Arkansas-Best regarding compensation of the pretrip inspection and transportation time. With respect to this claim, petitioners sought to have the decision of the joint grievance committee set aside and to have proper compensation awarded under the collective-bargaining agreement.

The District Court addressed only the fair representation claim. While it conceded that "the evidence seems . . . rather to predominate in favor of the finding that there was a side agreement" as petitioners alleged, it found that the existence of such an agreement did not in itself give rise to a breach of the union's duty of fair representation, because the labor laws permit "parties by their own actions . . . [to] fill in the gaps that always arise with a written instrument when you apply that instrument to a multiplicity of situations and practices." App. to Pet. for Cert. 8a, 9a. This rul-

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at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

See App. 3–7.

[8] Section 16 (b) of the Act, 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b), provides:

"Any employer who violates the [minimum wage] provisions . . . of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

ing was affirmed by a unanimous panel of the Court of Appeals for the Eighth Circuit, 615 F. 2d 1194, 1202 (1980), and is not challenged here.[9]

With one judge dissenting, the Court of Appeals also held that the District Court was correct in not addressing the merits of petitioners' FLSA claim. Emphasizing that national labor policy encourages arbitration of labor disputes, the court stated that "wage disputes arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides . . . at least in situations in which employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement." *Id.*, at 1199. Finding that petitioners had voluntarily submitted their grievances to arbitration, the court concluded that they were barred from asserting their statutory wage claim in the subsequently filed federal-court action. *Id.*, at 1199–1200. We granted certiorari, 449 U. S. 819 (1980), and reverse.

II

Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective-bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when

[9] The District Court also noted that petitioners' collective-bargaining agreement, if read literally, would require compensation for the time in question, since "[t]here is no question that the driver when [inspecting the vehicle] is on the employer's business." App. to Pet for Cert. 4a. Nonetheless, because it found no breach of the duty of fair representation, the court was obliged to let the decision of the joint committee stand with respect to the contractual claim. The Court of Appeals agreed with this conclusion, and also noted that the literal terms of the collective-bargaining agreement appeared to cover the disputed time. 615 F. 2d, at 1198.

the parties to a collective-bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures.

The national policy favoring collective bargaining and industrial self-government was first expressed in the National Labor Relations Act of 1935, 29 U. S. C. § 151 *et seq.* (the Wagner Act). It received further expression and definition in the Labor Management Relations Act, 1947, 29 U. S. C. § 141 *et seq.* (the Taft-Hartley Act). Predicated on the assumption that individual workers have little, if any, bargaining power, and that "by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions," *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180 (1967), these statutes reflect Congress' determination that to improve the economic well-being of workers, and thus to promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers. See *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967); 29 U. S. C. § 159 (a). The rights established through this system of majority rule are thus

> "protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.' 29 U. S. C. § 151." *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U. S. 50, 62 (1975).

To further this policy, Congress has declared that

> "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U. S. C. § 173 (d).

Thus, courts ordinarily defer to collectively bargained dispute-resolution procedures when the parties' dispute arises out of the collective-bargaining process. See, *e. g., Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 562–563 (1976); *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 377–380 (1974); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 652–653 (1965); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 577–578, 582–583 (1960); *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 566, 568 (1960); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 458–459 (1957).[10]

Respondents contend that the aspect of national labor policy encouraging collective bargaining and industrial self-government requires affirmance of the Court of Appeals. They note that the collective-bargaining agreement between Arkansas-Best and petitioners' union requires that "any controversy" between the parties to the agreement be resolved through the binding contractual grievance procedures. See n. 5, *supra*. They further note that Local 878 processed petitioners' grievances in accordance with those procedures, and that the District Court made an unchallenged finding that the union did not breach its duty of fair representation in doing so. Accordingly, they conclude that petitioners should be barred from bringing the statutory component of their wage claim in federal court.[11]

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[10] As we stated in *Vaca* v *Sipes*, 386 U. S. 171, 184 (1967), when an employee's claim "is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." Only if the arbitration process has been tainted, *e. g.*, by the union's breach of its duty of fair representation, may the employee pursue his grievance in the courts. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S., at 567; *Vaca* v. *Sipes, supra*, at 186.

[11] As an alternative ground in support of affirmance, respondents assert that petitioners' claims should be barred because petitioners failed to comply with 29 U. S. C. § 216 (b), which provides:

"No employee shall be a party plaintiff to any [FLSA enforcement ac-

We reject this argument. Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

These considerations were the basis for our decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). In that case, petitioner, a black employee, had been discharged by respondent employer, allegedly for producing too many defective parts. Claiming that his discharge was racially motivated, petitioner asked his union to pursue the grievance and arbitration procedure set forth in the collective-bargaining agreement. The union did so, relying on the nondiscrimination clause in the collective-bargaining agreement, but the arbitrator found that petitioner had been discharged for just cause. Petitioner then brought an action under Title VII of the Civil Rights Act of 1964 in Federal District Court based on the same facts that were before the arbitrator. The District Court granted summary judgment for the employer, holding that petitioner was bound by the prior adverse arbitral decision. The Court of Appeals affirmed.

This Court reversed, concluding that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed by the prior submission of his discrimination claim to final arbitration under a collective-bargaining agreement. The Court found that in enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to

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tion] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

Even if this requirement were to apply to petitioners' suit, a nonclass action, it was satisfied when petitioners individually signed at least two sets of interrogatories.

equal employment opportunities that was separate and distinct from the rights created through the "majoritarian processes" of collective bargaining. *Id.*, at 51. Moreover, because Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court concluded that Title VII claims should be resolved by the courts *de novo*.[12]

Respondents would distinguish *Gardner-Denver* on the ground that because petitioners' FLSA claim is based on a dispute over wages and hours, subjects at the heart of the collective-bargaining process, their claim is particularly well suited to resolution through collectively bargained grievance and arbitration procedures. But this contention misperceives the nature of petitioners' FLSA claim.[13]

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[12] Cf. *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351, 357 (1971) (seaman may assert wage claim in federal court under the Seaman's Wage Act, 46 U. S. C. § 596, even though he had not previously pursued arbitral remedies provided by contractual grievance procedures); *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, 268–270 (1958) (employee returning from military service need not pursue grievance and arbitration procedure prior to asserting seniority rights in federal court under Universal Military Training and Service Act).

[13] There are three components to petitioners' FLSA claim. First, they contend that the pretrip inspection and transportation time is compensable under § 6 of the FLSA, 29 U. S. C. § 206, because it constitutes "principal" rather than "preliminary" activity under § 4 of the Portal-to-Portal Act amendments, 29 U. S. C. § 254. See *Steiner* v. *Mitchell*, 350 U. S. 247 (1956). Second, they contend that even if it is preliminary activity, it is compensable under § 4 (b) (1) of the Portal-to-Portal Act amendments, 29 U. S. C. § 254 (b) (1), because it constitutes "time spent in the service of the Employer" under Art. 50 of the collective-bargaining agreement. Third, they contend that even if it is preliminary activity, and even if it is not compensable under "an express provision of a written [collective bargaining agreement]," 29 U. S. C. § 254 (b) (1), it is compensable under § 4 (b) (2) of the Portal-to-Portal Act amendments, 29 U. S. C. § 254 (b) (2), because there is "a custom or practice in effect" between Arkansas-Best and drivers in other terminals whereby those

The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U. S. C. § 202 (a).[14] In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*, the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' " and would be protected from "the evil of 'overwork' as well as 'underpay.' " *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 578 (1942), quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt).[15]

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drivers are compensated for their pretrip inspection and transportation time.

The threshold question in this action, then, is whether petitioners were engaged in "activities which are preliminary to [their] principal activity," 29 U. S. C. § 254 (a)(2), when they conducted the pretrip safety inspections of their vehicles. Resolution of that question requires inquiry into whether the inspection and transportation procedures "are an integral and indispensable part of the principal activities for which [petitioners] are employed." *Steiner* v. *Mitchell*, *supra*, at 256 (changing clothes and showering are "principal" activities of employees working with dangerously caustic and toxic materials); see *Mitchell* v. *King Packing Co.*, 350 U. S. 260, 263 (1956) (knife sharpening is "principal" activity of butchers in meatpacking plant); 29 CFR §§ 790.7, 790.8 (1980). For the reasons that follow, we conclude that this is a question of statutory construction that must be resolved by the courts.

[14] Congress enacted the FLSA under its commerce power, having found that the existence of such "detrimental" labor conditions would endanger national health and efficiency and consequently would interfere with the free movement of goods in interstate commerce. See *United States* v. *Darby*, 312 U. S. 100, 109–110 (1941); 29 U. S. C. § 202 (a).

[15] In mandatory language, Congress provided in § 6 (a) of the Act, 29 U. S. C. § 206 (a), that "[e]very employer shall pay to each of his

The statutory enforcement scheme grants individual employees broad access to the courts. Section 16 (b) of the Act, 29 U. S. C. § 216 (b), which contains the principal enforcement provisions, permits an aggrieved employee to bring his statutory wage and hour claim "in any Federal or State court of competent jurisdiction." No exhaustion requirement or other procedural barriers are set up, and no other forum for enforcement of statutory rights is referred to or created by the statute.[16]

This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707 (1945); see *D. A. Schulte, Inc.* v. *Gangi*, 328 U. S. 108, 114–116 (1946); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 42 (1944); *Overnight Motor Transportation Co.* v. *Missel, supra*, at 577; see 29 CFR § 785.8 (1974).[17] Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation

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employees . . wages at the following rates . . ." It provided in § 7 (a) (2) of the Act, 29 U. S. C § 207 (a) (2), that "no employer shall employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed"

[16] To encourage employees to enforce their FLSA rights in court, and thus to further the public policies underlying the FLSA, see *Brooklyn Savings Bank* v *O'Neil*, 324 U S. 697, 709 (1945), Congress has permitted individual employees to sue for back wages and liquidated damages and to receive reasonable attorney's fees and costs. 29 U S C. § 216 (b) In addition, Congress has empowered the Secretary of Labor to bring judicial enforcement actions under the Act. 29 U. S. C. §§ 216 (c), 217.

[17] But see 29 U. S. C. § 216 (c).

arrangement. See, *e. g., Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173, 177–178 (1946); *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 430–432 (1945); *Jewell Ridge Coal Corp.* v. *Mine Workers*, 325 U. S. 161, 166–167, 170 (1945).[18] As we stated in *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 602–603 (1944) (footnote omitted):

> "The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts. . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." [19]

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[18] "[N]othing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining." *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446, 463 (1948). "[E]mployees are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents." *Jewell Ridge Coal Corp.*, 325 U. S., at 167.

[19] It is true that the FLSA, as amended, includes a number of references to collective-bargaining agreements. See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U S., at 602, n. 18. Sections 7 (b) (1) and (2) of the FLSA, 29 U. S. C. §§ 207 (b) (1) and (2), state that an employer need not pay overtime under the Act for an employee's performance of work in excess of the statutory maximum, if the employee is employed "in pursuance of an agreement [containing alternative maximum hours provisions] made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board." Section 3 (o) of the Portal-to-Portal Act amendments, 29 U. S. C. § 203 (o), excludes from the definition of "hours worked" under §§ 6 and 7 of the FLSA, "any time spent in changing clothes or washing at the beginning or end of each workday" if that time was noncompensable "under a bona fide collective-bargaining agreement." And § 4 (a) (2) of that Act, 29 U. S. C. § 254 (a) (2), which excludes from compensable

There are two reasons why an employee's right to a minimum wage and overtime pay under the FLSA might be lost if submission of his wage claim to arbitration precluded him from later bringing an FLSA suit in federal court. First, even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. Wage and hour disputes that are subject to arbitration under a collective-bargaining agreement are invariably processed by unions rather than by individual employees. Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available, cf. *Gardner-Denver*, 415 U. S., at 58, n. 19, a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.[20]

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time "preliminary" or "postliminary" working activities, requires compensation under the minimum wage provisions if a collective-bargaining agreement in effect between the employer and the employee's union makes that time compensable. See also 29 U. S. C. §§ 207 (e) (7), (f). Where plaintiff's claim depends upon application of one of these exceptions, we assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective-bargaining agreement. In this case, however, petitioners' threshold claim does not depend upon application of any of those exceptions. The contention that petitioners were engaged in compensable "principal" activity when conducting the pretrip safety inspections is a claim that arises wholly independently of the collective-bargaining agreement. Accordingly, deference to the prior arbitral decision in this case would be inappropriate. See n. 13, *supra*.

[20] Cf. *Humphrey* v. *Moore*, 375 U. S. 335, 349 (1964) ("we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another"); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337–339 (1953).

Second, even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected. Because the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," *id.*, at 57; see *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S., at 581–582, many arbitrators may not be conversant with the public law considerations underlying the FLSA.[21] FLSA claims typically involve complex mixed questions of fact and law—*e. g.*, what constitutes the "regular rate," the "workweek," or "principal" rather than "preliminary or postliminary" activities. These statutory questions must be resolved in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings. Although an arbitrator may be competent to resolve many preliminary factual questions, such as whether the employee "punched in" when he said he did, he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute has been violated.[22]

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[21] We have noted that "a substantial proportion of labor arbitrators are not lawyers," *Gardner-Denver*, 415 U. S., at 57, n. 18; see also *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1956), and this is particularly true with respect to most members of joint grievance committees, who are drawn from the ranks of management and union leadership.

[22] We do not hold that an arbitral decision has no evidentiary bearing on a subsequent FLSA action in court. As we decided in *Gardner-Denver*, such a decision may be admitted into evidence, but

"[w]e adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with [the statute], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's

Moreover, even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement. *Gardner-Denver,* 415 U. S., at 53. He "has no general authority to invoke public laws that conflict with the bargain between the parties." *Ibid.* His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties. Accordingly,

> "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Ibid.,* quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S., at 597.

Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.[23]

Finally, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, see

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[statutory] rights, a court may properly accord it great weight This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. . . ." 415 U. S., at 60, n. 21.

See also n 19, *supra.*

[23] Even where the crucial provision in the collective-bargaining agreement incorporates the statutory language, as in *Gardner-Denver,* "the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by [the statute]." 415 U. S., at 53–54.

Gardner-Denver, supra, at 57–58, but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U. S. C. § 216 (b). An arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement. He "is confined to interpretation and application of the collective bargaining agreement" and his "award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* at 597. It is most unlikely that he will be authorized to award liquidated damages, costs, or attorney's fees.

III

In sum, the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable. Because Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioners' claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures. As we stated in *Gardner-Denver:*

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both

rights to be enforced in their respectively appropriate forums." 415 U. S., at 49–50.

Reversed.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today moves—rather blithely, so it seems to me, and unnecessarily—in a direction counter to the needs and interests of workers and employers and contrary to the interests of the judicial system. It does so on the theory that this result advances congressional policy, but careful analysis reveals that Congress, if anything, has mandated the contrary. With funds appropriated by Congress, the Executive Branch, through the Department of Justice, and the Judicial Branch have undertaken studies and pilot programs to remove just such routine and relatively modest-sized claims as this from the courts. Today, the Court moves in precisely the opposite direction, ignoring the objectives of Congress, the agreement of the parties, and the common sense of the situation. It moves toward making federal courts small claims courts contrary to the constitutional concept of these courts as having special and limited jurisdiction.

I

I agree, of course, that the congressionally created right of individual workers to a minimum wage under § 6 of the Fair Labor Standards Act, 29 U. S. C. § 206, may not be waived through a collective-bargaining agreement between an employer and the workers' union or through a direct agreement between an individual worker and the employer. *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, 707 (1945). I also agree that the Act creates a private cause of action to vindicate the right to a minimum wage. Fair Labor Standards Act § 16, 29 U. S. C. § 216. But it is a different—indeed, a totally different—proposition to say that employees and employers may not agree to a means of enforcing the employees'

routine wage claims outside the costly, cumbersome judicial process of the federal courts and, specifically, that employees, acting through their union in an arm's-length negotiation with the employer, may not bind themselves—as the petitioners did here—to submit to final and binding arbitration "any controversy that might arise," App. 24, rather than resolve it through litigation in the federal courts. The existence of a right and the provision of a judicial forum do not necessarily make either nonwaivable; if that were so, all the holdings of this Court and countless decisions of federal and state courts that parties are bound by contracts to arbitrate are placed in doubt. "[T]he question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil, supra,* at 705.

Unfortunately, neither the parties nor the United States as *amicus curiae* can point to a clear answer to this question in the legislative history of the Fair Labor Standards Act. It is hornbook law, however, that there is a strong congressional policy favoring grievance procedures and arbitration as a method of resolving labor disputes. See Labor Management Relations Act, §§ 201 (b), 203 (d), 29 U. S. C. §§ 171 (b), 173 (d); Norris-LaGuardia Act, § 8, 29 U. S. C. § 108. This Court has acknowledged that policy in the past. See, *e. g., Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578, and n. 4 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 458–459 (1957). The Court today pays lipservice to that congressional policy, *ante,* at 734–736, but then—paradoxically—ignores it.

The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. See, *e. g., Steel-*

workers v. *Warrior & Gulf Navigation Co., supra*, at 581–582. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony and avoids strikes and conflicts; it provides a swift, fair, and inexpensive remedy.

The policy of favoring extrajudicial methods of resolving disputes is reflected in other areas as well. With federal courts flooded by litigation increasing in volume, in length, and in a variety of novel forms,[1] the National Institute of Justice, under the leadership of Attorney General Griffin Bell, in 1979 launched a multimillion-dollar program of field studies to test whether mediation at a neighborhood level could resolve small disputes out of courts in a fashion satisfactory to the parties. Neighborhood Justice Centers Field Test: Final Evaluation Report 7–8 (1980). The results of this study—and other similar studies financed by private sources[2]—confirmed what many had long suspected: small disputes may be resolved more swiftly and to the satisfaction of the parties without employing the cumbersome, time-consuming, and expensive processes of litigation.[3] The National

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[1] Civil filings in fiscal year 1960 were 59,284; in 1980 they were 168,789, an increase of 184.7%. Even with the increases in numbers of judges, the number of cases per judge has risen 35.1%, from 242 to 327. Annual Report of the Director, Administrative Office of U. S. Courts 3 (1980). During this same period, the number of appeals docketed in the Courts of Appeals rose from 3,899 to 23,200, 495.0%, and the caseload per panel increased from 172 to 527, or 206.4%. *Id.*, at 1.

[2] See Dispute Resolution, 88 Yale L. J. 905 (1979). In 1976 the Judicial Conference of the United States joined with the Conference of Chief Justices and the American Bar Association to sponsor a conference to search for ways of improving justice, with emphasis on alternative means of resolving disputes. See The Pound Conference. Perspectives on Justice in the Future (West Pub. Co. 1979).

[3] Of 3,947 "cases"—*i. e.*, matters—voluntarily referred to these centers in the three study cities (Atlanta, Kansas City, and Los Angeles), 45% were

Institute of Justice recommended further study and implementation of similar procedures. Neighborhood Justice Centers Field Test, *supra,* at 108–109. Congress itself has recognized this problem and authorized such studies. Dispute Resolution Act, 94 Stat. 17.

II

By rejecting binding arbitration for resolution of this relatively simple wage claim arising under the Fair Labor Standards Act, the Court thereby rejects as well a policy Congress has followed for at least half a century throughout the field of labor relations and now being applied in other areas as well. To reach that strange result, the Court relies on our holding in *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36 (1974). But that case in no sense compels today's holding. The congressionally created right under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.,* was aimed at guaranteeing a workplace free from *discrimination,* racial and otherwise. That fundamental right is not and should not be subject to waiver by a collective-bargaining agreement negotiated by a union. But there obviously is a vast difference between resolving allegations of discrimination under the Civil Rights Act and settling a relatively typical and simple wage dispute such as we have here when the parties have expressly agreed to resolve such grievances by arbitration.

The long history of union discrimination against minorities

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resolved in some form, either through a hearing or simply by placing the parties in contact with each other. Neighborhood Justice Centers Field Test: Final Evaluation Report 26 (1980). Resolution came within a matter of days or weeks. *Ibid.* Interviews were conducted with one or both disputants in 63% of the mediated cases six months later. For both complainants and respondents, 88% were satisfied with the experience; 80% of complainants and 83% of respondents were satisfied with the agreement reached. In addition, over two-thirds felt that the adverse party had kept the bargain, and fewer than 30% felt that additional problems had arisen. *Id.,* at 45–50.

and women, now happily receding,[4] led Congress to forbid discrimination by unions as well as employers. See 42 U. S. C. § 2003e–2 (c). Against a background of union discrimination, Congress was aware that, in the context of claims under the Civil Rights Act, unions sometimes had been the adversary of workers. Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens. But this case is not a discrimination case.

Even beyond the historical fact of union discrimination, we observed in *Gardner-Denver* that arbitrators are not likely to have the needed experience to deal with the special issues arising under the Civil Rights Act, a statute "whose broad language frequently can be given meaning only by reference to public law concepts." 415 U. S., at 57. Leaving resolution of discrimination claims to persons unfamiliar with the congressional policies behind that statute could have undermined enforcement of fundamental rights Congress intended to protect. But the "tension" seen by the Court in *Gardner-Denver, ante,* at 734, is simply not present here.

A dispute over wages under the Fair Labor Standards Act arises in an entirely different historical and legal context. In that setting, the union and the employee are the traditional allies, united in enforcing wage claims of employees individually as well as collectively. The Court distorts the possibility that union leadership might fail to protect members' interests in a wage dispute. *Ante,* at 742. If this rare exception arose, protection of the employee is abundantly

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[4] See, *e. g., Steelworkers* v. *Weber*, 443 U. S. 193, 198, and n. 1 (1979), and sources cited therein; *id.,* at 218 (BURGER, C. J., dissenting).

available by way of the cause of action for breach of the union's duty of fair representation. See *Vaca* v. *Sipes*, 386 U. S. 171 (1967).[5]

Despite the Court's contrary view, *ante*, at 743–744, whether the time spent in the driver's inspection of a vehicle before taking to the road, as required by federal law, and in transportation of the vehicle to a repair facility when necessary constituted "compensable time" under "Federal Wage Laws," App. 21 (petitioner Barrentine's grievance), is a factual question well suited for disposition by grievance processes and arbitration. The following factors are relevant:

(a) the vehicle inspection was mandated, not by the employer, but by a federal regulation, 49 CFR § 392.7 (1980);

(b) the regulation places the responsibility to inspect the vehicle on *the driver* directly;

(c) the inspection is intended primarily for the benefit of the public;

(d) the petitioners' claim is one for wages; and

(e) the bargaining over wages, which produced a rate well above the statutory minimum wage, presumably took into account the time spent by drivers in complying with federal requirements.

This elementary wage dispute falls well within the scope of traditional arbitration as it exists under countless collective-bargaining agreements, which the Court now channels into the federal courts. For years the labor movement has developed panels of persons acceptable to both sides who are

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[5] Indeed, count 2 of the petitioners' complaint alleged that respondent Local 878 had breached its duty of fair representation. App. 7. The District Court expressly rejected that claim in its oral ruling, App. to Pet. for Cert. 12a, even though it found some evidence of a side agreement between Local 878 and the employer, *id.*, at 8a–11a. The petitioners have not challenged the findings of fact, and the Court of Appeals held they were not clearly erroneous. 615 F. 2d 1194, 1202 (CA8 1980).

familiar with "the law of the shop . . . [and] the demands and norms of industrial relations." *Alexander* v. *Gardner-Denver Co., supra,* at 57. The Court's generalizations about the powers of arbitrators, *ante,* at 744–745, are irrelevant; arbitrators have whatever power the parties confer upon them. Here, that power extends to "*any* controversy that might arise." App. 24 (emphasis added). Surely a wage claim is covered.

Allowing one party to such an elementary industrial dispute unilaterally to resort to the federal courts when an established, simplified, less costly procedure is available—and desired, as here, by the employer and the employee's union—can only increase costs and consume judicial time unnecessarily. It makes neither good sense nor sound law to read the broad language of *Gardner-Denver*—written in a civil rights *discrimination* case—to govern a routine wage dispute over a matter traditionally entrusted by the parties' arm's-length bargaining to binding arbitration.

III

The Court seems unaware that people's patience with the judicial process is wearing thin. Its holding runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts. See The Pound Conference: Perspectives on Justice in the Future *passim* (West Pub. Co. 1979); American Bar Assn., Report on the National Conference on Minor Disputes Resolution *passim* (1978). The Federal Government, as I noted earlier, has spent millions of dollars in pilot programs experimenting in extrajudicial procedures for simpler mechanisms to resolve disputes. Approving an extrajudicial resolution procedure "is not a question of first-class or second-class . . . means. It is a matter of tailoring the means to the problem that is involved." Resolution of Minor Disputes, Joint Hearings before the Subcommittee on Courts,

Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, and Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., 28 (1979) (testimony of Assistant Attorney General Meador). This Court ought not be oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods.

UNIVERSITIES RESEARCH ASSN., INC. *v.* COUTU

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

No 78–1945. Argued November 10, 1980—Decided April 6, 1981

Section 1 (a) of the Davis-Bacon Act provides that advertised specifications for federal construction contracts in excess of $2,000 "shall contain" a provision stating the minimum wages to be paid laborers and mechanics, which wages must be based on those the Secretary of Labor determines to be prevailing in the locality, and further provides that every contract based on such specifications "shall contain" a stipulation that the contractor will pay wages not less than those stated in the specifications. Petitioner made a contract with the Atomic Energy Commission to provide scientific and management services to the United States in connection with the construction, alteration, and repair of the Fermi National Accelerator Laboratory, a high-energy physics research facility. The contract was administratively determined not to call for work subject to the Act, and therefore did not contain a prevailing wage stipulation Respondent, a former employee of petitioner, brought suit against petitioner on behalf of himself and others similarly situated, seeking damages on the theory that petitioner had violated the Davis-Bacon Act by failing to pay prevailing wages for the construction work. The District Court entered summary judgment for petitioner on the ground that since it appeared from the record that there were no express Davis-Bacon Act stipulations in the contract, it would be improper for the court to declare in the first instance that the contract was subject to the Act and to make appropriate wage determinations for the parties The Court of Appeals reversed, holding that if petitioner actually performed Davis-Bacon Act work with its own employees, respondent and his class became entitled to the prevailing wages, and the court remanded the case to allow respondent the opportunity to demonstrate, if he could, that petitioner had used him and his class to perform Davis-Bacon Act work.

Held: The Davis-Bacon Act does not confer upon an employee a private right of action for back wages under a contract that has been administratively determined not to call for work subject to the Act and thus does not contain prevailing wage stipulations. Pp. 767–784.

(a) While requiring that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, § 1 of the Act does not confer rights directly on these individuals but is simply "phrased as a directive to federal agencies engaged in the disbursement of public funds," *Cannon* v. *University of Chicago*, 441 U. S. 677, 693, n. 14. That Congress did not intend to authorize a suit for back wages where there are no prevailing wage stipulations in the contract is also indicated by the absence of a provision comparable to § 3 of the Davis-Bacon Act, which confers on laborers and mechanics working under a contract containing such stipulations a conditional right of action against the contractor on the payment bond required by the Miller Act Pp. 771–773.

(b) The Davis-Bacon Act's legislative history further supports the conclusion that implication of a private right of action under the circumstances of this case would be inconsistent with congressional intent. No contrary inference can be drawn from the Portal-to-Portal Act of 1947. Pp 773–781.

(c) Finally, the underlying purpose of the Davis-Bacon Act's legislative scheme indicates that Congress did not intend to create the right of action asserted by respondent. To imply a private right of action to sue for Davis-Bacon Act wages under a contract that does not contain prevailing wage stipulations would destroy the careful balance the Act strikes between the interests of contractors and their employees. In addition, the implication of a private right of action where there has been no Davis-Bacon Act determination would introduce substantial uncertainty into Government contracting, and would undercut the elaborate administrative scheme promulgated to assure consistency in the administration and enforcement of the Act. Pp. 782–784.

595 F. 2d 396, reversed and remanded.

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

Robert E. Mann argued the cause and filed briefs for petitioner.

Robert Jay Nye argued the cause for respondent. With him on the brief were *Hugh B. Arnold* and *Daniel N. Kadjan.*

Harriet S. Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General McCree, Assistant Attorney General Daniel,*

Deputy Solicitor General Geller, Robert E. Kopp, and *Eloise E. Davies.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The Davis-Bacon Act requires that certain federal construction contracts contain a stipulation that laborers and mechanics will be paid not less than prevailing wages, as determined by the Secretary of Labor. The question presented in this case is whether the Act confers upon an employee a private right of action for back wages under a contract that has been administratively determined *not* to call for Davis-Bacon work, and that therefore does not contain a prevailing wage stipulation.

I

Section 1 (a) of the Davis-Bacon Act of March 3, 1931 (Act), ch. 411, § 1, 46 Stat. 1494, as amended, 40 U. S. C. § 276a (a),[1] provides that the advertised specifications for

**J. Albert Woll, Laurence Gold, Laurence J. Cohen,* and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

[1] Section 1 (a) reads:

"(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the

every federal contract in excess of $2,000 "for construction, alteration, and/or repair . . . of public buildings or public works of the United States . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding classes of laborers and mechanics employed on similar projects in the locality. Every contract based upon these specifications must contain a stipulation that the contractor shall pay wages not less than those stated in the specifications.[2]

A contract entered into pursuant to the Act must also provide that if the contractor fails to pay the minimum wages specified in the contract, the Government contracting officer may withhold so much of the accrued payments as may be considered necessary to pay the laborers and mechanics the difference between the contract wages and those actually paid. Section 3 of the Act, as added Aug. 30, 1935, 49 Stat.

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site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents."

[2] The Act also applies to contracts entered into without advertising for proposals, if the Act would be otherwise applicable. Act of Mar. 23, 1941, 55 Stat. 53; Act of Aug. 21, 1941, 55 Stat. 664, 40 U. S. C. § 276a–7.

1012, 40 U. S. C. § 276a–2,[3] authorizes the Comptroller General to pay these accrued payments directly to the laborers and mechanics.

Should the withheld funds prove insufficient to reimburse the employees, § 3 confers on them "the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials." Laborers and mechanics working under a contract that *contains* Davis-Bacon Act stipulations thus may themselves bring suit against the contractor on the payment bond that the Miller Act of August 24, 1935, 49 Stat. 793, as amended, 40 U. S. C. § 270a *et seq.* (1976 ed. and Supp. III), requires for the protection of persons supplying labor or materials under certain federal construction contracts.[4] In addition,

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[3] Section 3 provides:

"(a) The Comptroller General of the United States is hereby authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to this Act; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

"(b) If the accrued payments withheld under the terms of the contract, as aforesaid are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds."

[4] Under § 1 (a)(2) of the Miller Act, 40 U. S. C. § 270a (a)(2), as it read at the time of the institution of the present suit, any person entering

if the contractor fails to pay at least the stipulated minimum wages, the contract may be terminated and the contractor debarred from all Government contracts for a period of three years.[5]

Pursuant to Reorganization Plan No. 14 of 1950, 5 U. S. C. App., p. 746, the Secretary of Labor (Secretary) has issued regulations designed to "assure coordination of administration and consistency of enforcement" of the Act and some 60 related statutes.[6] See 29 CFR Parts 1, 3, 5, 7 (1980).[7] In

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into a contract exceeding $2,000 for the "construction, alteration, or repair of any public building or public work of the United States" must furnish, *inter alia,* a payment bond for the protection of persons supplying labor or material. Under § 2 (a) of that Act, 40 U. S. C. § 270b (a), suits on such a bond may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within 90 days.

By Pub. L. 95–585, 92 Stat. 2484, approved Nov. 2, 1978, the $2,000 figure was raised to $25,000.

[5] Section 2 of the Act, as added Aug. 30, 1935, 49 Stat. 1012, 40 U. S. C. § 276a–1, provides that every contract within the scope of the Act must stipulate that the Government may terminate the contractor's right to proceed with the work in the event that it is found by the contracting officer that any laborer or mechanic "has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid." Section 3 (a), see n. 3, *supra,* contains the disqualification provision.

[6] The Reorganization Plan requires the Secretary to "prescribe appropriate standards, regulations, and procedures" to be observed by contracting agencies, and directs the Secretary to make "such investigations, concerning compliance with and enforcement of such labor standards, as he deems desirable." The Presidential message accompanying the plan made clear, however, that the contracting agency retains the primary responsibility for investigating violations and enforcing the Act. 5 U. S. C. App., p. 746. See 29 CFR § 5.6 (1980); Elisburg, Wage Protection Under the Davis-Bacon Act, 28 Lab. L. J. 323, 326–327 (1977).

The Secretary derives further authority from the Copeland Anti-Kickback Act, ch. 482, § 2, 48 Stat. 948, as amended, 40 U. S. C. § 276c, which requires him to make reasonable regulations for federal construction contractors, including a provision that each contractor shall furnish weekly

[*Footnote 7 is on p. 760*]

their turn, various contracting agencies have issued detailed regulations concerning the applicability of the Act to the contracts they let. See, *e. g.*, 41 CFR Subpart 9–18.7 (1979) (Department of Energy). The contracting agency has the initial responsibility for determining whether a particular contract is subject to the Davis-Bacon Act. See A. Thieblot, The Davis-Bacon Act 31 (Labor Relations and Public Policy Series Report No. 10, Univ. of Pa., 1975) (hereinafter Thieblot). If the agency determines that the contract is subject to the Act, it must determine the appropriate prevailing wage rate,[8] and ensure that the rate chosen is inserted in the requests for bids on the project, as well as in any resulting contract. See 29 CFR § 5.5 (1980); Thieblot, at 31–34.

The contracting agency's coverage and classification determinations are subject to administrative review. Prior to the award of a contract, a contractor, labor organization, or employee may appeal a final agency determination that a project is not covered by the Act to the Department of Labor.

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a statement of the wages paid each employee during the preceding week. In addition, § 10 of the Portal-to-Portal Act of 1947, 61 Stat. 89, 29 U. S. C. § 259, provides that an employer shall not be liable for failure to pay wages required by the Davis-Bacon Act if he proves good-faith reliance on "any written administrative regulation, order, ruling, approval, or interpretation" of the Secretary.

[7] Part 1 of 29 CFR sets forth procedures for predetermining the prevailing wage rate. Part 3, issued pursuant to the Copeland Anti-Kickback Act, requires submission of weekly payroll data. Part 5 provides guidelines for application and enforcement of the Act, including certain coverage definitions. 29 CFR § 5.2 (1980). Finally, procedures governing practice before the Department of Labor's Wage Appeals Board are set forth in Part 7.

[8] The contracting agency determines the appropriate wage rate either by referring to the "area" wage determinations published by the Secretary in the Federal Register or, if no such determinations exist for the relevant area or class of work, by requesting a project wage determination from the Wage and Hour Division of the Department of Labor. See 29 CFR §§ 1.5, 1.6 (1980), Thieblot, at 31–34.

29 CFR §§ 5.12 and 7.9 (1980).[9] Disputes over the proper classification of workers under a contract containing Davis-Bacon provisions must be referred to the Secretary for determination. 41 CFR § 1–18.703–1 (i) (1979); 29 CFR § 5.12 (1980). See *North Georgia Bldg. & C. T. C.* v. *U. S. Dept. of Transp.*, 399 F. Supp. 58 (ND Ga. 1975). In turn, any "interested person" may appeal the Secretary's wage rate determination to the Wage Appeals Board of the Department of Labor, provided review is sought prior to the award of the contract at issue. 29 CFR § 1.16 (1980); 29 CFR Part 7 (1980). See Thieblot, at 40–43.[10]

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[9] The binding effect of the Department's coverage determination on the contracting agency is disputed. Compare, *e. g.*, 41 Op. Atty Gen. 488 (1960) (Secretary has final authority to determine whether employees are "laborers or mechanics" under Act and related statute), with 40 Comp. Gen 565 (1961) (judgment of contracting officer that Act not applicable cannot be reversed by the Secretary). Cf. 43 Op. Atty. Gen. No 14 (1979) (Secretary has final authority to determine whether particular contracts are covered by Walsh-Healey or Service Contract Acts).

There is currently no administrative procedure that expressly provides review of a coverage determination after the contract has been let. See 40 Comp. Gen., at 570–571 (omission of minimum wage stipulations cannot be cured after contract awarded); *North Georgia Bldg & C. T C.* v. *U. S. Dept. of Transp.*, 399 F. Supp. 58, 62 (ND Ga. 1975). Proposed Department of Labor regulations, however, provide for the postaward incorporation of wage determinations in contracts that do not originally include them 44 Fed. Reg. 77029 (Dec. 28, 1979) (proposed 29 CFR § 1.6 (f)). The United States, as *amicus curiae*, states that several contracting agencies, including the Department of Energy, have objected to the proposed regulations, asserting that contracting agencies have final authority with respect to coverage determinations for a particular contract.

[10] The correctness of the Secretary's wage rate determination is not subject to judicial review See, *e. g.*, *United States* v. *Binghamton Constr. Co.*, 347 U. S 171, 177 (1954). At least two Courts of Appeals have held, however, that the practices and procedures of the Secretary are reviewable under the standards of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* See *Virginia ex rel. Commissioner, Dept. of Transp.* v. *Marshall*, 599 F. 2d 588, 592 (CA4 1979); *North Georgia Bldg. & Constr. Trades Council* v. *Goldschmidt*, 621 F. 2d 697, 707–708 (CA5

II

Petitioner Universities Research Association, Inc., is a not-for-profit consortium of North American universities. In 1967, petitioner made a contract with the Atomic Energy Commission (AEC) to provide scientific and management services to the United States in connection with the construction, alteration, and repair of the Fermi National Accelerator Laboratory, a high-energy physics research facility located in Kane and Du Page Counties, Ill. Effective April 1972, this contract was modified to provide that petitioner also would furnish personnel to administer and operate the Fermi Laboratory. The contract was later assumed in turn by the AEC's successors, the Energy Research and Development Agency (ERDA) and the Department of Energy (DOE).[11]

At all relevant times the funding for the Fermi Laboratory was supplied entirely by the United States through the AEC. The contract, which tracked AEC procurement regulations,[12] specified the rates of compensation to be paid certain classifications of employees; in addition, petitioner was required to obtain approval from the AEC prior to adopting new classifications of employees or making any changes in employee compensation.

Article XXXIII of the contract expressly stated that it was not contemplated that petitioner would use its own employees to perform work that the AEC determined to be subject to the Act; such work, if any, was to be procured by subcontracts approved by the AEC and containing Davis-

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1980). Cf. *Fry Bros. Corp.* v. *HUD,* 614 F. 2d 732, 733 (CA10 1980) We express no view on the latter question.

[11] See Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq ;* Department of Energy Organization Act, 91 Stat. 565, 42 U. S. C. § 7101 *et seq.* (1976 ed., Supp. III). For convenience, we refer to the contracting agency here as the AEC.

[12] DOE procurement regulations are currently set forth in 41 CFR, ch. 9 (1979).

Bacon stipulations.[13] In a letter dated January 23, 1968, from the AEC to petitioner, the AEC stated that Art. XXXIII was included in the contract with the understanding that the contract would be modified to incorporate Davis-Bacon stipulations "[i]f presently unforeseen conditions" arose making it necessary that Davis-Bacon work be performed by petitioner with its own employees.[14] Another letter, dated April 6, 1972, with identical provisions was sent to petitioner by the AEC following the modification of the contract in 1972. App. 63. In order to implement Art. XXXIII, a committee of AEC officials was designated to review specific work projects and to make Davis-Bacon Act coverage determinations as was necessary.[15]

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[13] Article XXXIII of the contract provided:

"1. This contract does not contemplate the performance of work by the Association [petitioner], with its own employees, which the Commission [AEC] determines is subject to the Davis-Bacon Act Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work." App. 55.

[14] The letter stated that Art. XXXIII was included in the contract "with the following understandings":

"(a) If presently unforeseen conditions arise which make it necessary in the best interests of timely and efficient completion of the accelerator that work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.

"(b) Should the Laboratory Director desire a review of any determinations with respect to the applicability of the Davis-Bacon Act, written requests for such reviews may be submitted to the AEC General Manager for consideration and resolution." App. 62.

[15] DOE guidelines for such determinations are set forth in 41 CFR Subpart 9–18.7 (1979). The regulations provide that the Act does not cover, *inter alia:* "[c]ontracts for servicing or maintenance work in an existing plant, including installation or movement of machinery or other

In April 1975, respondent Stanley E. Coutu, a former employee of petitioner, brought suit in the United States District Court for the Northern District of Illinois on behalf of himself and other mechanics and laborers similarly situated, seeking more than $5 million in damages on the theory that petitioner had violated the Davis-Bacon Act by failing to pay prevailing wages for construction work performed by its employees under the contract with the AEC. Respondent had been employed by petitioner as an electronics technician from September 25, 1972, until September 10, 1975. During that time, he was compensated in accordance with the wage schedules for the "technician" classification set forth in the contract. Respondent's duties involved monitoring computers, providing assistance to scientific personnel, supervising accelerator operation, and recordkeeping. He also would make minor repairs to malfunctioning equipment, assemble prefabricated items, and assist in connecting power sources to experimental equipment. Respondent's supervisors typically were high-rated technicians, engineers, and physicists.

Respondent's complaint was in seven counts. The first alleged that petitioner had failed to pay "the minimum wages

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equipment, and plant rearrangement, which involve only an incidental amount of work . . . that would otherwise be considered construction, alteration and/or repair," § 9–18.701–51 (a)(3); and contracts for work involving "[e]xperimental development of equipment, processes and devices, including assembly, fitting, installation, testing, reworking, and disassembly." § 9–18.701–52 (a)(4).

The regulations make clear, however, that "[t]he classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside of Davis-Bacon Act coverage." The procuring officer is thus charged with scrutinizing proposed work assignments in order to ensure that "[c]ontractors whose contracts do not contemplate the performance of covered work with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Davis-Bacon Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act." § 9–18.701–52 (b).

required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act." App. 4 The second alleged that the contract was within the purview of the Davis-Bacon Act and that the contract by its terms provided for payment "at the legal wage rate applicable to the work actually performed." *Id.*, at 6–7. The remaining counts rested on common-law bases, for which pendent federal jurisdiction was asserted.

On October 8, 1975, the District Court dismissed respondent's first cause of action on the ground that it was not "totally borne out" by the contract. *Id.*, at 22. The court, however, denied petitioner's motion to dismiss the second count and the pendent claims. It relied on the Seventh Circuit's first decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (*McDaniel I*), vacated and remanded, 423 U. S. 810 (1975), judgment re-entered on remand, 548 F. 2d 689 (1977) (*McDaniel II*), cert. denied, 434 U. S. 1033 (1978). *McDaniel I* held that the Davis-Bacon Act conferred an implied private right of action upon an employee seeking to enforce a contractor's commitment to pay prevailing wages.[16] The Dis-

[16] Like this case, *McDaniel* was a class action for back wages brought by an employee under an AEC contract which provided that work subject to the Act was to be subcontracted, rather than performed by the contractor's own employees. In *McDaniel*, however, the plaintiff alleged that the contract contained prevailing wage stipulations, and, for the purpose of the summary judgment motion, the defendant did not deny that allegation. See 512 F. 2d, at 584; 548 F. 2d, at 695. Defendant also did not contravene the plaintiff's allegation that the express remedies provided by the Act were unavailable. 512 F. 2d, at 587. Assuming these facts to be true, the Court of Appeals held in *McDaniel I* that inasmuch as the statutory remedies provided in the Act had proved ineffective, "we should be especially 'alert to provide such remedies as are necessary to make effective the congressional purpose,'" *ibid.*, quoting *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). Accordingly, the Court of Appeals held that the complaint stated a cause of action under the Act.

This Court subsequently granted certiorari, and vacated and remanded

trict Court reasoned that the AEC letter of April 6, 1972 interpreting Art. XXXIII of the contract, left open the possibility that petitioner's employees had performed work covered by the Act pursuant to proper determinations by the AEC. The court accordingly gave respondent "leave to show that the Secretary of Labor through [AEC] has made Davis-Bacon Act determinations with respect to the alleged contract, and that [respondent] and the class have performed such work at [petitioner's] direction, pursuant to the contract." App. 25.

After discovery, petitioner moved for summary judgment. In support of its motion, petitioner submitted an affidavit of the chief legal counsel for the Fermi Laboratory, which stated that "[n]o Davis-Bacon Act . . . stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in [the] Contract." *Id.*, at 31–32. The District Court noted that respondent "as much concedes that the contract fails to include Davis-Bacon specifications," and it found that "[o]n the present state of the record it is clear that no Davis-Bacon Act determinations have been made a part of this contract." *Id.*, at 32–33. After reviewing the statutory and regulatory framework of the Act, the court concluded that "it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties." *Id.*, at 34. The court therefore dismissed the second count and, "in the exercise of its discre-

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McDaniel I for reconsideration in the light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), and *Cort* v. *Ash*, 422 U. S. 66 (1975). On remand, the Court of Appeals reaffirmed its earlier opinion, again stressing that "the plaintiffs-appellants allege that the government contract with appellee *did* contain the prevailing wage requirement, and appellee does not deny it." 548 F. 2d, at 695 (emphasis in original). Thereafter, defendant petitioned for certiorari; as indicated in the text, certiorari was denied.

tion," *ibid.*, declined to assume jurisdiction over the pendent state-law claims.

The United States Court of Appeals for the Seventh Circuit reversed and remanded the case. 595 F. 2d 396 (1979). That court recognized that the affidavit submitted by petitioner tended to disprove that there were express Davis-Bacon Act stipulations in the contract; it determined, however, that summary judgment on the second count was not appropriate, since "there may have been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law." *Id.*, at 398. Reasoning from its prior opinions in *McDaniel I* and *II*, the court concluded that "if the [petitioner] actually performed [Davis-Bacon Act] work with its own employees at the Fermi Laboratory, [respondent and his class] became entitled to the prevailing wages in Kane County where the work was to be performed." 595 F. 2d, at 399. After rejecting petitioner's alternative argument that exhaustion of administrative remedies was required, the court remanded the case to allow respondent the opportunity on remand to demonstrate, if he could, that petitioner had used respondent and his class to perform Davis-Bacon construction work at the Fermi Laboratory. *Id.*, at 402.

Because of the importance of the implied-right-of-action issue, we granted certiorari. 445 U. S. 925 (1980).

III

Before us, petitioner makes two major arguments. It contends first that the federal courts do not have jurisdiction to make coverage, classification, or wage determinations under the Davis-Bacon Act. Alternatively, petitioner contends that Congress did not intend that the Davis-Bacon Act be enforced through private actions. Because we conclude that the Act does not confer a private right of action for back wages under a contract that administratively has been deter-

mined not to call for Davis-Bacon work,[17] we find it unnecessary to reach the broader question whether federal courts have any jurisdiction to review agency coverage and classifi-

[17] Respondent contends that the issue of an implied right of action under the Act was not raised in the District Court and the Court of Appeals, and that, therefore, it is not properly before this Court. In addition, he asserts that the AEC viewed this contract as one covered by the Act, and thus that the case does not present the question whether the Act confers an implied right of action on an employee under a contract that has been predetermined administratively not to call for Davis-Bacon work. We find both contentions to be without merit.

First, our reading of the record leads us to conclude that the question we decide today was raised and passed upon by the District Court and the Court of Appeals. In its answer to the complaint, petitioner alleged as an affirmative defense that the complaint failed to state a claim upon which relief could be granted because of respondent's failure to allege a contract containing Davis-Bacon provisions or wage stipulations. App. 17. In opposition to petitioner's motion for summary judgment, respondent argued that the absence of Davis-Bacon Act stipulations in the contract was itself a violation of the Act that should not serve to shield petitioner from the implied right of action found in *McDaniel*. App. 32. In ruling upon petitioner's motion for summary judgment, the District Court characterized the issue as "whether plaintiff class can proceed in this action under the Davis-Bacon Act absent any showing that the government and [petitioner] have made a determination that the contract is subject to the Act's provisions." *Id.*, at 33. Finally, the Court of Appeals stated: "Our decision in the present case flows directly from the *McDaniel* opinions," which, the court noted, had held that "employees have an implied right of action to sue for wages due under the Act." 595 F. 2d, at 397. "[C]omplications" arose "only from the procedural posture" of this case and from petitioner's "renewed attempt to establish an exhaustion requirement." *Ibid.*

We are similarly unconvinced by respondent's contention that the contracting agency viewed the contract as one covered by the Davis-Bacon Act. Respondent points out that Art. XXXIII of the contract states that Davis-Bacon work is to be subcontracted, and that the AEC letters construing that clause stipulate that if petitioner's employees do perform Davis-Bacon work, the contract will be modified to include Davis-Bacon Act determinations. But rather than showing that the AEC considered this contract to be one for Davis-Bacon Act work, these provisions demonstrate precisely the opposite. Since the District Court found that the

cation determinations.[18] Similarly, we do not decide whether the Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations.[19]

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contract was not modified to include Davis-Bacon stipulations, it is clear that the contracting agency did not view the contract as covered by the Act. Thus, this case presents the issue that was not raised in *McDaniel I* and *II*.

[18] As noted above, it is settled that the correctness of wage determinations of the Secretary are not subject to judicial review. See n. 10, *supra*.

[19] Compare *McDaniel* (Act confers implied private right of action to enforce prevailing wage stipulations) with *United States ex rel. Glynn* v. *Capeletti Bros.*, 621 F. 2d 1309, 1312, n. 10 (CA5 1980) (disapproving *McDaniel*).

While we recognize that some of our reasoning arguably applies to the question whether the Act creates *any* implied right of action, we have no reason to reach that broader issue here. Further, we note that there is some question whether that issue is properly before us in light of the following colloquy at oral argument:

"QUESTION: Mr. Mann [attorney for petitioner], could I just be sure I understand your position. Assume here there had been a predetermination that some part of the construction work on the laboratory would be covered by Davis-Bacon. And the laboratory did not pay those—and it was performed by their own people. And supposing an employee didn't know about that till the contract was performed and then he had gotten less than the Davis-Bacon Act provided, would he have in your view of the law . . . a private cause of action against your client for the difference between what he was paid and what he actually should have been paid?

"MR. MANN: We have taken the position on that question . . . that there is under the Act no private right of action at all, even to recover under express provisions. There may be a right of action in a state court, under a state common law theory of third-party beneficiary, but not in federal court, because there's no real federal question there; it's a contract question involved there. So we've taken the position that even if there were an express contract that there would not be a private right to go to court.

"QUESTION: Did you take that position in the 7th Circuit?

"MR. MANN: . . . [T]hat question was not asked in the 7th Circuit, and that issue was not actually before us.

[*Footnote 19 is continued on p. 770*]

Relying on *McDaniel*,[20] respondent argues that it must be assumed that no statutory relief is available to him, and that therefore the implication of a private right of action is necessary to effectuate the purpose of Congress in passing the Act. But as the Court's recent opinions have made clear, the question whether a statute creates a private right of action is ultimately "one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979). See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979). In order to determine whether Congress intended to create the private right of action asserted here, we consider three factors set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), that we have "traditionally relied upon in determining legislative intent": the "language and focus of the statute, its legislative history, and its purpose." See *Touche Ross*, 442 U. S., at 575–576. We conclude that each of these factors points to the conclusion that Congress did not intend to create a private right of action in favor of an employee under a contract that does not contain prevailing wage stipulations.[21]

"QUESTION: But you didn't raise that in the 7th Circuit?

"MR. MANN: That's correct.

"QUESTION: Or in the trial court?

"MR. MANN: In the trial court the question of the private right of action per se was raised in the context of the jurisdiction of the court to revise the contract. That is, we didn't really address the issue whether in general there is a private right to enforce a specific clause, but whether there is a private right to obtain the court determination of the fundamental issues of coverage, of classification, of rate, that was the issue presented to the trial court." Tr. of Oral Arg. 8–9.

[20] In *McDaniel*, the Court of Appeals accepted as true respondent's allegation that no funds had been withheld by the Government contracting agency and that no Miller Act payment bond had been filed. See n. 16, *supra*.

[21] Given this conclusion, we find it unnecessary to consider the fourth *Cort* factor, *i. e.*, whether the cause of action is "one traditionally relegated

A

We turn first to the language of the Act itself. See *Transamerica*, 444 U. S., at 16; *Touche Ross*, 442 U. S., at 568. Section 1 of the Act states that the advertised specifications for every federal construction contract in excess of the specified amount "shall contain" a provision stating the minimum wages to be paid laborers and contractors, which wages shall be based on those the Secretary determines to be prevailing in the locality. Section 1 further provides that "every contract based upon these specifications shall contain a stipulation" that the contractor shall pay wages "not less than those stated in the advertised specifications."

The Court's previous opinions have recognized that "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers." *United States* v. *Binghamton Constr. Co.*, 347 U. S. 171, 178 (1954); *Walsh* v. *Schlect*, 429 U. S. 401, 411 (1977). But the fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation. See *Transamerica*, 444 U. S., at 17–18.[22] The Court consistently has found that Congress intended to create a cause of action "where the

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to state law." *Cort* v. *Ash*, 422 U S, at 78 See *Touche Ross*, 442 U S., at 579–580 (BRENNAN, J., concurring) (when neither statute nor legislative history indicates an intent to create a federal right in favor of the plaintiff, "the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action").

[22] In *Transamerica*, the Court refused to imply a private cause of action under § 206 of the Investment Advisers Act of 1940, 54 Stat. 852, as amended, 15 U S C. § 80b–6, since that provision "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities" 444 U S, at 19. The Court noted: "Section 206 of the Act . . concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id*, at 24.

language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case" *Cannon* v. *University of Chicago*, 441 U. S 677, 690, n. 13 (1979). Conversely, it has noted that there "would be far less reason to infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefited class," instead has framed the statute simply as a general prohibition or a command to a federal agency. *Id.*, at 690–692. Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals. Since § 1 is simply "phrased as a directive to federal agencies engaged in the disbursement of public funds," 441 U. S., at 693, n. 14,[23] its

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[23] In *Cannon*, the Court found an implied right of action under Title IX of the Education Amendments of 1972, § 901 (a), 86 Stat. 373, as amended, 20 U S C § 1681, which provides that "[n]o person in the United States shall, on the basis of sex, . . be subject to discrimination under any educational program or activity receiving Federal financial assistance" As indicated in the text, however, it pointed out that "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices" 441 U S , at 690–693

Further, the Fifth Circuit in *Capeletti*, 621 F 2d, at 1313–1314, noted that *Cannon* distinguished the language of an alternative version of Title XI that Congress did not adopt·

"' The Secretary shall not make any grant . . . nor . . . enter into any contract with any institution of higher education . . . unless the . contract . for the grant . . contains assurances satisfactory to the Secretary that any such institution . . . will not discriminate on the basis of sex'" See 441 U S , at 693, n 14

The court in *Capeletti* pointed out that there are "obvious similarities" between the language of the rejected alternative version of Title IX and § 1 of the Davis-Bacon Act: "Neither section 1 of the Davis-Bacon Act

language provides no support for the implication of a private remedy.

Moreover, § 3 of the Act demonstrates that in this context, as in others, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross,* 442 U. S., at 572. Under § 1 of the Act, the contracting agency is entitled to withhold "so much of accrued payments" as may be considered necessary to pay to laborers and mechanics the difference between "the rates of wages required by the contract" and the rates actually paid. If the wages so withheld are insufficient to reimburse the laborers and mechanics, then § 3 confers on them the same "right of action and/or intervention" conferred by the Miller Act on laborers and materialmen The absence of a comparable provision authorizing a suit for back wages where there are *no* prevailing wage stipulations in the contract buttresses our conclusion that Congress did not intend to create such a remedy.[24]

B

The legislative history of the Davis-Bacon Act provides further support for the result we reach. The Act was "designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." House Committee on Education and Labor, Legislative History of the Davis-Bacon Act, 87th

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nor the proposed Title IX statute cited in *Cannon* focuses on the benefited class in its right—or duty—creating language. Instead, in both instances the duty created by the statutory language is imposed upon federal agencies to ensure that certain provisions are included in federal contracts." 621 F 2d, at 1314

[24] The Court has observed that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies" *National Railroad Passenger Corp* v *National Assn of Railroad Passengers,* 414 U S. 453, 458 (1974). There is some evidence that Congress intended the suit on the contractor's bond to be the sole method of enforcing the obligations imposed by the Act See n. 28, *infra.*

Cong., 2d Sess., 1 (Comm. Print 1962) (Legislative History). Passage of the Act was spurred by the economic conditions of the early 1930's, which gave rise to an oversupply of labor and increased the importance of federal building programs, since private construction was limited. See Thieblot, at 7; Elisburg, Wage Protection Under the Davis-Bacon Act, 28 Lab. L. J. 323, 324 (1977); S. Rep. No. 1445, 71st Cong., 3d Sess., 1 (1931). In the words of Representative Bacon, the Act was intended to combat the practice of "certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country 'picking' off a contact here and a contract there." The purpose of the bill was "simply to give local labor and the local contractor a fair opportunity to participate in this building program." 74 Cong. Rec. 6510 (1931).[25]

As originally enacted in 1931, ch. 411, 46 Stat. 1494, the

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[25] Mr. Bacon continued:

"I think that it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a 'fair break' in getting the contract. If the local contractor is successful in obtaining the bid, it means that local labor will be employed, because that local contractor is going to continue in business in that community after the work is done If an outside contractor gets the contract, and there is no discrimination against the honest contractor, it means that he will have to pay the prevailing wages, just like the local contractor." 74 Cong. Rec. 6510 (1931)

See *id*, at 6505 (remarks of Rep Welch); 6510 (remarks of Rep. LaGuardia), 6512 (remarks of Rep. Norton), 6512 (remarks of Rep. Cochran); 6513 (remarks of Rep. Briggs); 6513–6515 (remarks of Rep. Granfield); 6515–6517 (remarks of Rep Kopp); 6517–6518 (remarks of Rep. Fitzgerald); 6519 (remarks of Rep Condon); 6520 (remarks of Rep. Zihlman). See also Hearings on H. R. 16619 before the House Committee on Labor. 71st Cong, 3d Sess., 19–21 (1931) (statement of Rep. Bacon), Hearings on S. 5904 before the Senate Committee on Manufactures, 71st Cong., 3d Sess , 9, 23 (1931); S Rep. No 1445, 71st Cong., 3d Sess., 2 (1931); H. R. Rep. No 2453, 71st Cong., 3d Sess., 2 (1931).

Act required that every federal contract in excess of $5,000 in amount for "construction, alteration, and/or repair of any public buildings" contain a provision stating that the rate of wages paid laborers and mechanics would not be less than the prevailing rate for similar work in the locality; the Act further required that every contract contain a provision stating that disputes as to what the prevailing wage was on any given project were to be conclusively determined by the Secretary if the contracting officer was unable to resolve the controversy. The original Act thus did not provide for predetermination of prevailing wages by the Secretary; it also did not establish any enforcement mechanism.[26]

Congress soon concluded, however, that the Act as originally drafted was inadequate. Discontent focused on the lack of effective enforcement provisions and the "postdetermination" of the prevailing wage. Legislative History 2. Contractors called for predetermination of prevailing wages, claiming that they had been put to unexpected expense by postcontract determinations that the prevailing wage was higher than the rate upon which they had based their bids. *Ibid.;* Hearings on H. R. 12 et al. before the House Committee on Labor, 72d Cong., 1st Sess., 8, 12, 14, 50–51, 54–55, 58, 65 (1932). While the labor movement was divided on this issue, most of the national leadership opposed predetermination. Legislative History 2. See 75 Cong. Rec. 12379 (1932) (remarks of Rep. Ramspeck); Hearings on

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[26] The decision to eschew both predetermination of wages and penalty provisions was deliberate. In the words of the Secretary:

"May I say that what prompted us to draft or suggest this bill in its present form was that we believed that 90 per cent of the controversies that may arise hereafter would settle themselves and that instead of endeavoring to fix a prevailing wage rate in advance we were all of the opinion that by the simple insertion of these provisions in contracts made with the contractors we could accomplish the desired results." Hearings on H. R. 16619 before the House Committee on Labor, 71st Cong., 3d Sess., 2–3 (1931).

H. R. 12, at 24, 114, 116, 122–123. Labor was united, however, in calling for the establishment of an enforcement mechanism. Legislative History 2. See Hearings on H. R. 12, at 122–123; 75 Cong. Rec. 12379 (1932) (remarks of Rep. Ramspeck).

In 1932, both Houses of Congress passed an amendment to the Act providing for predetermination of prevailing wages by the Secretary and for penalties for failure to pay the rate "stated in the advertised specifications and made a part of the contract." See S. 3847, 72d Cong., 1st Sess. (1932). The bill, however, was vetoed by the President. See Veto Message, S. Doc. No. 134, 72d Cong., 1st Sess. (1932). But in 1935, Congress succeeded in adding the predetermination and enforcement provisions found in the current statute. Act of Aug. 30, 1935, 49 Stat. 1011.

The legislative history accompanying these amendments is significant in two respects. First, it indicates that Congress amended the Act to provide for predetermination of wages not only in order to end abuses,[27] but "so that the contractor may know definitely in advance of submitting his bid what his approximate labor costs will be." S. Rep. No. 1155, 74th Cong., 1st Sess., 2 (1935); H. R. Rep. No. 1756, 74th Cong., 1st Sess., 2 (1935). Second, it demonstrates that Congress intended to give laborers and mechanics only "the same right of action against the contractor and his sureties in court

[27] The House and Senate Reports stated that predetermination of wages "would strengthen the present law considerably since at present the Secretary of Labor is not permitted to fix the minimum wage rates until a dispute has arisen in the course of construction. In practice this has meant that in the early stages of the contract, unscrupulous contractors have defied orders of the contracting officers to pay the prevailing rate until a formal adjudication has been requested of the Secretary of Labor. This means that laborers and mechanics underpaid until the decision was rendered had no redress since it has been held that the decisions of the Secretary could not operate retroactively." S. Rep. No. 1155, 74th Cong., 1st Sess., 2–3 (1935); H. R. Rep. No. 1756, 74th Cong., 1st Sess., 2–3 (1935).

which is now conferred by the bond statute." S. Rep. No. 1155, at 2; H. R. Rep. No. 1756, at 2.[28] To imply a private right of action here would be to defeat each of these congressional objectives.

The legislative history of the 1964 amendment to the Act also cuts against respondent's position. In 1964, Congress considered and passed H. R. 6041, 88th Cong., 1st Sess., a bill to amend the Act in order to include fringe benefits within the definition of wages. Pub. L. 88–349, § 1, 78 Stat 238. While H. R. 6041 was under consideration, Representative Goodell introduced a bill that would have amended the

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[28] The bond statute to which the Reports that accompany the amendments refer is the Heard Act, ch 280, 28 Stat 278, from which the Miller Act derived At the time of the 1935 amendments to the Davis-Bacon Act, it was well established that the failure to supply a contractor's bond did not give rise to a private right of action under the Heard Act See *United States ex rel Zambetti* v *American Fence Constr. Co*, 15 F. 2d 450 (CA2 1926); *Strong* v. *American Fence Constr. Co.*, 245 N Y. 48, 156 N E. 92 (1927). In *Strong,* then Chief Judge Cardozo wrote for a unanimous court·

"Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory liability, which in turn is inseparably linked to the statutory remedy, assumes the existence of a bond as an indispensable condition Till then, there is neither Federal jurisdiction nor any right of action that can rest upon the statute" *Id.,* at 52, 156 N. E, at 93.

While *Strong* held that laborers and materialmen might recover as third-party beneficiaries in state court if the contractor had breached a *promise* to provide a bond, *id*, at 53, 156 N. E., at 93, it stressed that no cause of action existed under the Heard Act unless a bond in fact had been filed. The Miller Act, which was originally passed by the same Congress that enacted the 1935 amendments to the Davis-Bacon Act, also has been so construed. See *Harry F Ortlip Co. of Pa* v. *Alvey Ferguson Co*, 223 F Supp. 893, 894–895 (ED Pa. 1963); *Gallaher & Speck, Inc.* v. *Ford Motor Co*, 226 F. 2d 728, 731 (CA7 1955). It would be anomalous to assume that Congress intended that the failure to include Davis-Bacon stipulations in a contract would give rise to a private cause of action, when the failure to file the Heard Act bond had been held to confer no such right.

Act to provide for judicial review of the Secretary's wage determinations at the behest of any aggrieved person, and that also would have conferred a private right of action on any laborer or mechanic who claimed that his employer had "refused or failed to pay the wages that he is required to pay by reason of a wage determination issued by the Secretary of Labor." H. R. 9590, 88th Cong., 2d Sess., § 2, p. 4 (1964). Representative Goodell sought to have the substance of H. R. 9590 considered during the House debate on H. R. 6041. After extended debate on the merits of judicial review of Davis-Bacon determinations, however, the House invoked its rule against nongermane amendments, and therefore refused to consider Mr. Goodell's proposals.[29] 110 Cong. Rec. 1194–1204 (1964).

Since the Goodell amendments were not defeated on their merits, it cannot be said that Congress has flatly rejected the proposition that judicial review should be available under the Act. Nor can the views of this later Congress be treated as determinative of the question whether the Act's drafters intended to preclude any form of judicial review. Nonetheless, we think it significant that both the proponents and opponents of the Goodell amendments assumed that the Act did not contemplate judicial review of determinations made by the Secretary; they differed only over whether the Act should be amended to permit such review. *Ibid.* Further, although much of the debate centered on the desirability of permitting judicial review of wage determinations,[30] respondent errs in contending that that was the sole topic of discussion, for several speakers expressed their view that the Act did not permit judicial review of any determination under the

[29] The House subsequently defeated Representative Goodell's attempt to introduce amendments providing for judicial review of fringe benefits determinations. 110 Cong. Rec 1227–1229 (1964).

[30] See, *e. g., id.,* at 1198 (remarks of Rep. Griffin); 1200 (remarks of Reps Pucinski and Broyhill); 1201 (remarks of Rep. Fogarty); 1202 (remarks of Rep. Skubitz).

Act whatsoever.[31] In particular Representative Bell pointed out that workers could not seek judicial review of the Secretary's determination that certain work was " 'the installation of equipment' and not the type of construction work which was subject to Davis-Bacon," and "neither employers nor employees have any recourse except to beg the mercy of the Secretary or prevail upon their Congressman to intercede." [32] *Id.*, at 1201–1202. Thus, while not dispositive, the debate on the Goodell amendments reinforces the conclusion that it

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[31] See, *e g*, *id*, at 1197 (remarks of Rep. Goodell) ("The Davis-Bacon Act is the only Federal wage-fixing law on the books where you do not have a provision for aggrieved parties to get into the court and let the judge tell them what Congress meant when it wrote the law"); 1200 (remarks of Rep Broyhill) (Act evades "our basic concept of checks and balances"). See also S. Rep No 963, 88th Cong, 2d Sess, 12 (1964) (dissenting views) ("The Davis-Bacon Act is the only Federal statute regulating wages under which the courts are completely excluded from participation").

[32] There is other evidence that one of the objectives of the Goodell amendments was to provide for judicial review of coverage determinations. In the early 1960's, a controversy arose over whether work on missile sites constituted "construction, alteration and/or repair" within the meaning of the Act See Donahue, The Davis-Bacon Act and The Walsh-Healey Public Contracts Act A Comparison of Coverage and Minimum Wage Provisions, 29 Law & Contemp Prob 488, 495 (1964); Cox, The Davis-Bacon Act and Defense Construction—Problems of Statutory Coverage, in 15th Annual NYU Conference on Labor 151 (1962). In an attempt to resolve this issue, the Secretary established the Missile Site Public Contract Advisory Committee, which issued a report setting forth criteria for determining whether missile site work was covered by the Act. See BNA Daily Labor Rep. No 200, p. E–1 (Oct. 16, 1961). The report itself triggered disagreement between contractors' associations and construction trade unions, on the one hand, and manufacturers and industrial unions on the other BNA Daily Labor Rep No 51, pp. A–7 to A–10 (Mar 14, 1962) In response, the minority members of the House Labor Committee made clear that they intended to sponsor an amendment to the Act that would provide for judicial review of coverage determinations. *Id*, at A–11. See also H. R. Rep. No. 308, 88th Cong., 1st Sess, 23–29 (1963) (dissenting views).

would be inappropriate for this Court to find that the Act implicitly creates the right of action contended for here.

Respondent, however, asserts that a contrary inference must be drawn from the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U. S. C. § 251 *et seq.* Relying on the analysis set forth in *McDaniel II*, 548 F. 2d, at 694, respondent points out that § 6 of the Portal-to-Portal Act, 61 Stat. 87, 29 U. S. C. § 255 (a), imposes a 2-year limitation on any cause of action for nonwillful "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*, the Walsh-Healey Act, 41 U. S. C. § 35 *et seq.*, or the Davis-Bacon Act. Since the Miller Act imposes a 1-year limitation on suits on the contractor's bond, 40 U. S. C. § 270b (b), respondent contends that the 2-year statute of limitations set forth in the Portal-to-Portal Act not only affirms the existence of a private cause of action under the Act, but excludes the proposition that that cause of action is limited to a suit on the Miller Act bond.

We agree with *amicus* United States, however, that this argument reads too much into the Portal-to-Portal Act. That statute was intended to curtail the numerous suits for unpaid compensation and liquidated damages under the FLSA that were filed after this Court's decision in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U. S. 680 (1946). See *Unexcelled Chemical Corp.* v. *United States* 345 U. S. 59, 61 (1953). Although no portal-to-portal suits had been filed under the Davis-Bacon or Walsh-Healey Acts, see 93 Cong. Rec. 2088 (1947) (remarks of Sens. Donnell and McGrath), Congress chose to include those statutes within the scope of the Portal-to-Portal Act on the ground that they, like the FLSA, related to minimum wages and were therefore affected by the *Mount Clemens* decision. See H. R. Rep. No. 71, 80th Cong., 1st Sess., 5 (1947); 93 Cong. Rec. 2088 (1947) (remarks of Sen. Donnell). The legislative history of the bills that became the Portal-to-Portal Act makes clear, how-

ever, that Congress simply did not recognize that it had created two incompatible statutes of limitations under the Davis-Bacon Act.[33] Moreover, even if the Portal-to-Portal Act had been intended to create a longer statute of limitations for actions under the Davis-Bacon Act than that applicable to suits on the Miller Act bond, respondent has pointed to nothing in the legislative history of the Portal-to-Portal Act that suggests that Congress believed that the Davis-Bacon Act conferred a private right of action for back wages under a contract lacking prevailing wage stipulations; to the contrary, Congress' concern was to foreclose the possibility of portal-to-portal suits for back wages under contracts that did contain Davis-Bacon Act provisions.[34]

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[33] The Senate bill, S 70, 80th Cong, 1st Sess (1947), would have amended only the FLSA "to exempt employers from liability for portal-to-portal wages." S Rep. No. 37, 80th Cong, 1st Sess (1947) In contrast, the House bill, H R 2157, 80th Cong, 1st Sess. (1947), would have limited portal-to-portal actions under the Davis-Bacon Act and the Walsh-Healey Act as well The Senate Committee Report on H. R. 2157 acceded to the wider coverage of the House bill, however, rather than adopting the 1-year limitations period set forth in H. R. 2157—which was compatible with the 1-year limitations period of the Miller Act, 40 U S C § 270b (b)—the Senate Committee Report retained the 2-year limitations period of S. 70 S Rep. No 48, 80th Cong, 1st Sess, 50–51 (1947) The 2-year limitations period was recommended by the Conference Committee, H R Conf Rep. No 326, 80th Cong, 1st Sess, 13–14 (1947), and was enacted. 61 Stat 87.

The Senate Report accompanying H R 2157, like the Senate debate that followed, suggests that Congress was not aware that it had created two inconsistent statutes of limitations under the Davis-Bacon Act. The Senate Report erroneously stated that "there is no limitation provision in either the Walsh-Healey or the Bacon-Davis Acts" S. Rep. No 48, 80th Cong, 1st Sess, 42 (1947) The same unfamiliarity with the Davis-Bacon Act was manifested during the debate on the bill. Senator Donnell, who introduced the bill in the Senate, stated that the Davis-Bacon Act had not been mentioned in the Senate subcommittee hearings on the legislation 93 Cong Rec 2124 (1947). See also *id.* at 2250, 2253 (remarks of Sen McGrath), *id.* at 2352–2353 (remarks of Sen Barkley).

[34] During the Senate debate on the Portal-to-Portal Act, Senator

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Finally, the underlying purpose of the legislative scheme indicates that Congress did not intend to create the right of action asserted by respondent. As noted above, the 1935 amendments added two key features to the Act: administrative predetermination of the minimum wages that the contractor must pay his laborers and mechanics, and a means whereby laborers and mechanics could recover back wages under a contract containing prevailing wage stipulations. The Act thus carefully balances the interests of contractors and their employees. The contractor is able to "know definitely in advance of submitting his bid what his approximate labor costs will be," [35] S. Rep. No. 1155, at 2, while the laborer or mechanic is given a right of action to enforce the stipulated wages. To imply a private right of action to sue for Davis-Bacon wages under a contract that does not contain prevailing wage stipulations would destroy this careful balance.

In addition, as petitioner and *amicus* United States point out, the implication of a private right of action where there has been no Davis-Bacon determination would introduce substantial uncertainty into Government contracting. In the

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McGrath argued that the 2-year statute of limitations was unfair to workers, since the "administrative procedures which are necessary to determine the validity of the workman's claim for back wages under the Davis-Bacon Act frequently take a considerable length of time which may very easily run for a period of more than 2 years" 93 Cong Rec. 2252 (1947). As the United States argues, Senator McGrath's statement strongly suggests that the limitations period of the Portal-to-Portal Act was designed to apply to the explicit statutory remedy set forth in the Davis-Bacon Act.

[35] It is clear, however, that the Secretary's prevailing wage determinations do not constitute a representation that the "specified minima will in fact be the prevailing rates." *United States* v. *Binghamton Constr. Co.*, 347 U. S., at 178. The 1935 amendments were designed to prevent only a postcontract *determination* that the prevailing rate was higher than that on which the successful contractor had based his bid.

case of cost-plus contracts, federal budgeting would be disrupted by a postcontract judicial determination that wages higher than those set forth in the contract must be paid. Fixed-price contracting also would be adversely affected, since it is likely that contractors would submit inflated bids to take into account the possibility that they would have to pay wages higher than those set forth in the specifications.[36] Finally, postcontract challenges would disrupt timely and efficient performance of Government contracts, and might well provoke jurisdictional disputes between construction unions and unions representing nonconstruction workers.[37]

The implication of a private right of action here would undercut as well the elaborate administrative scheme promulgated pursuant to Reorganization Plan No. 14. The goal of that plan was to introduce consistency into the administration and enforcement of the Act and related statutes; to that end, the Secretary and contracting agencies have issued detailed regulations governing, among other things, coverage determinations. The uniformity fostered by those regulations would be short-lived if courts were free to make postcontract coverage rulings. Respondent, however, replies that no administrative functions would be disrupted by judicial intervention, since Davis-Bacon stipulations are incorporated by operation of law into every federal construction contract, regardless of whether the contracting agency has made a coverage determination. But this assertion ignores the fact

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[36] Significantly, the Comptroller General had recommended that the original Act provide for predetermination of wages precisely because he "feared that contractors would inflate their bids to provide a reserve against higher postdeterminations." Legislative History 2.

[37] The history of the construction of missile sites during the early 1960's reveals that the inclusion of Davis-Bacon stipulations in a contract may give rise to a jurisdictional dispute. See n. 32, *supra*. Hearings on Work Stoppages at Missile Bases, before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 87th Cong., 1st Sess., 13, 501, 584, 594 (1961).

that the Act does not define the terms "construction, alteration, and/or repair," "public buildings or public works," and "mechanics and/or laborers." [38] A number of commentators have noted the difficulty of determining whether particular work constitutes "construction" within the meaning of the Act, particularly when the work is performed in the context of an AEC contract involving a nuclear facility.[39] Like other contracting agencies, AEC and its successors have developed detailed guidelines for determining whether particular work is covered by the Act. See n. 15, *supra*. Whatever may be the merits of allowing judicial review of these complex coverage determinations prior to contracting, it clearly would be inappropriate for a court to substitute its judgment for that of the contracting agency in a private action brought after the contract was let.

IV

In sum, to imply a private right of action under these circumstances would severely disrupt federal contracting. Nothing in the language, history, or purpose of the Davis-Bacon Act suggests that Congress intended that result. 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.

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[38] Accordingly, as petitioner points out, respondent's reliance on cases such as *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 11–17, 312 F. 2d 418, 424–427 (termination-for-convenience clause incorporated in contract by operation of law), reargument denied, 160 Ct. Cl. 58, 60–67, 320 F. 2d 345, 347–351, cert. denied, 375 U. S. 954 (1963), is misplaced, since the Act is not self-implementing.

[39] See Thieblot, at 26–27, 64–67, 143–146; Donahue, The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions, 29 Law & Contemp. Prob. 488, 494–497 (1964); Price, A Review of the Application of the Davis-Bacon Act, 14 Lab. Law J. 614, 619–621 (1963).

Syllabus

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v* HANSEN

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

No 80–1162 Decided April 6, 1981

Under § 202 (g) (1) (D) of the Social Security Act, "mother's insurance benefits" are available only to one who, among other qualifications, "has filed application" An implementing regulation provides that only written applications satisfy this requirement A Social Security Administration (SSA) field representative erroneously told respondent that she was not entitled to such benefits. And contrary to instructions in SSA's Claims Manual, an internal handbook, he failed to recommend to respondent that she file a written application; nor did he advise her of the advantages of doing so After subsequently learning that she was eligible for benefits, respondent filed a written application and sought retroactive benefits that she would have received if she had been properly advised by the field representative Her claim for such retroactive benefits was denied in administrative proceedings, but the District Court found for her in her subsequent lawsuit The Court of Appeals affirmed

Held: The SSA field representative's erroneous statement and neglect of the Claims Manual did not estop the Secretary of Health and Human Services from denying retroactive benefits to respondent for the period in which she was eligible for benefits but had not filed a written application The field representative's conduct was less than "affirmative misconduct" and does not justify abnegation of "the duty of all courts to observe the conditions defined by Congress for charging the public treasury" *Federal Crop Insurance Corp* v *Merrill*, 332 U S. 380, 385 Although the field representative failed to follow the Claims Manual, the Manual has no legal force and does not bind the SSA Nor is estoppel justified on the basis of any distinction between respondent's "substantive eligibility" and her failure to satisfy a "procedural requirement" A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.

Certiorari granted; 619 F 2d 942, reversed.

PER CURIAM.

On June 12, 1974, respondent met for about 15 minutes with Don Connelly, a field representative of the Social Security Administration (SSA), and orally inquired of him whether she was eligible for "mother's insurance benefits" under § 202 (g) of the Social Security Act (Act), 64 Stat. 485, as amended, 42 U. S. C. § 402 (g). Connelly erroneously told her that she was not, and she left the SSA office without having filed a written application. By the Act's terms, such benefits are available only to one who, among other qualifications, "has filed application." 42 U. S. C. § 402 (g)(1)(D). By a regulation promulgated pursuant to the Act, only written applications satisfy the "filed application" requirement. 20 CFR § 404.601 (1974).[1] The SSA's Claims Manual, an internal Administration handbook, instructs field representatives to advise applicants of the advantages of filing written applications and to recommend to applicants who are uncertain about their eligibility that they file written applications. Connelly, however, did not recommend to respondent that she file a written application; nor did he advise her of the advantages of doing so. The question is whether Connelly's erroneous statement and neglect of the Claims Manual estop petitioner, the Secretary of Health and Human Services, from denying retroactive benefits to respondent for a period in which she was eligible for benefits but had not filed a written application.

Respondent eventually filed a written application after learning in May 1975 that in fact she was eligible. She then began receiving benefits. Pursuant to § 202 (j)(1) of the Act,[2] she also received retroactive benefits for the preceding

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[1] This regulation has been recodified and now appears at 20 CFR §§ 404.602–404.614 (1980).

[2] This section provides, in pertinent part:

"An individual who would have been entitled to a benefit under subsectio[n] . . . (g) . . . of this section for any month after August 1950 had he

12 months, which was the maximum retroactive benefit allowed by the Act. Respondent contended, however, that she should receive retroactive benefits for the 12 months preceding her June 1974 interview with Connelly. An Administrative Law Judge rejected this claim, concluding that Connelly's erroneous statement and neglect of the Claims Manual did not estop petitioner from determining respondent's eligibility for benefits only as of the date of respondent's written application. The Social Security Appeals Council affirmed.

Respondent then brought this lawsuit in the District Court for the District of Vermont,[3] which held that the written-application requirement was "unreasonably restrictive" as applied to the facts of this case. A divided panel of the Court of Appeals for the Second Circuit affirmed. 619 F. 2d 942 (1980). It agreed with petitioner as an initial matter that the regulation requiring a written application is valid and that the Claims Manual has no legally binding effect. But it considered the written-application requirement a mere "procedural requirement" of lesser import than the fact that respondent in June 1974 had been "substantively eligible" for the benefits. *Id.*, at 948. In such circumstances, the majority held, "misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." *Ibid.* In summarizing its holding, the majority stated that the Government may be estopped "where (a) a procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective

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filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month . . ." 42 U. S. C. § 402 (j)(1).

[3] Judicial review of final decisions by the Secretary is authorized by 42 U. S C. § 405 (g)

standards of conduct exists and supports an inference of misconduct by a Government employee." *Id.*, at 949.

Judge Friendly dissented. He argued that the majority's conclusion is irreconcilable with decisions of this Court, *e. g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380 (1947); *Montana* v. *Kennedy*, 366 U. S. 308 (1961); *INS* v. *Hibi*, 414 U. S. 5 (1973) (*per curiam*), and with decisions of other Courts of Appeals, *Leimbach* v. *Califano*, 596 F. 2d 300 (CA8 1979); *Cheers* v. *Secretary of HEW*, 610 F. 2d 463 (CA7 1979).

We agree with the dissent This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits. In two cases involving denial of citizenship, the Court has declined to decide whether even "affirmative misconduct" would estop the Government from denying citizenship, for in neither case was "affirmative misconduct" involved. *INS* v. *Hibi*, *supra*, at 8–9; *Montana* v. *Kennedy*, *supra*, at 314–315. The Court has recognized, however, "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Federal Crop Insurance Corp.* v. *Merrill*, *supra*, at 385. Lower federal courts have recognized that duty also, and consistently have relied on *Merrill* in refusing to estop the Government where an eligible applicant has lost Social Security benefits because of possibly erroneous replies to oral inquiries. See *Leimbach* v. *Califano*, *supra*, at 304–305; *Cheers* v. *Secretary of HEW*, *supra*, at 468–469; *Goldberg* v. *Weinberger*, 546 F. 2d 477, 481 (CA2 1976), cert. denied, 431 U. S. 937 (1977); *Simon* v. *Califano*, 593 F. 2d 121, 123 (CA9 1979); *Parker* v. *Finch*, 327 F. Supp. 193, 195 (ND Ga. 1971); *Flamm* v. *Ribicoff*, 203 F. Supp. 507, 510 (SDNY 1961). This is another in that line of cases,[4] for we

[4] JUSTICE MARSHALL cites several cases in which federal courts have applied estoppel against the Government *Post*, at 791. In some of the

are convinced that Connelly's conduct—which the majority conceded to be less than "affirmative misconduct," 619 F. 2d, at 948—does not justify the abnegation of that duty.

Connelly erred in telling respondent that she was ineligible for the benefit she sought. It may be that Connelly erred because he was unfamiliar with a recent amendment which afforded benefits to respondent. *Id.*, at 947. Or it may be that respondent gave Connelly too little information for him to know that he was in error. *Id.*, at 955 (Friendly, J., dissenting). But at worst, Connelly's conduct did not cause respondent to take action, cf. *Federal Crop Insurance Corp.* v. *Merrill, supra,* or fail to take action, cf. *Montana* v. *Kennedy, supra,* that respondent could not correct at any time.

Similarly, there is no doubt that Connelly failed to follow the Claims Manual in neglecting to recommend that respondent file a written application and in neglecting to advise her of the advantages of a written application. But the Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA. Rather, it is a 13-volume handbook for internal use by thousands of SSA employees, including the hundreds of employees who receive untold numbers of oral inquiries like respondent's each year. If Connelly's minor breach of such a manual suffices to estop petitioner, then the Government is put "at risk that every alleged failure

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cases, the Government had entered into written agreements which supported the claim of estoppel *E. g., United States* v. *Lazy FC Ranch,* 481 F 2d 985, 990 (CA9 1973); *Walsonavich* v *United States,* 335 F. 2d 96, 100–101 (CA3 1964). In others, estoppel did not threaten the public fisc as estoppel does here *E g. Semaan* v *Mumford,* 118 U S App. D. C 282, 284, and n 6, 335 F. 2d 704, 706, and n 6 (1964). In another, a bank claiming estoppel had erred in certain applications because it had to file before the Government would provide it with necessary information. *United States* v *Fox Lake State Bank,* 366 F. 2d 962 (CA7 1966). We need not consider the correctness of these cases. We do think that they are easily distinguishable from the type of situation presented in this case and the line of cases we rely upon above.

by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement which experience has taught to be essential to the honest and effective administration of the Social Security Laws." 619 F. 2d. at 956 (Friendly, J., dissenting). See *United States* v. *Caceres*, 440 U. S. 741, 755–756 (1979).[5]

Finally, the majority's distinction between respondent's "substantiv[e] eligib[ility]" and her failure to satisfy a "procedural requirement" does not justify estopping petitioner in this case. Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits

In sum, Connelly's errors "fal[l] far short" of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation. *Montana* v. *Kennedy*, *supra*, at 314. Accordingly, we grant the motion of respondent for leave to proceed *in*

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[5] The contention was made in *Caceres* that a violation of an internal IRS regulation concerning electronic eavesdropping should result in exclusion from trial of the evidence obtained by such eavesdropping In rejecting this contention, we noted that such a *per se* rule "would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form." 440 U. S., at 755–756.

forma pauperis and the petition for certiorari and reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error. Because this is not such a case, I dissent from the majority's summary reversal of the judgment of the Court of Appeals, and would instead grant the petition and set the case for plenary consideration.

The issue here is important, not only in economic terms to respondent Hansen, but in constitutional terms as well. The question of when the Government may be equitably estopped has divided the distinguished panel of the Court of Appeals in this case, has received inconsistent treatment from other Courts of Appeals, and has been the subject of considerable ferment. See, *e. g., Corniel-Rodriguez* v. *INS,* 532 F. 2d 301 (CA2 1976); *United States* v. *Lazy FC Ranch,* 481 F. 2d 985 (CA9 1973); *United States* v. *Fox Lake State Bank,* 366 F. 2d 962 (CA7 1966); *Walsonavich* v. *United States,* 335 F. 2d 96 (CA3 1964); *Simmons* v. *United States,* 308 F. 2d 938 (CA5 1962); *Semaan* v. *Mumford,* 118 U. S. App. D. C. 282, 335 F. 2d 704 (1964); *Eichelberger* v. *Commissioner of Internal Revenue,* 88 F. 2d 874 (CA5 1937). See generally K. Davis, Administrative Law of the Seventies § 17.01 (1976); Note, Equitable Estoppel of the Government, 79 Colum. L. Rev. 551 (1979). Indeed, the majority today recognizes that "[t]his Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." *Ante,* at 788. The majority goes on to suggest that estoppel may be justified in some circumstances. Yet rather than address the issue in a compre-

hensive fashion, the Court simply concludes that this is not such a case.[1] The apparent message of today's decision—that we will know an estoppel when we see one—provides inadequate guidance to the lower courts in an area of the law that, contrary to the majority's view, is far from settled.

Indeed, the majority's attempt to distinguish conflicting decisions of other courts itself demonstrates the impropriety of today's summary disposition. The majority declines to "consider the correctness of these cases" and instead simply notes that they are distinguishable on their facts from the present case *Ante*, at 789, n. 4. Yet the majority fails to explain why or how these purported factual distinctions affect the legal question of when the Government may be equitably estopped. Thus, the lower courts are left guessing whether the factual differences cited by the majority are of any real consequence For example, the majority distinguishes *Semaan* v. *Mumford*, *supra*, on the ground that "estoppel did not threaten the public fisc." *Ante*, at 789, n. 4. Even accepting this characterization as correct,[2] I am unable to discern from the majority's opinion why the rules governing estoppel should differ depending on whether the party as-

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[1] Ironically, the central case relied on by the majority today, *INS* v. *Hibi*, 414 U. S. 5 (1973), was also a *per curiam* decision rendered without the benefit of briefing and oral argument Moreover, in that case the applicant applied for the sought-after benefit—naturalization—20 years after his substantive eligibility had expired, and the claim of estoppel arose solely from an alleged general failure of the Government to adequately inform noncitizens who served with the Armed Services of the United States during World War II of their possible eligibility for naturalization Here, in contrast, respondent was eligible for the benefits at the time of her interview with Connelly and the claim of estoppel here arises from Connelly's specific failures to answer correctly her questions concerning eligibility and to encourage her to file an application

[2] In *Semaan*, the benefit ultimately sought by the party claiming estoppel was reinstatement in the job from which he was discharged Thus, I believe that the majority errs in claiming that the estoppel "did not threaten the public fisc." *Ante*, at 789, n 4

serting an estoppel seeks monetary benefits from the Government instead of some other form of Government action or inaction. Similarly, the majority distinguishes *United States* v. *Fox Lake State Bank, supra,* on the ground it involved a claim of estoppel by "a bank [that] had erred in certain applications because it had to file before the Government would provide it with necessary information." *Ante,* at 789, n. 4. I trust that the majority does not intend to suggest that a claim of estoppel is more likely to prevail when raised by a bank rather than by a person eligible for Social Security benefits, but I do not believe that the majority's other basis for distinguishing that case—that the Government failed to provide the information necessary to file correct applications—is substantively different from the Government's failure in this case to supply respondent with correct information when she sought to apply for benefits. The third distinction offered by the majority—one that apparently differentiates between written statements by the Government and oral ones—might be relevant to the proof of the Government's conduct in some cases. However, estoppel against the Government has not been restricted in the past to written misrepresentations, see, *e. g., Simmons* v. *United States, supra,* and today's decision leaves unclear whether or when such a limitation will apply in the future. Thus, I believe that the majority, in its haste to reverse the judgment of the Court of Appeals, has simply added confusion to an already unsettled area by hinting, but not deciding, that various factual nuances may be dispositive of estoppel claims against the Government.

Moreover, in summarily reversing the judgment of the Court of Appeals, the majority glosses over the sorts of situations—such as that presented by this case—that have increasingly led courts to conclude that in some cases hard and fast rules against estoppel of the Government are neither fair nor constitutionally required. The majority characterizes Connelly's conduct in this case as little more than an innocent mistake, based possibly on his unfamiliarity with a "recent

amendment" rendering respondent eligible for benefits, or possibly, the majority speculates, on respondent's failure to give Connelly sufficient "information . . . to know that he was in error." *Ante*, at 789. The majority further concludes that this error was essentially harmless, because, in the majority's view, it "did not cause respondent to . . . fail to take action . . . that respondent could not correct at any time." *Ibid.*

While these characterizations certainly facilitate the summary disposition the majority seeks, they do not fit this case. The "recent amendment" had been in effect for a year and a half when respondent was incorrectly informed that she was not eligible. Moreover, it is quite clear that respondent provided Connelly with sufficient information on which to make a correct judgment, had he been so inclined.[3] Finally, to conclude that Connelly's incorrect assessment of respondent's eligibility did not cause her to act to her detriment in a manner that she "could not correct at any time" is to blink in the face of the obvious. Connelly, and not respondent, had the legal duty to meet with Social Security applicants and advise them concerning their eligibility for benefits. While not necessarily free of error, such preliminary advice is inevitably accorded great weight by applicants who—like respondent—are totally uneducated in the intricacies of the Social Security

[3] The apparent basis for the majority's speculation that respondent may not have informed Connelly of all the relevant facts is Judge Friendly's assertion, in dissent, that Connelly did not know that respondent's husband had died. This view is wholly implausible. Respondent asked Connelly whether she was eligible for mother's insurance benefits. These benefits are *only* available to persons whose spouses have died, 42 U. S. C. § 402 (g), a fact that must have been known to Connelly. It is clear from the record that Connelly assumed that respondent's husband had died, and instead focused his questions on respondent's marital status at the time of her husband's death, in the mistaken belief that she would be ineligible if she was divorced at that time. Thus, respondent testified before the Administrative Law Judge that Connelly "said I was not [eligible] because I was divorced *at the time of my husband's death.*" App. to Brief in Opposition 2a. (Emphasis added.)

laws. Hence, the majority's effort to cast respondent as the architect of her own predicament is wholly unpersuasive. Instead, the fault for respondent's failure to file a timely application for benefits that she was entitled to must rest squarely with the Government, first, because its agent incorrectly advised her that she was ineligible for benefits, and, second, because the same agent breached his duty to encourage to file a written application regardless of his views on her eligibility.

In my view, when this sort of governmental misconduct directly causes an individual's failure to comply with a purely procedural requirement established by the agency, it may be sufficient to estop the Government from denying that individual benefits that she is substantively entitled to receive. Indeed, in an analogous situation, we concluded that before an agency "may extinguish the entitlement of . . . otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures." *Morton* v. *Ruiz,* 415 U. S. 199, 235 (1974). At the very least, the question deserves more than the casual treatment it receives from the majority today.

Reporter's Note

The next page is purposely numbered 901 The numbers between 795 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports

ORDERS FROM FEBRUARY 23 THROUGH APRIL 8, 1981

FEBRUARY 23, 1981

Dismissal Under Rule 53

No. 80–769. SONITROL CORP. *v.* BENNETT. Ct. App. Ind. Certiorari dismissed under this Court's Rule 53.

Affirmed on Appeal

No. 80–714. JEFFERSON COUNTY, COLORADO, ET AL. *v.* UNITED STATES. Affirmed on appeal from C. A. 10th Cir. Reported below: 627 F. 2d 217.

No. 80–805. INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT ET AL. *v.* COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. Affirmed on appeal from D. C. S. D. Tex. Reported below: 494 F. Supp. 738.

No. 80–801. CONSUMERS UNION OF UNITED STATES, INC., ET AL. *v.* SIEBERT, SUPERINTENDENT OF BANKS OF NEW YORK. Affirmed on appeal from D. C. S. D. N. Y. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 80–697. COALITION TO PRESERVE HOUSTON AND THE HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. *v.* INTERIM BOARD OF TRUSTEES OF THE WESTHEIMER INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from D. C. S. D. Tex. dismissed for want of jurisdiction. Reported below: 494 F. Supp. 738.

No. 80–852. WIESNER *v.* WILLKIE FARR & GALLAGHER. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Reported below: 76 App. Div. 2d 1044, 428 N. Y. S. 2d 771.

No. 80–5939. SHAO FEN CHIN, ADMINISTRATOR *v.* ST. LUKE'S HOSPITAL CENTER ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 51 N. Y. 2d 835, 413 N. E. 2d 1173.

No. 80–853. PENTHOUSE INTERNATIONAL, LTD., ET AL. *v.* RANCHO LA COSTA, INC., ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Motion of Times Mirror Co. et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 106 Cal. App. 3d 646, 165 Cal. Rptr. 347.

No. 80–902. FLEMING *v.* COURT OF APPEALS OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5904. SITTON *v.* TEXAS. Appeal from County Ct. at Law No. 2, Travis County, Tex., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–906. DAMASCUS COMMUNITY CHURCH *v.* CLACKAMAS COUNTY, OREGON. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 45 Ore. App. 1065, 610 P. 2d 273.

No. 80–932. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA (CITY OF SALINAS, REAL PARTY IN INTEREST). Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 80–968. CITY OF DETROIT *v.* DETROIT POLICE OFFICERS ASSN. ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 408 Mich. 410, 294 N. W. 2d 68.

No. 80–1014. CARROLL FEED SERVICE, INC. *v.* DIRECTOR, ILLINOIS DEPARTMENT OF AGRICULTURE, ET AL. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of substantial federal question. Reported below: 83 Ill. App. 3d 164, 403 N. E. 2d 762.

No. 80–1055. REMBOLD, ADMINISTRATOR, ET AL. *v.* ELIZABETH GAMBLE DEACONESS HOME ASSN., DBA CHRIST HOSPITAL, ET AL. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of substantial federal question.

No. 80–5920. GOODE *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question.

No. 80–5902. DE PRIEST *v.* BIBLE, COMMISSIONER, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEWART would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Affirmed. (See No. 80–338, *ante,* p. 1.)

Certiorari Granted—Vacated and Remanded

No. 80–892. GAF CORP. *v.* CHENG. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded with instructions that the appeal be dismissed. *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U. S. 368 (1981). Reported below: 631 F. 2d 1052.

Vacated and Remanded After Certiorari Granted

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. [Certiorari granted, 449 U. S. 981.] Upon consideration of the motion of respondent to dismiss the writ of certiorari as improvidently granted, the judgment is vacated and the case is remanded for further consideration in light of the Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349.

Miscellaneous Orders

No. A–589. PRATT *v.* UNITED STATES. Application for transfer of custody, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–592 (80–1331). FLORIDA *v.* MALONE. Sup. Ct. Fla. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–633. COOPER *v.* COOPER. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–670. CALIFORNIA *v.* VELASQUEZ; and

No. A–680. CALIFORNIA *v.* LANPHEAR. Sup. Ct. Cal. The temporary stays heretofore entered by JUSTICE REHNQUIST are vacated and the applications for stay are denied.

No. D–38. IN RE DISBARMENT OF DONNELLY. John J. Donnelly, Jr., of Washington, D. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 24, 1975 [420 U. S. 941], is hereby discharged.

No. D–192. IN RE DISBARMENT OF CRUMPACKER. Disbarment entered. [For earlier order herein, see 446 U. S. 933].

No. D–195. IN RE DISBARMENT OF CORY. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–201. IN RE DISBARMENT OF NOONAN. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–207. IN RE DISBARMENT OF WALSH. It having been reported to the Court by Robert O'Connor, of Omaha, Neb., that Bernard Walsh, Jr., has died, the rule to show cause, heretofore issued on November 10, 1980 [449 U. S. 979], is hereby discharged.

No. D–209. IN RE DISBARMENT OF PATT. Disbarment entered. [For earlier order herein, see 449 U. S. 990.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Report of the Special Master on motion of Texas Power & Light Co. for leave to intervene received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed within fourteen days. Reply briefs, if any, to such Exceptions may be filed within seven days. [For earlier order herein, see, *e. g.*, 449 U. S. 990.]

No. 79–1144. TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 449 U. S. 949.] Motion of Corrugated Container Class in M. D. L. 310 (SD Tex.) for leave to file a brief as *amicus curiae* granted.

No. 79–1794. MICHIGAN *v.* SUMMERS. Sup. Ct. Mich. [Certiorari granted, 449 U. S. 898.] Motion of American Civil Liberties Union for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–242. LEHMAN, SECRETARY OF THE NAVY *v.* NAKSHIAN. C. A. D. C. Cir. [Certiorari granted *sub nom. Hidalgo* v. *Nakshian*, 449 U. S. 1009.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. C. A. 3d Cir. [Probable jurisdiction noted, 449 U. S. 949]; and

No. 80–193. BUCZYNSKI ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 449 U. S. 950.] Motion of ERISA Industry Committee for leave to file a brief as *amicus curiae* in No. 80–193 granted. Motions of Chamber of Commerce of the United States of America, Allegheny-Ludlum Industries, Inc., et al., and National Steel Corp. for leave to file briefs as *amici curiae* granted. Joint motion of petitioners in No. 80–193 and appellants in No. 79–1943 for divided argument granted.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. [Certiorari granted, 449 U. S. 950.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–251. ROSTKER, DIRECTOR OF SELECTIVE SERVICE *v.* GOLDBERG ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 449 U. S. 1009.] Motion of Stacey Acker et al. for leave to participate in oral argument as *amici curiae* denied.

No. 80–396. CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 449 U. S. 1060.] Motion of James J. Clancy for leave to file a brief as *amicus curiae* granted.

No. 80–332. RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL. C. A. 6th Cir. [Certiorari granted, 449 U. S. 951.] Motion of State Public Defender of California for leave to file a brief as *amicus curiae* granted. Motion of the Attorney General of Oregon for leave to file an untimely motion for leave to participate in oral argument as *amicus curiae* denied.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH. C. A. 5th Cir. [Certiorari granted, 449 U. S. 950.] Motions of Michigan Rehabilitation Association et al.; Legal Action Center of the City of New York, Inc.; American Civil Liberties Union et al.; Deaf Counseling, Advocacy & Referral Agency, Inc., et al.; and American Coalition of Citizens with Disabilities et al. for leave to file briefs as *amici curiae* granted.

No. 80–429. COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL. C. A. 9th Cir. [Certiorari granted, 449 U. S. 950.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 80–441. GULF OIL CO. ET AL. *v.* BERNARD ET AL. C. A. 5th Cir. [Certiorari granted, 449 U. S. 1033.] Motion of Tallahassee Memorial Hospital for leave to participate in oral argument as *amicus curiae* denied.

No. 80–544. FIRST NATIONAL MAINTENANCE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. [Certiorari granted, 449 U. S. 1076.] Joint motion for leave to dispense with printing the joint appendix granted.

No. 80–590. GULF OFFSHORE CO., A DIVISION OF POOL CO. *v.* MOBIL OIL CORP. ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. [Certiorari granted, 449 U. S. 1033.] Motion of respondent Gaedecke for divided argument granted. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 80–1002. BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY ROWLEY ET UX. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–1239 (A–640). RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. Appeal from C. A. 7th Cir. Motion of appellant to expedite consideration of the appeal denied. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 80–5815. IN RE RUTHERFORD;
No. 80–5897. IN RE ROBERTS;
No. 80–5909. IN RE WATKINS;
No. 80–5926. IN RE WELCH;
No. 80–5971. IN RE LIKAKUR;
No. 80–5994. IN RE MAPSON; and
No. 80–6044. IN RE GREEN. Petitions for writs of mandamus denied.

No. 80–5901. IN RE SPHALER. Petition for writ of mandamus and/or prohibition denied.

No. 80–1044. IN RE FISHER. Petition for writ of prohibition and/or mandamus and/or certiorari denied.

Probable Jurisdiction Noted

No. 80–737. CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. Reported below: 27 Cal. 3d 819, 614 P. 2d 742.

No. 80–1146. ZOBEL ET UX. *v.* WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL. Appeal from Sup. Ct. Alaska. Probable jurisdiction noted. Reported below: 619 P. 2d 448.

No. 80–847. COMMON CAUSE ET AL. *v.* SCHMITT ET AL.; and
No. 80–1067. FEDERAL ELECTION COMMISSION *v.* AMERICANS FOR CHANGE ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 512 F. Supp. 489.

No. 80–5950. LOGAN *v.* ZIMMERMAN BRUSH CO. ET AL. Appeal from Sup. Ct. Ill. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 82 Ill. 2d 99, 411 N. E. 2d 277.

Certiorari Granted

No. 80–327. VALLEY FORGE CHRISTIAN COLLEGE *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 619 F. 2d 252.

No. 80–986. NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 629 F. 2d 773.

No. 80–1082. SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS. C. A. 2d Cir. Certiorari granted. Reported below: 632 F. 2d 1019.

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. Motions of Bible Study et al. and Center for Law and Religious Freedom of the Christian Legal Society for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 635 F. 2d 1310.

No. 80–702. UNITED STATES *v.* NEW MEXICO ET AL. C. A. 10th Cir. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 111.

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. Certiorari in No. 80–848 granted. Certiorari in No. 80–883 granted limited to Question 1 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 630 F. 2d 149.

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. Motion of Board of Trade of the City of Chicago et al. for leave to file a brief as *amici curiae* in No. 80–757 granted. Motion of Futures Industry Association for leave to file a brief as *amicus curiae* in No. 80–936 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 638 F. 2d 283.

No. 80–846. ROSE, WARDEN *v.* LUNDY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 624 F. 2d 1100.

Certiorari Denied. (See also Nos. 80–853, 80–902, 80–5904, and 80–1044, *supra.*)

No. 79–1881. AGRELLA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 372 So. 2d 487.

No. 80–442. GARMAN *v.* NORTHERN TRUST CO. C. A. 7th Cir. Certiorari denied. Reported below: 643 F. 2d 1252.

No. 80–553. DEMANETT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 862.

No. 80–585. MAYNE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 483, 414 A. 2d 1.

No. 80–601. CASSADY *v.* GREEN. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1090.

No. 80–607. SAGER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 600 S. W. 2d 541.

No. 80–610. FREEMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 1112.

No. 80–616. McGOVERN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–617. STEMPLE *v.* BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 893.

No. 80–631. HOSPITAL CENTRAL SERVICES ASSN. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 611.

No. 80–673. TAYLOR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 80–693. SIFFRIN RESIDENTIAL ASSOCIATION FOR THE DEVELOPMENTALLY DISABLED OF STARK COUNTY, INC., ET AL. *v.* GARCIA ET UX. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 2d 259, 407 N. E. 2d 1369.

No. 80–698. NEWSPAPER PRINTING CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 625 F. 2d 956.

No. 80–715. UNITED GAS PIPE LINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1127.

No. 80–716. LONE STAR STEEL CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–940. NATIONAL LABOR RELATIONS BOARD *v.* LONE STAR STEEL CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 639 F. 2d 545.

No. 80–722. CANADIAN MOUNTAIN HOLIDAYS, LTD. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (BUIST, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–728. COLETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–734. PENA ET AL. *v.* O'CONNELL, RECEIVER. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 439.

No. 80–742. NATIONAL PORK PRODUCERS COUNCIL ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 2d 1353.

No. 80–758. S.S. ZOE COLOCOTRONI ET AL. *v.* PUERTO RICO ET AL.; and

No. 80–979. PUERTO RICO ET AL. *v.* S.S. ZOE COLOCOTRONI ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 652.

No. 80–759. SANCHEZ ET AL. *v.* TUCSON UNIFIED SCHOOL DISTRICT No. 1 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1338.

No. 80–760. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–764. ENSTAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 857.

No. 80–765. BROWN INSULATING SYSTEMS, INC. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 629 F. 2d 428.

No. 80–766. ANDERSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 1358.

No. 80–768. AMUSEMENT & MUSIC OPERATORS ASSN. ET AL. *v.* COPYRIGHT ROYALTY TRIBUNAL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 204 U. S. App. D. C. 259, 636 F. 2d 531.

No. 80–771. BURNHAM VAN SERVICE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 41.

No. 80–773. PENELLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–776. SHORT *v.* KITTRELL. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1013.

No. 80–779. CONCERNED JEWISH YOUTH *v.* MCGUIRE, POLICE COMMISSIONER OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 471.

No. 80–785. CERTAIN UNINDICTED INDIVIDUALS AND CORPORATIONS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 629 F. 2d 943.

No. 80–786. RASHKIND, ASSISTANT STATE PROSECUTING ATTORNEY, 11TH JUDICIAL CIRCUIT OF FLORIDA *v.* MARRERO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 499.

No. 80–804. SILVERMAN, ADMINISTRATRIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 961.

No. 80–809. LITTON SYSTEMS, INC. *v.* LUNDY. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 590.

No. 80–814. SAFEWAY STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 425.

No. 80–818. REDDING ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 1169.

No. 80–819. BRISTOL SPRING MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–820. MANKA ET AL. *v.* MARTIN ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 200 Colo. ——, 614 P. 2d 875.

No. 80–822. LIVINGSTON, ADMINISTRATRIX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 165.

No. 80–828. PACIFIC LEGAL FOUNDATION ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 917.

No. 80–832. MILLER ET AL. *v.* CALHOUN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1091.

No. 80–835. DASCO, INC., ET AL. *v.* AMERICAN CITY BANK & TRUST CO., N. A., ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–839. MARTIER *v.* UNITED STATES; and
No. 80–1019. JASTRZEBSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 210.

No. 80–843. CARIBE TRAILER SYSTEMS, INC., ET AL. *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–844. SAFIR *v.* CHUDNOFF, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–845. KAUFMAN INVESTMENT CORP. *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 598.

No. 80–858. INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION ET AL. *v.* COLLIER; and
No. 80–859. INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 6, ET AL. *v.* COLLIER. Sup. Ct. Va. Certiorari denied. Reported below: No. 80–858, 220 Va. ciii; No. 80–859, 220 Va. civ.

No. 80–860. OUIMET CORP. ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 630 F. 2d 4.

No. 80–862. McNeil *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 47 N. C. App. 30, 266 S. E. 2d 824.

No. 80–863. Wolski *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 83 Ill. App. 3d 17, 403 N. E. 2d 528.

No. 80–864. Pathway Bellows, Inc. *v.* Blanchette et al., Trustees. C. A. 2d Cir. Certiorari denied. Reported below: 630 F. 2d 900.

No. 80–865. Harris et al. *v.* Virginia; and

No. 80–884. Syski *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: No. 80–865, 221 Va. xcviii; No. 80–884, 221 Va. cxlviii.

No. 80–873. W. W. Leasing Unlimited *v.* County of Monterey. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 109 Cal. App. 3d 636, 167 Cal. Rptr. 12.

No. 80–876. Scarpelli *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 689, 402 N. E. 2d 915.

No. 80–877. Hopkins et al. *v.* Rector, Churchwardens, and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York, et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 808, 426 N. Y. S. 2d 966.

No. 80–879. Sax et al. *v.* Oliff et al. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 1162.

No. 80–881. Tema Oil Co. et al. *v.* Federal Energy Regulatory Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 436, 631 F. 2d 1018.

No. 80–891. AuBuchon *v.* Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 2d 581.

No. 80–894. BECKER'S MOTOR TRANSPORTATION, INC., ET AL. *v.* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 632 F. 2d 242.

No. 80–898. TONER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 899.

No. 80–900. CARBONE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 1159.

No. 80–903. FOWLER *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 101 Idaho 546, 617 P. 2d 850.

No. 80–907. JENSEN ET AL. *v.* FARRELL LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 625 F. 2d 379.

No. 80–911. JONES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 1353.

No. 80–913. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* INGLE. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 608 S. W. 2d 76.

No. 80–914. COHEN, ATTORNEY GENERAL OF MAINE *v.* EQUIFAX SERVICES, INC., ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 420 A. 2d 189.

No. 80–918. TRUE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 80–919. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 830.

No. 80–930. BLUE SHIELD OF VIRGINIA ET AL. *v.* VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 476.

No. 80–933. PHYSICIANS NATIONAL HOUSE STAFF ASSN. ET AL. *v.* MURPHY, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 87, 642 F. 2d 492.

No. 80–934. ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1303.

No. 80–935. FIRST NATIONAL BANK OF JACKSON *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1004.

No. 80–942. SHAHEEN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–943. CURTIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 109 Cal. App. 3d 691, 167 Cal. Rptr. 636.

No. 80–946. LOUISIANA AIRCRAFT, INC. *v.* AYCOCK, ADMINISTRATOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 432.

No. 80–952. EMORY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1347.

No. 80–954. ARBOLEDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 985.

No. 80–959. OHIO *v.* THOMPSON ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 80–960. MATSCHKE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 83 Ill. App. 3d 1000, 404 N. E. 2d 1047.

No. 80–961. FEDERAL TRADE COMMISSION *v.* OFFICIAL AIRLINE GUIDES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 630 F. 2d 920.

No. 80–962. BOARD OF SUPERVISORS OF SAN DIEGO COUNTY *v.* LONERGAN, AUDITOR AND CONTROLLER OF SAN DIEGO COUNTY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 27 Cal. 3d 855, 616 P. 2d 802.

No. 80–967. HOSPITAL & INSTITUTIONAL WORKERS UNION, LOCAL 250 *v.* PASATIEMPO DEVELOPMENT CORP. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 1011.

No. 80–971. LANDIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 632 F. 2d 66.

No. 80–973. SMITH *v.* FORD MOTOR CO. C. A. 10th Cir. Certiorari denied. Reported below: 626 F. 2d 784.

No. 80–976. SIRCY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80–982. KARN *v.* MAGNAVOX CO. ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 424 A. 2d 25.

No. 80–984. GARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 712.

No. 80–996. MCGINLEY *v.* HYNES, DEPUTY ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 116, 412 N. E. 2d 376.

No. 80–998. WOLFSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–1001. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 215.

No. 80–1003. DANIEL CONSTRUCTION CO., A DIVISION OF DANIEL INTERNATIONAL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 621.

No. 80–1005. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 224.

No. 80–1006. CRAIG ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 659.

No. 80–1011. WYCHE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1348.

No. 80–1015. ASCHER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 81 Ill. 2d 485, 411 N. E. 2d 1.

No. 80–1020. ADAMS ET AL. *v.* D'ANDREA. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 469.

No. 80–1028. TONER ET AL. *v.* HANNA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 630 F. 2d 442.

No. 80–1029. LONDON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1356.

No. 80–1033. JAMIL *v.* SOUTHRIDGE COOPERATIVE SECTION 4, INC. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 77 App. Div. 2d 822, 429 N. Y. S. 2d 340.

No. 80–1039. MACIEJEWSKI ET AL. *v.* ENTERTAINMENT CONCEPTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 497.

No. 80–1041. RIZZO *v.* DAVIS, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–1042. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 123.

No. 80–1046. REICHSTEIN *v.* BRIGGS. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 80–1050. BARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 494.

No. 80–1051. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 910.

No. 80–1053. QUICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 892.

No. 80–1054. OLTERSDORF *v.* CHESAPEAKE & OHIO RAILROAD CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 83 Ill. App. 3d 457, 404 N. E. 2d 320.

No. 80–1056. TOURVILLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1206.

No. 80–1059. ALLOTT *v.* SICINSKI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–1063. MONTGOMERY *v.* AMERICAN AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 607.

No. 80–1064. SINGLETON *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 185.

No. 80–1065. TWO RIVERS CO. *v.* CURTISS BREEDING SERVICE, A DIVISION OF SEARLE AGRICULTURE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1242.

No. 80–1066. BASKES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 640 F. 2d 48.

No. 80–1071. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–1072. GERALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1291.

No. 80–1078. ROLLINS INTERNATIONAL, INC. *v.* STAUB ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–1079. RAGU FOODS, INC., ET AL. *v.* HUNT-WESSON FOODS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 919.

No. 80–1081. HOLMES *v.* DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW. Ct. App. D. C. Certiorari denied. Reported below: 421 A. 2d 27.

No. 80–1088. BLODGETT ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 225 Ct. Cl. ——, 650 F. 2d 289.

No. 80–1089. SHAKESPEARE CO. *v.* FURY IMPORTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 585.

No. 80–1090. HATCHER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 891.

No. 80–1091. RIGGS ET UX. *v.* TERRAZAS. Ct. App. Tenn. Certiorari denied. Reported below: 612 S. W. 2d 461.

No. 80–1094. BURLINGTON NORTHERN INC. *v.* FLANIGAN. C. A. 8th Cir. Certiorari denied. Reported below: 632 F. 2d 880.

No. 80–1097. STALDER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1224.

No. 80–1100. MARRIOTT CORP. ET AL. *v.* BETHLEHEM STEEL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 2d 441.

No. 80–1108. SHARTEL ET AL. *v.* BLASINGHAM ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 84 Ill. App. 3d 981, 406 N. E. 2d 565.

No. 80–1111. WING DING CHAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 396, 631 F. 2d 978.

No. 80–1113. ATHANASIOU ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–1117. CASTILLO *v.* FORSHT, UNITED STATES MARSHAL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1098.

No. 80–1131. VIARS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–1133. FINGER *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 403, 431 N. Y. S. 2d 71.

No. 80–1141. ESTATE OF CADY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 631.

No. 80–1143. MATSIS *v.* MATSIS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 75 App. Div. 2d 1030, 427 N. Y. S. 2d 896.

No. 80–1144. GUTIERREZ *v.* BOSTON OLD COLONY INSURANCE CO. Sup. Ct. Fla. Certiorari denied. Reported below: 386 So. 2d 783.

No. 80–1150. SMITH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 155 Ga. App. 506, 271 S. E. 2d 654.

No. 80–1157. SANDATE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 326.

No. 80–1174. SOO LINE RAILROAD CO. *v.* TOWN OF EAST TROY. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1123.

No. 80–1175. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 361.

No. 80–1186. MURZYN *v.* UNITED STATES; and
No. 80–5936. HALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 525.

No. 80–1197. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 758.

No. 80–1218. BOWLER *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 647 F. 2d 159.

No. 80–1280. CHACON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–5382. FORD ET AL. *v.* GRIFFIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5454. ALFARO ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 386 So. 2d 1321.

No. 80–5485. SULLIVAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 9.

No. 80–5503. JUSTICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5522. GOOCH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 384 So. 2d 74.

No. 80–5563. WRIGHT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 389 So. 2d 1121.

No. 80–5582. CLENNY *v.* HARRISON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 80–5595. GURMANKIN *v.* COSTANZO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 626 F. 2d 1115.

No. 80–5596. CHIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1090.

No. 80–5599. ALESTRA *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 388 So. 2d 1133.

No. 80–5603. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 628 F. 2d 1276.

No. 80–5604. CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 953.

No. 80–5631. SASSER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 387 So. 2d 237.

No. 80–5633. BLAND *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 80–5635. ANDERSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 692, 608 P. 2d 1234.

No. 80–5653. CALHOUN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5662. WATTERS ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 80–5663. STRICKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1012.

No. 80–5664. BARBER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 80–5675. CRAMER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 98 Wis. 2d 416, 296 N. W. 2d 921.

No. 80–5688. MARTINEZ ET AL. *v.* BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 624 F. 2d 1.

No. 80–5689. COREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 704.

No. 80–5694. KENNEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 386 So. 2d 365.

No. 80–5697. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 760.

No. 80–5699. DEEMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 81 Ill. 2d 384, 410 N. E. 2d 8.

No. 80–5719. DUFUR, AKA BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 512.

No. 80–5723. BONI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–5726. LIGHT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 386 So. 2d 364.

No. 80–5742. TURNER *v.* MUNCY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1351.

No. 80–5743. PRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 689.

No. 80–5755. HARDING *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5791. YARETSKY ET AL. *v.* BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 817.

No. 80–5800. LAROSE *v.* WORCESTER HOUSING AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 629 F. 2d 691.

No. 80–5801. SOLOMON, DBA VIC'S GARAGE *v.* FUSCO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 80–5802. BROOKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5803. ANAYA *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 2d 226.

No. 80–5807. COOPER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 387 So. 2d 712.

No. 80–5810. BRADENBURG *v.* MASCHNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 80–5811. ROGERS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 2d 590, 434 N. Y. S. 2d 674.

No. 80–5814. PHILLIPS *v.* BENTON, CORRECTIONS DIRECTOR, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5817. FALLIN *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 98.

No. 80–5821. CLUMM *v.* OHIO. Ct. App. Ohio, Athens County. Certiorari denied.

No. 80–5822. CARIGLIO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5825. ROBINSON *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 626.

No. 80–5826. ROBINSON *v.* SANDERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 625.

No. 80–5827. WILLIAMS ET AL. *v.* NORTH CAROLINA STATE BAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1094.

No. 80–5828. HANEI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 81 Ill. App. 3d 690, 403 N. E. 2d 16.

No. 80–5829. HAID *v.* WALKER ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5831. HOUSLEY *v.* MATTOX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 171.

No. 80–5833. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 449.

No. 80–5834. DONOHUE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 913, 429 N. Y. S. 2d 885.

No. 80–5835. GROCHULSKI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 637 F. 2d 50.

No. 80–5842. EDWARDS *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 80–5845. KNIGHT *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 80–5846. ROBINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxxxvi.

No. 80–5848. BARKSDALE *v.* BREWER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–5849. GRAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–5852. MAGILL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 386 So. 2d 1188.

No. 80–5855. HALL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 297 N. W. 2d 80.

No. 80–5857. HENDERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 109 Cal. App. 3d 219, 167 Cal. Rptr. 141.

No. 80–5858. LANE *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1296.

No. 80–5860. ARCENEAUX ET AL. *v.* TEXACO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 924.

No. 80–5863. PACKARD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 389 So. 2d 56.

No. 80–5865. WOFFORD *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1206.

No. 80–5868. LEWANDOWSKI *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–5869. VASSER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 2d 507.

No. 80–5871. VALENTINO *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5873. OLIVER *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5874. PRUITT *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 625.

No. 80–5875. SHULER *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 270.

No. 80–5878. PHILLIPS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 380 Mass. ——, 409 N. E. 2d 771.

No. 80–5879. IN RE C. S. Sup. Ct. N. J. Certiorari denied. Reported below: 85 N. J. 466, 427 A. 2d 563.

No. 80–5880. ERICKSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–5881. LAWSON *v.* ORIGINAL APPALACHIAN ARTWORKS, INC. C. A. 5th Cir. Certiorari denied.

No. 80–5883. CLEVELAND *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1212.

No. 80–5886. BROOKS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–5890. ORPIANO *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 632 F. 2d 1096.

No. 80–5891. THERIAULT ET AL. *v.* ESTABLISHMENT OF RELIGION ON TAXPAYERS' MONEY IN THE FEDERAL BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 2d 648.

No. 80–5892. WATKINS *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1215.

No. 80–5898. PASSARO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 80–5903. COUNTRYMAN *v.* ZIPP, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 632 F. 2d 30.

No. 80–5905. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 605 S. W. 2d 929.

No. 80–5911. HILL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. c.

No. 80–5912. AVILES *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5915. PREACHER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1222.

No. 80–5917. FLENNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. lxxxix.

No. 80–5922. GRAVES *v.* WILLIAMS, SHERIFF. Ct. App. Wis. Certiorari denied. Reported below: 99 Wis. 2d 65, 298 N. W. 2d 392.

No. 80–5923. PUSCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 1353.

No. 80–5924. TENG ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–5930. KEEZER ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 292 N. W. 2d 714.

No. 80–5934. SULLIVAN *v.* SOWDERS, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–5935. KANASOLA *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 630 F. 2d 472.

No. 80–5941. BROUGHTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 632 F. 2d 706.

No. 80–5944. KOHLS *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 139, 629 F. 2d 173.

No. 80–5948. LOCKETT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5949. BURKHALTER *v.* CHRYSLER CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80–5952. STEELE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5955. FINLAYSON ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 670, 431 N. Y. S. 2d 839.

No. 80–5956. SKINNER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 80–5957. JOHNSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–5958. KADET *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1202.

No. 80–5959. ANTONELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80–5960. MAZZELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5961. THOMAS *v.* UNITED STATES; and
No. 80–5965. MADDOX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 239.

No. 80–5962. RHEUARK ET AL. *v.* DALLAS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 297.

No. 80–5963. HOLMES *v.* ORR, SECRETARY OF THE AIR FORCE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5964. PHIPPS *v.* BROWN ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5967. MOORE, AKA WARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 786.

No. 80–5968. ROHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 195.

No. 80–5970. HALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5973. FAISON ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5974. ELIASON *v.* CHRISTLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1348.

No. 80–5975. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 80–5976. IVORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 80–5978. BROWN *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 80–5979. HARRIS *v.* PETERSON. Ct. App. Ore. Certiorari denied. Reported below: 47 Ore. App. 375, 614 P. 2d 635.

No. 80–5983. OSBORNE *v.* UNITED STATES C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 452.

No. 80–5984. MUCCIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5985. DeLoach, aka Zockman *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 48, 654 F. 2d 763.

No. 80–5987. Timmons *v.* Franzen et al. Sup. Ct. Ill. Certiorari denied.

No. 80–5988. Boag *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 80–5989. Coney *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 388 So. 2d 1164.

No. 80–5990. Hockenbury *v.* Sowders, Penitentiary Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 111 and 633 F. 2d 443.

No. 80–5991. McDonald *v.* Metropolitan Government of Nashville and Davidson County. Sup. Ct. Tenn. Certiorari denied.

No. 80–5992. Hughes *v.* Hopper et al. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1036.

No. 80–5993. Avery *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 214.

No. 80–5995. Young, aka Cloudy *v.* Rustamier. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 74.

No. 80–5997. Witherspoon *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 1247.

No. 80–6001. Yin-Ho Wong *v.* Carlson et al. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 628.

No. 80–6004. Regan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–6010. George *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 1299.

No. 80–6011. ZUCKERMAN *v.* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–6014. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 693.

No. 80–6015. DUNAWAY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 80–6016. FERREBOEUF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 832.

No. 80–6018. CLAYBROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 80–6019. JACKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 390.

No. 80–6020. GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 410.

No. 80–6022. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 238.

No. 80–6043. OSBORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 374.

No. 80–6048. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1220.

No. 80–6054. AEBISCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6057. SPIKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 144.

No. 80–6062. ARMSTRONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 1354.

No. 80–6063. TOLLIVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 786.

No. 80–6065. WRIGHT *v.* BOMBARD, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 457.

No. 80–6070. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–6072. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1382.

No. 80–6078. GREGG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 773, 412 N. E. 2d 387.

No. 80–6079. MOWAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 866.

No. 80–6081. LUTTRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 730.

No. 80–6083. WICKIZER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 900.

No. 80–6086. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–6099. FONTANEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 687.

No. 80–6105. MOLINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 637.

No. 79–1856. EATON CORP. *v.* FOX. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 716.

No. 79–1953. FREEMAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CHAMBLY ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 624 F. 2d 1108.

No. 79–6309. CLARK *v.* FLORIDA. Sup. Ct. Fla.;
No. 80–5856. BAKER *v.* GEORGIA. Sup. Ct. Ga.; and
No. 80–5986. GREEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–6309, 379 So. 2d 97; No. 80–5856, 246 Ga. 259, 272 S. E. 2d 61; No. 80–5986, 246 Ga. 598, 272 S. E. 2d 475.

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. 80–255. GEORGIA POWER CO. *v.* 138.30 ACRES OF LAND ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 617 F. 2d 1112.

No. 80–381. DIGILIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 726.

No. 80–472. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* SIMS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 619 F. 2d 598.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This Court has been asked to review a determination by a Federal Court of Appeals that a state-court murder conviction was obtained in violation of the Double Jeopardy Clause

of the Fifth Amendment. Because I think the conclusion of the Court of Appeals is wrong and has erroneously expanded the role that court was to play in providing habeas corpus review of state-court criminal convictions, I dissent from denial of the petition for certiorari.

On February 27, 1962, the Juvenile Division of the Cuyahoga County, Ohio, Court of Common Pleas issued a citation and warrant against the respondent alleging that he had participated in several armed robberies, one of which resulted in a death. Respondent was taken into custody and brought before the Juvenile Court on March 27, 1962, for a hearing; no transcript or record of that hearing was made. In accordance with then Ohio Rev. Code Ann. § 2151.26 (1954),* the Juvenile Court decided to bind respondent over to the Criminal Division of the Court of Common Pleas for trial as an adult. This determination was entered on the court's docket as a journal entry which is the only record of what transpired at that hearing. The journal entry reads:

> "TO COURT: This twenty-seventh day of March, 1962, James Samuel Sims, a minor of about the age of seventeen years, came before the Honorable Albert A. Woldman upon the petition of Charles R. Reynolds alleging that James Samuel Sims is a delinquent child in this:

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*At the time of the juvenile proceedings afforded respondent in this case, Ohio Rev. Code Ann. § 2151.26 (1954) provided:

"In any case involving a delinquent child under sections 2151 01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

that on or about February 16, 1962, at 4502 St. Clair Avenue, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, Dorothy Kulas, cash in the approximate amount of $1069.00, contrary to the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 18, 1962, at 3005 Woodhill Road, Cleveland, Ohio, he did unlawfully, purposely and while in the perpetration of a robbery, kill one, William C. Beasley, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. That on or about February 23, 1962, at 6938 Kinsman Road, Cleveland, Ohio, he did unlawfully, and by putting in fear while armed with a dangerous weapon, to wit, a pistol, rob from the person of one, David Warren, cash in the approximate amount of $104.50, contrary to the form of the statute in such case made and provided for and against the peace and dignity of the State of Ohio. *It appearing to the Court that said child has committed acts which, if committed by an adult, would be felonies, a mental and physical examination having been made by duly qualified persons as provided by statute, it is hereby ordered that pursuant to Section 2151.26 Ohio Revised Code the said James Samuel Sims be bound over to the Court of Common Pleas of Cuyahoga County for further proceedings according to law. It is ordered that said James Samuel Sims be, and he hereby is, committed to the jail of Cuyahoga County.*" 619 F. 2d 598, 599 (1980). (Emphasis added.)

Following this journal entry, respondent was indicted on two counts of first-degree murder. Respondent pleaded not guilty, but later withdrew his plea and entered a plea of guilty to homicide generally and waived trial by jury. Pursuant to

then-current Ohio law, respondent was tried before a three-judge court solely on the issue of the degree of culpability. He was found guilty of first-degree murder on both counts of the indictment and sentenced to two consecutive terms of life imprisonment.

On May 17, 1976, respondent filed a *pro se* motion for leave to appeal with the Ohio Eighth District Court of Appeals seeking to challenge his conviction on the ground that he had been placed twice in jeopardy by being tried and convicted as an adult in criminal court. The Court of Appeals granted his motion, appointed counsel, but later found no error and affirmed the convictions and sentences. With regard to the double jeopardy claim, the court acknowledged that this Court held in *Breed* v. *Jones,* 421 U. S. 519 (1975), that a juvenile who has been subject to a "jurisdictional or adjudicatory hearing" in a juvenile court before being bound over to be tried as an adult is placed twice in jeopardy by the later criminal trial. However, this Court also stated that it was not foreclosing States from requiring a finding of probable cause as a prerequisite for transfer. *Id.,* at 538, n. 18. Applying the principles set forth in *Breed,* the Ohio Court of Appeals found that there was no indication that an adjudicatory hearing or a jurisdictional hearing was conducted in this case. The court explained:

> "There is no finding of delinquency, and there is no recitation of any evidence upon which such an adjudication could be premised. All that appears to have occurred is that the Juvenile Court arrived at a determination that there was an appearance of possible criminal action which properly and appropriately should be considered by the Court of Common Pleas of Cuyahoga County." *State* v. *Sims,* 55 Ohio App. 2d 285, 290, 380 N. E. 2d 1350, 1353 (1977).

After the Ohio Supreme Court dismissed respondent's appeal for failure to state a substantial constitutional question,

respondent petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Ohio again alleging a double jeopardy claim. The District Court denied the petition. The court held that the journal entry lent little support to respondent's position because it contained neither a specific finding that respondent committed any of the criminal acts alleged nor a recitation of evidence. The court also rejected the respondent's contention that because the journal entry purported to be issued pursuant to Ohio Rev. Code Ann. § 2151.26 (1954), compliance with that statute required that a juvenile be formally adjudged delinquent before being bound over to be tried as an adult. In rejecting this contention, the District Court explained that the proper operation and construction of § 2151.26 was largely unsettled prior to the clarification provided by the Ohio Supreme Court in *In re Jackson,* 21 Ohio St. 2d 215, 257 N. E. 2d 74 (1970). Prior to that 1970 decision, many Juvenile Courts bound over only on a determination of probable cause. Given the uncertainty of the law surrounding § 2151.26 prior to the *Jackson* decision, the District Court was unwilling to assume that an adjudication of delinquency was made at respondent's 1962 hearing. The pre-*Jackson* practice of binding over on a probable-cause determination, coupled with the absence of any specific factual findings indicative of adjudication, strongly suggests that respondent's juvenile hearing was of a nonadjudicatory nature.

The Court of Appeals for the Sixth Circuit reversed. 619 F. 2d 598 (1980). According to the Court of Appeals, the District Court's reasoning overlooks the essential fact that the Juvenile Judge was empowered to impose sanctions at the 1962 hearing, that evidence was taken, and that the liberty and reputation of the respondent were put in risk at that time. The rendering of a final judgment is immaterial to the applicability of the Double Jeopardy Clause and therefore the much disputed meaning of the Juvenile Court's jour-

nal entry is irrelevant and unnecessary to the disposition of the case. The court stated:

> "What actually occurred at the March 27, 1962 hearing is also insignificant. Once the Juvenile Court, possessing the jurisdiction and power to enter final orders levying a wide range of possible sanctions, began a hearing, not limited in scope by statute to a preliminary or probable cause hearing, jeopardy attached and appellant possessed the constitutional right to have the Juvenile Court, as the original trier of fact, determine his fate." *Id.*, at 605.

Subsequently, the Court of Appeals denied a petition for rehearing, stating that petitioner was in error in his contention that the court's opinion would require the release of every juvenile who was bound over according to the procedures of former Ohio Rev. Code Ann. § 2151.26 (1954). The court explained that it was not deciding that there would be a double jeopardy violation where the record of the Juvenile Court hearing plainly established that the hearing was limited to a determination of probable cause.

The decision of the Court of Appeals, in my view, merits review if not outright summary reversal for several reasons. In the first place, any petition for habeas corpus which seeks to attack a juvenile journal entry, or to construe it, by means of a federal habeas petition filed 16 years later should receive the strictest scrutiny from the federal courts who are asked to intervene and set aside a state-court conviction presumptively valid on its face. This was commendably recognized by the District Court when it said:

> "Inquiry concerning the nature of the March 27, 1962 hearing by the Juvenile Court is hindered by the absence of any transcript of the proceeding." App. to Pet. for Cert. A–20.

A federal court in this situation should also not lose sight of the fact that it is the habeas applicant who has the burden of

proving a constitutional violation, see *Sumner* v. *Mata*, 449 U. S. 539 (1981), and that no system of justice which gives both society and a defendant their due is aided by attempting to reconstruct or re-evaluate events that took place decades ago, as if it were an archaeological expedition, rather than an exercise in the administration of justice.

Public confidence that justice is administered fairly between the defendant and the State is not bolstered by the fact that the opinion of the Court of Appeals can quite reasonably be read as inconsistent on its face with its later order denying the petition for rehearing. In that order, the court stated that a double jeopardy violation would not arise if it were clear that a probable-cause determination, as opposed to a delinquency determination, was made at the bindover hearing. This is in direct contradiction to the analysis the court employed in its original opinion where it stated that it need not inquire into what occurred at the 1962 hearing because once the Juvenile Court began a hearing which was not limited by statute to a probable-cause determination, jeopardy attached.

To the extent the court meant what it said in its original opinion, the decision is of significant importance. First, to reach its conclusion the court had to make an assessment as to the type of determination a juvenile court was required to make in 1962 prior to binding over a juvenile for trial as an adult. The court held that an Ohio juvenile court was required to make a "delinquency" determination at such a hearing and it reached this result even though the other courts which addressed the issue, including the Ohio state courts, all concluded to the contrary, explaining that the law on this point was not settled until the 1970 decision in *Jackson*. The prior uncertainty of the law on this point (and consequently the Court of Appeals' error) is most clearly illustrated by the fact that *Jackson* itself affirmed a lower court opinion reversing a juvenile's bindover on a finding of probable cause. It is patently obvious to me that the Ohio state courts are much

more competent than a federal habeas court to determine what Ohio law required of juvenile courts in 1962.

The assumption, made cavalierly in my opinion by the Court of Appeals, that a double jeopardy violation arose because the Ohio Juvenile Court was required to make a delinquency determination prior to binding the juvenile over for trial as an adult, goes far beyond what we held in *Breed* v. *Jones*, 421 U. S. 519 (1975). If the decision remains the law of the Sixth Circuit, and if we deny certiorari there is no reason to believe that other Circuits will not follow it, and it may well require the release of every juvenile bound over under the same statute and then subsequently convicted as an adult. If we dealt here with the fate of only one criminal defendant, it would not be worth the time of this Court to inquire into the correctness of the decision of the Court of Appeals. But a decision that appears to require what may be the massive release of large numbers of similarly situated convicted criminals should not occur without this Court's first reviewing the constitutional underpinnings of such decision.

The District Court, sitting as it did with a District Judge far more familiar with Ohio practice than the three judges of the Court of Appeals only one of whom is an Ohioan, was surely correct in its unwillingness to assume that an adjudication of delinquency was made at respondent's 1962 hearing. Indeed, as the District Court stated:

> "The pre-*In re Jackson* practice of binding over on a probable cause determination, coupled with the absence of any specific factual findings indicative of an adjudication, discussed *infra*, strongly suggest that petitioner's juvenile hearing was of a non-adjudicatory nature." App. to Pet. for Cert. A–23.

For the reasons previously stated, I would grant certiorari to review what seems to me an abuse of the "Great Writ" by the Court of Appeals for the Sixth Circuit. Respondent was indicted by the Cuyahoga County grand jury on two counts

of first-degree murder 19 years ago, and although first pleading not guilty to these charges, later withdrew this plea and entered a plea of guilty to homicide generally and waived a trial by jury. He was then tried before a three-judge court solely on the degree of culpability according to then-current Ohio law, and was found guilty and sentenced to two consecutive terms of life imprisonment on the basis of his plea. It was not until 14 years later that it occurred to him that these Ohio proceedings violated the double jeopardy provision of the Fifth and Fourteenth Amendments, and then he unsuccessfully sought relief in the Ohio Court of Appeals, the Supreme Court of Ohio, and the United States District Court for the Northern District of Ohio. It cannot be fairly said that the opinion of the Court of Appeals will affect only respondent, but it can be fairly said that respondent has set in motion legal machinery, both state and federal, far exceeding either the merits of his claim or the proper allocation of judicial resources in a system of justice which recognizes both the interests of society and that of the defendant.

No. 80–484. PRINCE EDWARD SCHOOL FOUNDATION *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

JUSTICE REHNQUIST, with whom JUSTICE STEWART and JUSTICE POWELL join, dissenting.

The initial question presented by this petition is whether the Internal Revenue Service is entitled to deny tax-exempt status to a private school which discriminates in its admissions policy. If so, the additional question posed is what steps a private school must take in order to establish that its admissions policy is in fact nondiscriminatory.

Petitioner, Prince Edward School Foundation, was formed as a nonprofit private school foundation to operate elementary and secondary schools in Prince Edward County, Va. The principal purpose for petitioner's establishment was to ensure a segregated education for the white children who attended petitioner's schools. *Griffin* v. *School Board of Prince Edward*

County, 377 U. S. 218, 223, 231 (1964). Presently, petitioner's sole activity is the operation of one private school, Prince Edward Academy.

From 1959 until 1970, petitioner was considered by the Service as a tax-exempt organization within the terms of § 501 (c)(3) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(3). Section 501 (a) of the Code exempts from the federal income taxes organizations described in § 501 (c)(3), and this latter provision includes corporations or foundations "organized and operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes . . . ."

In 1970, the Service announced that it would no longer recognize the tax-exempt status of any private school unless the school adopted and administered a nondiscriminatory admissions policy. This new position was announced during the course of litigation in *Green* v. *Connally,* 330 F. Supp. 1150 (DC 1971), in which the Service's prior policy was being challenged. A three-judge panel in *Green* thereafter ruled that a private school is not entitled to acquire or retain exempt status under § 501 (c)(3) unless it has a racially nondiscriminatory admissions policy. Although § 501 (c)(3) does not, by its express terms, impose such a limitation on the right to tax-exempt status, the *Green* court reasoned that such a limitation was mandated by both public policy and the common-law definition of "charitable." [1]

To effectuate its new policy regarding tax exemptions for private schools, the Service issued Revenue Procedure 72–54 (currently Rev. Proc. 75–50, 1975–2 Cum. Bull. 587), which requires a private school seeking tax-exempt status to publicize its nondiscriminatory admissions policy to all segments

[1] This Court summarily affirmed the District Court's decision, *sub nom. Coit* v. *Green,* 404 U. S. 997 (1971), but we later explained in *Bob Jones University* v. *Simon,* 416 U. S. 725, 740, n. 11 (1974), that this affirmance lacks precedential weight because no controversy remained in *Green* by the time the case reached this Court.

of the community either through a newspaper of general circulation or over the broadcast media.

Petitioner has continuously refused to publicize that its school has a racially nondiscriminatory admissions policy, although it has steadfastly contended that in fact this is the case. (App. to Pet. for Cert. 49a.) In 1978, the Service revoked petitioner's exempt status because it "[had] not complied with the requirements of Revenue Procedure 75–50 nor any of its guidelines that preceded it and [has] not demonstrated that [it has] adopted a racially nondiscriminatory policy as to students . . . ." (*Id.*, at 18a.)

Thereafter, petitioner brought this action under 26 U. S. C. § 7428 to review the Service's determination regarding its tax-exempt status, attacking both the statutory and constitutional validity of Rev. Proc. 75–50. Petitioner filed affidavits in the District Court asserting that it has an open admissions policy and, although no black student has ever attended its school, no black student has ever applied for admission and no official of or personnel related to the petitioner has ever done or said anything to discourage such application. (App. to Pet. for Cert. 49a.) Petitioner also argued to the District Court that since 1973 it has been subject to an injunction entered by another District Court requiring it to admit any qualified black applicants. *McCrary* v. *Runyon,* 363 F. Supp. 1200 (ED Va. 1973), aff'd, 427 U. S. 160 (1976). No contention has been made that petitioner is in violation of that injunction order.

On cross-motions for summary judgment, the District Court upheld the Service's determination. The District Court concluded:

> "It is accordingly undisputed that the plaintiff has never admitted, never received an application from, and thus has never denied admission to a black person. Notwithstanding the absence of direct evidence in either party's favor, it remains the plaintiff's burden to establish that

> its policy is to admit black students on the same basis as those of other races. The plaintiff has failed to present any evidence to that effect. On the other hand, the inference that plaintiff in fact administers a racially discriminatory policy may be drawn from the circumstances surrounding the school's establishment. . . . A further inference that plaintiff administers a racially discriminatory admissions policy can be drawn from the fact that plaintiff has previously conceded that it practiced a racially discriminatory policy of exclusiveness, was subsequently enjoined from such practices by court order, but has failed to present any evidence that it has since modified that policy." [2]

The questions presented by this petition are of widespread importance. The validity of the Service's policy of denying tax-exempt status to private schools which have a racially discriminatory admissions policy is not apparent from a reading of the relevant provisions of the 1954 Code. Section 501 (c)(3) speaks to a number of different types of organizations which are entitled to tax-exempt treatment. Separate references are made to "educational" and "charitable" organizations. Arguably, these separate references reflect Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status. Moreover, for statutory interpretation purposes, it is difficult to distinguish between private schools which discriminate on the basis of race, private "religious" schools which discriminate on the basis of religion, and private "religious" schools which dis-

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[2] The District Court did not address petitioner's statutory and constitutional challenges to Rev. Proc. 75–50. The court reasoned that a ruling on the validity of this Revenue Procedure would not affect the ultimate question of whether petitioner was in fact administering a nondiscriminatory admissions policy. The opinion of the District Court was affirmed in a *per curiam* order by the Court of Appeals.

criminate on the basis of race but claim that separation of the races is one of the tenets of their religion. Certainly, the Service has never proffered any persuasive reason why these situations should be treated dissimilarly.

Given the general rule that words of a statute, including the Revenue Acts, should be interpreted where possible in their ordinary, everyday sense, *Malat* v. *Riddell,* 383 U. S. 569, 571 (1966); *Hanover Bank* v. *Commissioner,* 369 U. S. 672, 687 (1962), the authority of the Secretary of the Treasury to promulgate this policy regarding the tax status of private schools is sufficiently questionable to merit review by this Court. Perhaps, implementation by the Service of the express language of the statute will, as suggested by the District Court in *Green* v. *Connally, supra,* create problems of a constitutional nature. That, however, is a question that this Court, as opposed to the Service, is better equipped to address.

Assuming, *arguendo,* the validity of the Service's policy pertaining to private schools, the determination made by the District Court that petitioner does not qualify for tax-exempt treatment is questionable on the record before us. Petitioner was, and still is, under a court order not to discriminate in its admissions. No contempt proceedings have been initiated against the petitioner for violation of that order. Moreover, the District Court had before it sworn affidavits that petitioner has an open admissions policy. Admittedly, petitioner refused to advertise this open admissions policy, but the Service's requirement of such is one step further removed from the express language of the statute and therefore of even more questionable statutory and constitutional validity.

Not surprisingly, petitioner has not had the opportunity to demonstrate the sincerity of its open admissions practice. Petitioner has retained, and in fact teaches, its belief that racial segregation is desirable. The Court, however, has upheld the First Amendment right of parents to send their children to educational institutions such as petitioner's, although we have condemned as unlawful the *practice* of deny-

ing admission to such institutions on account of race. *McCrary* v. *Runyon*, 427 U. S. 160, 176 (1976). It is easy to understand why any black parents would not seek their child's admission to an "educational" institution which seeks to inculcate the merits of segregation in the value system of its students. It is not at all unlikely that petitioner will never receive an application for the admission of a black child. This, however, is of no relevance to the narrow question of whether a black child, if he desired to attend petitioner's institution, would in fact be granted admission on the same basis as a white child. The Service presented no evidence to rebut the evidence brought forth by the petitioner that this would be the case.

Because I believe the time has come for this Court to deal with the difficult statutory and constitutional questions raised in this petition, I dissent from the denial of the petition for a writ of certiorari.

No. 80–733. SHEET METAL WORKERS' INTERNATIONAL ASSN., AFL–CIO *v.* CARTER. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1093.

JUSTICE REHNQUIST, dissenting.

The Court of Appeals for the Fifth Circuit held in this case that an order of the District Court for the Southern District of Georgia remanding a case to the state court from which it was removed was reviewable through a petition for a writ of mandamus. This conclusion is directly contrary to the plain language of 28 U. S. C. § 1447 (d), which provides that "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." Such manifest disregard of the language of Congress should in my opinion warrant at least review by this Court, if not summary reversal.

The complicated course of this litigation began in 1972, when respondent filed an action against petitioner International Union in state court. Petitioner did not answer the

complaint but instead moved to dismiss it for improper service. This motion was denied and a default judgment eventually entered against petitioner. A state trial was held for the sole purpose of calculating damages. The judgment entered for respondent, however, was ultimately reversed by the Georgia Supreme Court on the ground that the International had not been properly served. *Sheet Metal Workers' International Assn.* v. *Carter,* 241 Ga. 220, 244 S. E. 2d 860 (1978). When the action was reinstituted and petitioner was properly served, it removed the action to federal court. As early as pretrial conference it clearly developed that respondent's only claim was a state-law claim for intentional infliction of emotional distress, App. to Pet. for Cert. 1a, but respondent never moved to remand the case and the court did not do so *sua sponte.* The case proceeded to trial and the jury awarded compensatory and punitive damages in favor of respondent. Petitioner then moved to have the judgment vacated and the case remanded for lack of subject-matter jurisdiction. The District Court concluded that jurisdiction was lacking, set aside the verdict and judgment, and remanded the action to state court. The court then stated: "Notwithstanding 28 U. S. C. § 1447 (d), this Court hopes this Order is appealable. Perhaps another exception may be carved out of the statute." *Id.,* at 3a.

The Court of Appeals acceded to the wishes of the District Court. It granted respondent's petition for a writ of mandamus, vacated the remand order, and directed the District Court to consider if it had pendent jurisdiction of the state-law claim. It overcame to its satisfaction the seemingly clear prohibition of § 1447 (d) on the ground that § 1447 (c) required remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction," while the District Court ordered remand *after* final judgment. Relying on our decision in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), the

court reasoned that the remand order was not within § 1447 (c) and thus review was not prohibited by § 1447 (d).

In *Thermtron*, however, the Court stated that "[i]f a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." 423 U. S., at 343. The District Court remanded this case precisely for the quoted reason. While *Thermtron* also stated that "[t]here is no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by the statute," *id.*, at 350, this remand order was entered on grounds permitted by the statute and therefore comes under that portion of the *Thermtron* opinion stating that "we neither disturb nor take issue with the well-established general rule that § 1447 (d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." *Id.*, at 351–352. See *Briscoe* v. *Bell*, 432 U. S. 404, 414, n. 13 (1977) ("Where the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand"); *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U. S. 723 (1977) ("Title 28 U. S. C. § 1447 (c) provides for remanding a removed action when the district court determines that 'the case was removed improvidently and without jurisdiction'; and when a remand has been ordered on these grounds, 28 U. S. C. § 1447 (d) unmistakably commands that the order 'remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise' "). Nothing in *Thermtron* suggests a further exception to the clear prohibition of § 1447 (d) based merely on the timing of the district judge's remand order.

The Court of Appeals stated that appellate review of remand orders entered after final judgment served the policy concerns underlying § 1447 (d). Not only is such policy

analysis inappropriate in light of the plain language of the statute, it is unsound also. Congress' purpose in enacting § 1447 (d) was to "prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron*, *supra*, at 351. When the appellate court undertakes review of a remand order entered after final judgment and concludes that remand was appropriate, the wasteful delay is clear. Although a retrial in state court may be avoided if a reviewing federal court determines remand was inappropriate, such a benefit can only be had by subjecting *all* remand orders after final judgment to review. The present case is actually a paradigmatic example of the delay Congress intended to prevent, since the Court of Appeals did not even resolve the jurisdictional issue, but remanded to the District Court for further proceedings. A clearer instance of the evil Congress intended to avoid—"delay in the trial of remanded cases by protracted litigation of jurisdictional issues"—would be difficult to imagine.

This Court obviously cannot grant certiorari to review every case in which four of its Members believe an important issue is presented and wrongly decided. But where, as here, we deal not with shades of gray clustering on both sides of a wavering legal line, but instead with a jurisdictional statute in which Congress has stated in bright-line terms that "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise," the case for plenary consideration is considerably stronger.

In these days of proliferating litigation, there is a tendency to lose sight of the very sensible observation of Justice Brandeis, dissenting in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932), that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." This is particularly true of jurisdictional statutes and statutes and rules regulating trial procedures and appellate review. Here the Court of Appeals, contrary to the opinion in *Thermtron, supra,* reviewed by extraordinary writ

(mandamus) an order remanding a case on grounds permitted by the applicable statute. If it may without further review here breathe life into the District Court's hope that "another exception may be carved out of the statute," the congressional policy underlying the statute will soon be at the mercy of any court of appeals which wishes to disobey it.

Since the litigation in question has been protracted, and because petitioner may be suspected of having engaged in tactical maneuvering in order to bring itself within the ambit of the congressional prohibition against such review, there is natural sympathy for respondent. But sympathy so generated is not a sound basis for administering a system of justice involving sensitive federal-state questions such as this. Since the action of the Court of Appeals was squarely contrary to the express congressional language referred to above, I would grant the petition for certiorari and reverse the judgment.

No. 80–777. BLACKBURN, WARDEN *v.* THOMAS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 623 F. 2d 383.

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

In 1972, respondent was tried in a Louisiana state court for possessing and distributing cocaine and heroin. Pursuant to the state law applicable at that time, the jury consisted of five members. La. Code Crim. Proc. Ann., Art. 782 (West 1967) (amended 1975). Respondent raised no objection to its size. The jury unanimously voted to convict respondent, and he was sentenced to a prison term.

More than six years later, after exhausting state remedies, respondent sought habeas corpus in Federal District Court.[1]

[1] Respondent did not take a direct appeal from his conviction. He exhausted his state remedies by seeking state collateral relief, relying for the

Relying on this Court's decision in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), respondent argued that his trial violated the Sixth Amendment (applicable to the States through the Fourteenth), because a jury of five persons was constitutionally inadequate. The District Court granted the writ in reliance on *Ballew*, App. to Pet. for Cert. 11a, 22a–31a, and the Court of Appeals for the Fifth Circuit affirmed, 623 F. 2d 383 (1980). The Court of Appeals recognized that respondent's conviction had become final long before *Ballew* held that five-member juries are unconstitutional. It nevertheless held that *Ballew* should be applied retroactively to invalidate all convictions rendered by juries of that size.[2]

I believe that the Court of Appeals improperly applied *Ballew* to reverse respondent's conviction. I therefore would grant the petition for certiorari and reverse the decision of the Court of Appeals.

Three recent cases govern respondent's claim. In *Ballew*, *supra*, we held that juries in criminal cases must have at least six members to meet constitutional requirements. A smaller jury may be insufficient to "foster effective group deliberation," 435 U. S., at 232, 234 (opinion of BLACKMUN, J.), and to provide a "fair cross-section" of the community, *id.*, at 245 (WHITE, J., concurring in judgment). Our decision in *Ballew* was reaffirmed one year later in *Burch* v. *Louisiana*, 441 U. S. 130, 137 (1979), when we identified similar constitutional flaws in a conviction reached by a nonunanimous

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first time on his jury-composition claim. The state trial court did not address respondent's failure to enter a contemporaneous objection to the five-member jury. Its denial of relief thus was on the merits. App. to Pet. for Cert. 34a. The Louisiana Supreme Court denied review. *State ex rel Thomas* v. *Blackburn*, 361 So. 2d 1218 (1978).

[2] Respondent failed to object at trial to the size of his jury. N. 1, *supra*. The Court of Appeals correctly disregarded this procedural default and reached the merits of respondent's petition because the state trial court on collateral review had ruled upon the merits, see *ibid.* *County Court of Ulster* v. *Allen*, 442 U. S. 140, 152–153, 154 (1979); *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978).

six-member jury. Cf. *Apodaca* v. *Oregon*, 406 U. S. 404 (1972); *Johnson* v. *Louisiana*, 406 U. S. 356 (1972).

Soon thereafter, in *Brown* v. *Louisiana*, 447 U. S. 323 (1980), the Court applied *Burch* retroactively to reverse a conviction reached by a nonunanimous six-member jury. The Court divided three ways in *Brown*, and it is essential for our present purposes to identify the divergent views. JUSTICE BRENNAN wrote for a plurality of four Justices and concluded that any conviction reached by a nonunanimous six-member jury should be reversed. Two other Justices concurred in the result, stating that *Burch* should be applied retroactively only to cases pending on direct review at the time *Burch* was decided. 447 U. S., at 337 (POWELL, J., with whom STEVENS, J., joined), quoting *Hankerson* v. *North Carolina*, 432 U. S. 233, 248 (1977) (POWELL, J., concurring in judgment). Three Justices dissented, arguing against any retroactive application of the new rule, because there was no " 'substantial likelihood' " that a 5-to-1 jury reached a result that was " 'factually incorrect.' " 447 U. S., at 338 (REHNQUIST, J., with whom BURGER, C. J., and WHITE, J., joined), quoting *Williams* v. *United States*, 401 U. S. 646, 656, n. 7 (1971).

In sum, in *Burch*, as in *Ballew*, we identified constitutional defects in jury composition. Though the system challenged in each case differed somewhat, we invalidated each one for essentially the same reason: the Constitution requires that criminal juries be structured in a manner conducive to highly reliable adjudication. *Ballew*, *supra*, at 232, 234 (opinion of BLACKMUN, J.); *Burch*, *supra*, at 137. It does not follow from either case, however, that unanimous five-member juries and nonunanimous six-member juries frequently—or even occasionally—render incorrect decisions. A criminal defendant's interest in a new trial, based on *post hoc* "speculation about what would have happened" with a jury of different size or structure, *Brown* v. *Louisiana*, *supra*, at 340 (REHNQUIST, J., dissenting), need not always prevail over the

public interest in assuring the finality of convictions. See *Sumner* v. *Mata*, 449 U. S. 539, 550–551, n. 3 (1981) ("both society and the individual criminal defendant have [an interest] 'in insuring that there will at some point be the certainty that comes with an end to litigation' "), quoting *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (Harlan, J., dissenting); *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part); *Hankerson* v. *North Carolina*, *supra*, at 247–248 (POWELL, J., concurring in judgment). At some point, the costs of retroactive application of new constitutional principles of jury size or structure exceed the possibility of enhanced reliability that may be obtained upon retrial.[3]

The present case involves a conviction rendered by a unanimous five-member jury. If the case now were to be tried, it is plain in light of *Ballew* that such a jury is not of constitutionally adequate size. But this case was tried in 1972—more than six years before *Ballew*—and it is now before us on *collateral review*. The retroactivity analysis of the plurality in *Brown* v. *Louisiana* thus is not controlling. Instead, the governing position is that represented by the combined views of the other five Justices in *Brown*. Because the Court of Appeals in this case improperly relied on the reasoning of the *Brown* plurality to apply *Ballew* retroactively, I would grant certiorari and reverse its judgment.

No. 80–837. GRASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 626 F. 2d 444.

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[3] The State is greatly disadvantaged when a conviction, long thought to be final, is reversed on collateral review. The State's opportunity to hold a retrial under these circumstances may be only theoretical. Witnesses disappear and memories fade with the passage of time. See *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (POWELL, J., concurring in judgment).

No. 80–963. MICHIGAN *v.* OLAH. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE would grant certiorari and reverse the judgment. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 409 Mich. 948, 298 N. W. 2d 422.

No. 80–5432. WATKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE MARSHALL would grant certiorari and reverse the judgment. *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980).

No. 80–5643. SNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 186.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner seeks review on double jeopardy grounds of his conviction of attempted bank robbery. 18 U. S. C. § 2113 (a). I would grant the petition for certiorari and reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Petitioner was originally charged in an indictment with attempted extortion, 18 U. S. C. § 1951, and conspiracy to commit bank robbery, 18 U. S. C. §§ 371, 2113 (a), and was convicted on both counts. On appeal, the Court of Appeals affirmed the conspiracy conviction, but reversed the attempted extortion conviction on the ground that the conduct charged was within the exclusive coverage of 18 U. S. C. § 2113 (a). 550 F. 2d 515 (1977). Petitioner was then charged in a second indictment with attempted bank robbery in violation of § 2113 (a), arising out of the same transaction which had given rise to the conspiracy conviction and the reversed conviction of attempted extortion. The United States District Court for the Northern District of California dismissed this second indictment on double jeopardy and due process grounds. The Court of Appeals reversed and re-

manded the case to the District Court for trial. 592 F. 2d 1083 (1979). A petition for certiorari was denied. 442 U. S. 944 (1979). Petitioner was then convicted of attempted bank robbery. His request to set aside his conviction on double jeopardy grounds was rejected by the Court of Appeals, 627 F. 2d 186 (1980), and this petition followed.

I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Clift* v. *Alabama,* 435 U. S. 909 (1978) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein. Since the charge under the second indictment arose out of the same criminal transaction that led to the conspiracy conviction and the reversed conviction of attempted extortion, the Double Jeopardy Clause barred its prosecution. I would, therefore, grant the petition for certiorari and reverse the judgment of the Court of Appeals.

No. 80–784. WASHINGTON *v.* DAUGHERTY. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 94 Wash. 2d 263, 616 P. 2d 649.

No. 80–964. KENTUCKY *v.* NEWSOME ET AL. Sup. Ct. Ky. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 609 S. W. 2d 370.

No. 80–1086. WYRICK, WARDEN *v.* HENSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 634 F. 2d 1080.

No. 80–812. MESCALERO APACHE TRIBE *v.* O'CHESKEY, COMMISSIONER OF REVENUE OF NEW MEXICO, ET AL. C. A. 10th Cir. Motion of Navajo Forest Products Industries for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 625 F. 2d 967.

No. 80–978. KEPHART *v.* INSTITUTE OF GAS TECHNOLOGY. C. A. 7th Cir. Motion of Legal Services for the Elderly for leave to file an untimely brief as *amicus curiae* denied. Certiorari denied. Reported below: 630 F. 2d 1217.

No. 80–1007. MARSCHAK, AKA ASHLEY, TRUSTEE *v.* KIRKLAND & ELLIS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 734.

No. 80–1025. LECLAIR ET AL. *v.* SAUNDERS. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 627 F. 2d 606.

No. 80–1026. CHRYSLER CORP. *v.* DAWSON ET AL. C. A. 3d Cir. Motion of Motor Vehicle Manufacturers Association of the United States for leave to file a brief as *amicus curiae* granted. Motion of petitioner to strike portions of respondents' brief in opposition denied. Certiorari denied. Reported below: 630 F. 2d 950.

No. 80–1038. PUBLIC SERVICE COMMISSION OF TENNESSEE ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 426.

No. 80–5824. LUM ET AL. *v.* CAMPBELL, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 626 F. 2d 739.

No. 80–5840. LANGWORTHY *v.* MARYLAND. Ct. Sp. App. Md. Motion of Citizens' Commission on Human Rights for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 46 Md. App. 116, 416 A. 2d 1287.

Rehearing Denied

No. 79–395. UNITED STATES *v.* MORRISON, 449 U. S. 361;

No. 79–870. UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ, 449 U. S. 166;

No. 79–1679. WASTE MANAGEMENT OF WISCONSIN, INC. *v.* FOKAKIS, 449 U. S. 1060;

No. 79–2040. PACILEO, SHERIFF *v.* WALKER, 449 U. S. 86;

No. 79–2059. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CITY OF MISHAWAKA, INDIANA, ET AL., 449 U. S. 1096;

No. 80–613. SHOSHONE TRIBE ET AL. *v.* DRY CREEK LODGE, INC., ET AL., 449 U. S. 1118;

No. 80–707. BRADY *v.* DOE, 449 U. S. 1081;

No. 80–5315. MAGGARD *v.* FLORIDA PAROLE COMMISSION, 449 U. S. 960;

No. 80–5580. EUGE *v.* UNITED STATES ET AL., 449 U. S. 1065;

No. 80–5585. PAPP *v.* OHIO, 449 U. S. 1065;

No. 80–5612. IN RE GAMBARA, 449 U. S. 1087;

No. 80–5716. BALOUN ET AL. *v.* GENERAL MOTORS CORP., 449 U. S. 1090;

No. 80–5725. GOODEN *v.* TEXAS, 449 U. S. 1072;

No. 80–5770. IN RE JACKSON, 449 U. S. 1075;

No. 80–5780. IN RE BEACH, 449 U. S. 1076;

No. 80–5782. IN RE LOHMANN, 449 U. S. 1109; and

No. 80–5866. PROCA *v.* UNITED STATES, 449 U. S. 1093. Petitions for rehearing denied.

No. 80–163. IN RE CHESTNUTT MANAGEMENT CORP., 449 U. S. 816 and 1027. Motion for leave to file a second petition for rehearing denied.

No. 80–5476. GORNICK *v.* ILLINOIS ET AL., 449 U. S. 1018; and

No. 80–5540. GRINAN *v.* TRESPALACIOS, 449 U. S. 1036. Motion for leave to file petitions for rehearing denied.

FEBRUARY 27, 1981

Miscellaneous Order

No. 87, Orig. CALIFORNIA *v.* TEXAS. In this case the Solicitor General is invited to file a brief expressing the views of the United States by noon Wednesday, March 4, 1981.

MARCH 2, 1981

Appeals Dismissed

No. 80–1040. PINCUS *v.* ESTATE OF GREENBERG ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE STEWART would note probable jurisdiction and set case for oral argument. Reported below: 390 So. 2d 40.

No. 80–1102. LUNG ET AL. *v.* O'CHESKEY ET AL. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 94 N. M. 802, 617 P. 2d 1317.

No. 80–1152. ROCHESTER GAS & ELECTRIC CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 51 N. Y. 2d 823, 413 N. E. 2d 359.

No. 80–1192. SYSKA, GUARDIAN *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 45 Md. App. 626, 415 A. 2d 301.

No. 80–1231. GARRISON *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 82 Ill. 2d 444, 412 N. E. 2d 483.

No. 80–5658. RUIZ *v.* TEXAS. Appeal from Common Ct. at Law No. 1, Hidalgo County, Tex., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 79–5710. BESSER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Weaver* v. *Graham, ante,* p. 24. Reported below: 376 So. 2d 857.

No. 79–5885. PORTLEY *v.* GROSSMAN ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Weaver* v. *Graham, ante,* p. 24. Reported below: 605 F. 2d 563.

No. 79–6574. MATTHEWS *v.* UNITED STATES. C. A. 3d 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 *Weaver* v. *Graham, ante,* p. 24. Reported below: 620 F. 2d 288.

Certiorari Granted—Reversed. (See No. 80–485, *ante,* p. 139; and No. 80–532, *ante,* p. 147.)

Miscellaneous Orders

No. A–714. SCHIFF *v.* UNITED STATES. C. A. 2d Cir. Application for recall and stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 80–396. CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 449 U. S. 1060.] Motion of James Clancy for leave to participate in oral argument as *amicus curiae* denied.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, 449 U. S. 820.] Motion of Westmoreland Resources, Inc., for leave to file a brief as *amicus curiae* granted. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 80–251. ROSTKER, DIRECTOR OF SELECTIVE SERVICE *v.* GOLDBERG ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 449 U. S. 1009.] Motion of National Organization for Women for leave to participate in oral argument as *amicus curiae* denied.

No. 80–348. H. A. ARTISTS & ASSOCIATES, INC., ET AL. *v.* ACTORS' EQUITY ASSN. ET AL. C. A. 2d Cir. [Certiorari granted, 449 U. S. 991.] Motion of respondents for leave to divide oral argument with American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* granted.

No. 80–420. FLYNT ET AL. *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 449 U. S. 1033.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* as *amicus curiae* granted.

No. 80–429. COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL. C. A. 9th Cir. [Certiorari granted, 449 U. S. 950.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Certiorari Granted

No. 80–824. POLK COUNTY ET AL. *v.* DODSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 628 F. 2d 1104.

No. 80–885. NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.; NATIONAL LABOR RELATIONS BOARD *v.* MALLEABLE IRON RANGE Co.; and

No. 80–1103. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Motion of Office & Professional Employees, AFL–CIO, for leave to file a brief as *amicus curiae* in No. 80–885 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 80–885 (first case) and No. 80–1103, 627 F. 2d 766; No. 80–885 (second case), 631 F. 2d 734.

No. 80–939. FEDERAL ELECTION COMMISSION *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL.; and

No. 80–1129. NATIONAL REPUBLICAN SENATORIAL COMMITTEE *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 212 U. S. App. D. C. 374, 660 F. 2d 773.

Certiorari Denied. (See also No. 80–5658, *supra.*)

No. 80–569. LOCALS 1830 AND 1833, GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 588.

No. 80–657. McCOWN ET AL. *v.* CRAVENS, RECEIVER, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 613 P. 2d 442.

No. 80–741. HIDALGO COUNTY GRAND JURY COMMISSIONERS ET AL. *v.* CIUDADANOS UNIDOS DE SAN JUAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 807.

No. 80–746. BRADSHAW, SECRETARY, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION *v.* HALL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 630 F. 2d 1018.

No. 80–823. BASSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 1007.

No. 80–866. HAYS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–868. BURWELL ET AL. *v.* EASTERN AIR LINES, INC.; and

No. 80–1076. EASTERN AIR LINES, INC. *v.* BURWELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 633 F. 2d 361.

No. 80–880. CONTINENTAL OIL CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 630 F. 2d 446.

No. 80–920. SOUTH SHORE HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 630 F. 2d 40.

No. 80–926. HEDMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 1184.

No. 80–938. BURBANK ANTI-NOISE GROUP ET AL. *v.* LEWIS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 115.

No. 80–948. ARMORED TRANSPORT, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 1313.

No. 80–953. CITY OF CHICAGO *v.* NATIONAL ORGANIZATION FOR WOMEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80–956. EMCH ET AL., CO-PERSONAL REPRESENTATIVES OF EMCH'S ESTATE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 523.

No. 80–957. ODOM CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 110.

No. 80–981. HAMMOND *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 839, 403 N. E. 2d 305.

No. 80–989. BROWN *v.* BROWN. Sup. Ct. La. Certiorari denied. Reported below: 387 So. 2d 565.

No. 80–999. GREEN *v.* ACKERMAN, DIRECTOR OF HEALTH OF OHIO, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 80–1062. SHIELDS *v.* UNITED STATES NATIONAL BANK OF OREGON. Ct. App. Ore. Certiorari denied. Reported below: 46 Ore. App. 807, 613 P. 2d 114.

No. 80–1068. JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. *v.* STEWART MECHANICAL ENTERPRISES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 971.

No. 80–1092. EATON ET AL. *v.* SUPREME COURT OF ARKANSAS COMMITTEE ON PROFESSIONAL CONDUCT. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 573, 607 S. W. 2d 55.

No. 80–1098. ORANGE COUNTY, NEW YORK *v.* DONOVAN, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 889.

No. 80–1105. WOLFSON *v.* BAKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1074.

No. 80–1106. CASTELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1116. STANDARD REGISTER CO. *v.* GRAPHIC ARTS INTERNATIONAL UNION, LOCAL 508, O-K-I. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 215.

No. 80–1120. PALMERI ET AL. *v.* UNITED STATES; and
No. 80–1271. CAMPISANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 192.

No. 80–1125. BARTZ ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 583, 633 F. 2d 571.

No. 80–1136. DRUMMOND *v.* STAHL ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 127 Ariz. 122, 618 P. 2d 616.

No. 80–1138. MAYOR OF BALTIMORE ET AL. *v.* CROCKETT ET UX. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 682, 415 A. 2d 606.

No. 80–1179. MATHEWS *v.* HANNAH, JUDGE, ET AL. Ct. App. Ariz. Certiorari denied.

No. 80–1184. MCGEE *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 614 P. 2d 800.

No. 80–1223. JONES *v.* UNITED STATES C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 402.

No. 80–1265. D'ANTIGNAC *v.* UNITED STATES; and
No. 80–1266. WELCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 428.

No. 80–1299. MAZZA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1211.

No. 80–1309. LEE *v.* LAW OFFICES OF ALIOTO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 222.

No. 80–5637. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 2d 726.

No. 80–5647. FRAME *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 723, 609 P. 2d 830.

No. 80–5665. CULBRETH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5711. LANDRY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 388 So. 2d 699.

No. 80–5718. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 629 F. 2d 975.

No. 80–5740. BYERS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 80–5758. GUICE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 83 Ill. App. 3d 914, 404 N. E. 2d 261.

No. 80–5851. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 785.

No. 80–5872. OCCHINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 629 F. 2d 561.

No. 80–5913. GOLDSTEIN *v.* BOARD OF REVIEW, DEPARTMENT OF LABOR AND INDUSTRY OF NEW JERSEY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1201.

No. 80–5937. PETROFSKY, DBA PETROF TRADING CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 450, 616 F. 2d 494.

No. 80–5999. HARGROVE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 80–6000. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–6002. HAYNES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–6003. MCKELDIN *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 2d 458.

No. 80–6006. POTTS *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–6013. GALLION *v.* MASSEY FERGUSON CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 634 F. 2d 631.

No. 80–6024. STATUM *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 390 So. 2d 886.

No. 80–6089. BUTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–6095. HOPKINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 631 F. 2d 665.

No. 80–6103. WASHINGTON *v.* MARKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 445.

No. 80–6104. WHITNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 654.

No. 80–6120. WELCH *v.* HICKEY, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 784.

No. 80–6122. EDMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 790.

No. 80–6126. LITTLES, AKA D'ANGELO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80–6129. MASSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1084.

No. 80–6138. MESA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 507.

No. 80–6142. JENKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–6159. WRIGHT *v.* UNITED STATES. C.A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 887.

No. 80–323. COLUMBIA BROADCASTING SYSTEM, INC. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. C. A. 2d Cir. Motions of National Broadcasting Co., Inc.; American Broadcasting Cos., Inc.; and All-Industry Television Station Music License Committee for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these motions or this petition. Reported below: 620 F. 2d 930.

No. 80–340. WASHINGTON *v.* DYER. Ct. App. Wash. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 25 Wash. App. 1036.

No. 80–548. MICHIGAN *v.* RANDLE. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE POWELL would grant certiorari.

No. 80–854. KERPELMAN *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Motion to recuse THE CHIEF JUSTICE denied. Certiorari denied. Reported below: 288 Md. 341, 420 A. 2d 940.

No. 80–929. CORBIN, TRUSTEE IN BANKRUPTCY *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 629 F. 2d 233.

No. 80–1104. STEWART-WARNER CORP. *v.* WESTERN ELECTRIC CO., INC. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 333.

Rehearing Denied

No. 80–650. CONNOR *v.* FLYNN, 449 U. S. 1079;

No. 80–723. PATRICELLI *v.* MECCA LTD. ET AL., 449 U. S. 1082;

No. 80–775. CIAFFONI ET AL. *v.* COWDEN ET AL., 449 U. S. 1083;

No. 80–5429. DEGIDEO *v.* ALTEMOSE CONSTRUCTION CO., 449 U. S. 1086;

No. 80–5565. WILLIAMS *v.* LOUISIANA, 449 U. S. 1103;

No. 80–5641. DOE *v.* WEST ET AL., 449 U. S. 1088;

No. 80–5751. BALDWIN *v.* LOUISIANA, 449 U. S. 1103;

No. 80–5778. WILSON *v.* GEORGIA, 449 U. S. 1103;

No. 80–5792. JOHL *v.* TOWN OF GROTON ET AL., 449 U. S. 1092; and

No. 80–5830. DUNK ET UX. *v.* MANUFACTURERS LIGHT & HEAT CO., 449 U. S. 1128. Petitions for rehearing denied.

No. 79–938. ALLSTATE INSURANCE CO. *v.* HAGUE, PERSONAL REPRESENTATIVE OF HAGUE'S ESTATE, 449 U. S. 302; and

No. 80–529. CALGON CORP. *v.* DAVIS, 449 U. S. 1101. Petitions for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of these petitions.

MARCH 6, 1981

Miscellaneous Order

No. A–754. WILLIAMS *v.* INDIANA. Application for stay of execution of Steven T. Judy, presented to JUSTICE STEVENS, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the stay.

MARCH 9, 1981

Certiorari Granted—Vacated and Remanded

No. 80–276. WESTINGHOUSE ELECTRIC CORP. *v.* VAUGHN ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine, ante,* p. 248. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 620 F. 2d 655.

No. 80–5589. SIMPSON *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wood* v. *Georgia, ante,* p. 261. Reported below: 154 Ga. App. 775, 270 S. E. 2d 50.

JUSTICE BRENNAN, dissenting.

I agree with JUSTICE WHITE that the record in this case presents clear evidence of waiver and that remand is therefore inappropriate. Rather than grant the petition for a writ of certiorari, however, I would vote to summarily reverse the conviction for distributing obscene materials in violation of Ga. Code § 26–2101 (1975) under the view I have frequently expressed, and to which I adhere, that such an obscenity statue is facially unconstitutional. See *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73, 113 (1973) (BRENNAN, J., dissenting); *McKinney* v. *Alabama,* 424 U. S. 669, 678 (1976) (separate opinion of BRENNAN, J.).

JUSTICE WHITE, dissenting.

We granted certiorari in *Wood* v. *Georgia, ante,* p. 261, in order to decide whether it is permissible under the Equal Protection Clause for a State to revoke an offender's probation for failure to make regular payments toward the satisfaction of a fine when nonpayment is due to the offender's indigency. This case raises the identical issue.

The majority vacated and remanded *Wood* v. *Georgia* on the ground that petitioners were perhaps deprived of

their constitutional right to adequate assistance of counsel by the possibly divided loyalties of their counsel. For reasons that I have explained in my dissent in that case, *ante*, at 275–281, I do not believe that the Court's disposition of *Wood* falls within the limits of our jurisdiction. The same jurisdictional limits apply to this case: petitioner at no point sought relief in the Georgia courts on the basis of a claim of ineffective assistance of counsel, nor has there been a final decision on this issue by the highest state court in which a decision could be had, as is required by 28 U. S. C. § 1257 (3). Beyond that, however, the State abandoned any suggestion of conflicting interest and has not raised it here.

There is, in my view, even less justification for the majority's disposition of this case than there is for the conclusion reached in *Wood*. Here, the potential conflict of interest was explained by the trial court to petitioner, and petitioner waived whatever constitutional right he might have had to a different attorney. The transcript in this case shows that the State's attorney raised the conflict of interest issue:

> "It is my contention, and the facts would show, . . . that [petitioner] worked for an organization headquartered on Marietta Street; that they promised they would pay all fines, if any, the lawyer's fees, bond fees and what not and he is now in a position that if his fine had been paid, he would not be where he is. He would not be in jail. . . . [T]he people who promised him that were the people that employed Mr. Zell to come and represent him. . . . If he has employed Mr. Zell, that is one thing, but if they have employed Mr. Zell to come down here and act on his behalf in this matter, I say that there is a clear and distinct conflict of interest." Tr. 2.

The trial court responded to this charge by asking petitioner if Mr. Zell was representing him and petitioner answered: "He is right now." The court continued:

> "Well, do you understand that if you do not have an

> attorney and desire an attorney, that I will appoint an attorney to represent you or if you do not know that, I am informing you now." *Id.*, at 4.

Petitioner responded that he "agreed to allow Mr. Zell to represent [him] because he is totally familiar with the case." He responded specifically that he knew of no possible conflict of interest between himself and Mr. Zell and of none between himself and any client represented by Mr. Zell, including his former employer. The discussion ended with the following exchange:

> "THE COURT: I will let Mr. Zell—if you want me to appoint someone to represent you, I will appoint someone to represent you. I mean, you are free to have Mr. Zell or to have the Court appoint someone.
>
> "MR. SIMPSON: Well, as I stand right now, I just as soon would go ahead with the hearing with Mr. Zell representing me here." *Id.*, at 7.

As I read this record, the possible conflict was fully explained to petitioner, the trial judge made perfectly clear that petitioner could have alternative counsel appointed, and petitioner voluntarily and knowingly decided that he would prefer to have Mr. Zell represent him. Even if there was a possible conflict of interest in Mr. Zell's representation—a proposition with which I do not agree, as I explained in *Wood*—I do not understand how the majority can read this record as failing to establish a valid waiver. Since there is no contention that the right to conflict-free counsel cannot be waived, I can perceive no possible bar to our reaching and resolving the equal protection issue presented in this case and in *Wood*.

Accordingly, I dissent from the Court's disposition of this case. Even if *Wood* was properly vacated and remanded, the petition in this case should be granted and the underlying constitutional issue resolved. With all due respect, I dissent.

Miscellaneous Orders

No. ——. HOMAN & CRIMEN, INC., ET AL. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Motion of petitioners to direct the Clerk to accept and docket the petition for writ of certiorari denied. Reported below: 626 F. 2d 1201.

No. A–611 (80–1418). STEVLICH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Application for recall and stay of mandate, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–625. ATIYEH, GOVERNOR OF OREGON, ET AL. *v.* CAPPS ET AL. D. C. Ore. Motion to vacate the stay heretofore entered by JUSTICE REHNQUIST is denied. JUSTICE BRENNAN and JUSTICE STEVENS would vacate the stay.

No. A–720. BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE *v.* LONG ET AL. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, granted. The order of the United States District Court for the Western District of Washington, filed January 12, 1981, is stayed pending disposition of the appeal currently pending before the United States Court of Appeals for the Ninth Circuit.

No. A–737. YIP *v.* UNITED STATES; and

No. A–741. GAN *v.* UNITED STATES. Applications for continuation of bail, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–197. IN RE DISBARMENT OF CAMPBELL. Disbarment entered. [For earlier order herein, see 449 U. S. 978.]

No. D–206. IN RE DISBARMENT OF KERPELMAN. Disbarment entered. [For earlier order herein, see 449 U. S. 979.]

No. D–211. IN RE DISBARMENT OF BARBUTO. Disbarment entered. [For earlier order herein, see 449 U. S. 990.]

No. D–212. IN RE DISBARMENT OF GROSS. Disbarment entered. [For earlier order herein, see 449 U. S. 1007.]

No. D–219. IN RE DISBARMENT OF ROSPOND. It is ordered that Robert P. Rospond, of Andover, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–220. IN RE DISBARMENT OF OSTROFF. It is ordered that Geoffrey Ostroff, of Cherry Hill, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–221. IN RE DISBARMENT OF LEIGHTON. It is ordered that Elliott Leighton, of Santa Rosa, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–222. IN RE DISBARMENT OF STRICKLAND. It is ordered that Maurice R. Strickland, of East Orange, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–224. IN RE DISBARMENT OF KLAUBER. It is ordered that Gerald Ney Klauber, 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.

No. D–223. IN RE DISBARMENT OF WOLF. It is ordered that Edward H. Wolf, 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–225. IN RE DISBARMENT OF FLORSHEIM. It is ordered that Robert Florsheim, 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. 87, Orig. CALIFORNIA *v.* TEXAS. Application of California for a temporary restraining order granted, and it is ordered that enforcement of the emergency order, No. 176.22.20.001, dated February 17, 1981, and effective March 1, 1981, promulgated by the Texas Department of Agriculture, is stayed pending action on the motion for leave to file a bill of complaint or further order of the Court. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE STEVENS dissent. [For earlier order herein, see *ante,* p. 961.]

No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, 449 U. S. 917.] Motion of petitioners in No. 79–1711 for leave to file a supplemental brief after argument granted.

No. 80–850. JONES, WARDEN *v.* HELMS. C. A. 5th Cir. [Probable jurisdiction noted, 449 U. S. 1122.] Motion of appellant for divided argument denied.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH. C. A. 5th Cir. [Certiorari granted, 449 U. S. 950.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–441. GULF OIL CO. ET AL. *v.* BERNARD ET AL. C. A 5th Cir. [Certiorari granted, 449 U. S. 1033.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–544. FIRST NATIONAL MAINTENANCE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. [Certiorari granted, 449 U. S. 1076.] Motion of Washington Legal Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 80–1188. EDGAR *v.* MITE CORP. ET AL. C. A. 7th Cir.; and

No. 80–6045. KREMER *v.* CHEMICAL CONSTRUCTION CORP. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–1491. TELTRONICS SERVICES, INC. *v.* L. M. ERICSSON TELECOMMUNICATIONS, INC. C. A. 2d Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 80–1320. IN RE RAMIREZ; and

No. 80–5533. IN RE DORTY. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 80–990. CABELL, ACTING CHIEF PROBATION OFFICER OF LOS ANGELES COUNTY, ET AL. *v.* CHAVEZ-SALIDO ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted. Reported below: 490 F. Supp. 984.

Certiorari Granted

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.;

No. 78–1549. TRANS WORLD AIRLINES, INC. *v.* ZIPES ET AL.; and

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: Nos. 78–1545 and 78–1549, 582 F. 2d 1142; No. 80–951, 630 F. 2d 1164.

No. 80–419. ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL. C. A. 9th Cir. Motions of The Gray Panthers and The American Association of Retired Persons et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 643 F. 2d 553.

No. 80–518. U. S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 200 U. S. App. D. C. 402, 627 F. 2d 455.

No. 80–931. CHARLES D. BONANNO LINEN SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 630 F. 2d 25.

No. 80–1070. RIDGWAY ET AL. *v.* RIDGWAY ET AL. Sup. Jud. Ct. Me. Motion of respondent Furbush for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 419 A. 2d 1030.

Certiorari Denied

No. 80–278. MUNSON, PROSECUTING ATTORNEY FOR THE SIXTH JUDICIAL DISTRICT OF ARKANSAS *v.* WOMACK. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 1292.

No. 80–681. LOCAL LODGE NO. 875, BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL–CIO *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–782. OLEGARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 204.

No. 80–841. HENSLER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 1141.

No. 80–889. MALIK *v.* HIDDEN VALLEY CIVIC CLUB ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 601 S. W. 2d 59.

No. 80–893. KIRKLAND ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.;

No. 80–1128. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.; and

No. 80–1139. ARKANSAS-BEST FREIGHT SYSTEM, INC. *v.* KIRKLAND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 629 F. 2d 538.

No. 80–921. BROOKLIER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 620.

No. 80–958. HOPLAND NOKOMIS ASSN. ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 221.

No. 80–983. UNITED STATES STEEL CORP. *v.* CHRIST. C. A. 10th Cir. Certiorari denied.

No. 80–992. FITZPATRICK ET AL. *v.* KIRKLAND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 796.

No. 80–995. SAUNDERS *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 596.

No. 80–1043. GERDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1013.

No. 80–1047. GEORGIA POWER CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 521, 633 F. 2d 554.

No. 80–1049. WESTERN CATHOLIC CHURCH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 736.

No. 80–1093. BROMLEY CORP., DBA ROBERTS AIRWAYS, ET AL. *v.* CORTESE, ADMINISTRATRIX, ET AL. Certiorari denied. Reported below: 623 F. 2d 1084.

No. 80–1109. TEICHGRAEBER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–1122. SCHWARZ *v.* COASTAL RESOURCES MANAGEMENT COUNCIL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 634 F. 2d 616.

No. 80–1142. SOWECO, INC. *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1178.

No. 80–1151. HAHN ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 625 F. 2d 1095.

No. 80–1156. GIBBS *v.* WELSH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 2d 436.

No. 80–1159. HOLLINGSWORTH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 155 Ga. App. 878, 273 S. E. 2d 639.

No. 80–1161. JOHNSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 270 Ark. 247, 604 S. W. 2d 927.

No. 80–1165. HANIGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 80–1172. BUTTKE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 2d 202.

No. 80–1177. CUMMINGS, SHERIFF, ET AL. *v.* DOBBS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 80–1182. MESERVE, REORGANIZATION TRUSTEE, ET AL. *v.* CHESAPEAKE & OHIO RAILWAY CO. ET AL.; and

No. 80–1196. CHESAPEAKE & OHIO RAILWAY CO. ET AL. *v.* MESERVE ET AL., TRUSTEES. C. A. 1st Cir. Certiorari denied. Reported below: 634 F. 2d 1359.

No. 80–1185. WILSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 390 So. 2d 575.

No. 80–1187. SPENCER, DBA IRVING EQUIPMENT & CONSTRUCTION CO. *v.* HOWE RICHARDSON SCALE CO. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1013.

No. 80–1194. WEIDMAN METAL MASTERS CO., INC. *v.* GLASS MASTER CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1024.

No. 80–1198. SHAPIRO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 390 So. 2d 344.

No. 80–1202. BAXTER *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–1209. O'BISO *v.* BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 774.

No. 80–1211. GENERAL PORTLAND CEMENT CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 321.

No. 80–1212. WATTS *v.* CIVIL SERVICE BOARD FOR THE CITY OF COLUMBIA, TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 606 S. W. 2d 274.

No. 80–1243. FRANKS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 391 So. 2d 1133.

No. 80–1279. HILL *v.* AMERICAN AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 730.

No. 80–1311. SHELNUT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 59.

No. 80–1323. DELUCCA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 294.

No. 80–1324. CARIELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 192.

No. 80–1328. EGAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–1355. DEAN ET AL. *v.* COUNTY OF BRAZORIA, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1331.

No. 80–5584. OUTLAW *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 80–5671. ZELDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1206.

No. 80–5768. MCDONALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 80–5859. MCDONALD *v.* DRAPER, JUDGE. Ct. Crim. App. Tenn. Certiorari denied.

No. 80–5894. ANTONI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 634 F. 2d 617.

No. 80–5895. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 632 F. 2d 155.

No. 80–5919. MUSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 1041.

No. 80–6007. BRADENBURG *v.* BEAMAN ET AL.; and
No. 80–6032. BRADENBURG *v.* SHILLINGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 120.

No. 80–6021. DOCK *v.* MORRIS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6023. COLEMAN *v.* SOWDERS, WARDEN; and
No. 80–6094. COLEMAN *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 450.

No. 80–6027. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6028. KINNELL *v.* CLERK OF THE COURT OF APPEALS OF KANSAS ET AL.; KINNELL *v.* CARLIN ET AL.; and KINNELL *v.* WILLCOTT ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6033. RAMOS *v.* PUERTO RICO. Super. Ct. P. R., Aquadilla Part. Certiorari denied.

No. 80–6035. SHEPPHARD *v.* CIRCUIT COURT OF CLARK COUNTY, INDIANA, ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 413 N. E. 2d 258.

No. 80–6036. HOLSEY *v.* WATKINS, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 623.

No. 80–6037. MAYNARD *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1218.

No. 80–6040. PHILLIPS *v.* CAREY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 638 F. 2d 207.

No. 80–6041. DOAK *v.* MARYLAND; and
No. 80–6042. DOAK *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 80–6046. RAHMAN, AKA MCGEE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 80–6047. CALIGURI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 1159.

No. 80–6049. OWCHARIW *v.* LAHR ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–6050. HARRIS *v.* SPAIN, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1349.

No. 80–6052. ORPIANO *v.* HORSLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 625.

No. 80–6053. MULLINS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 80–6060. YOUNG *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6061. MACARTHUR *v.* PHILIPPINE AIR LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 192.

No. 80–6066. SARSYCKI *v.* HESS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–6091. HENDERSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 730.

No. 80–6140. LININGER *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 80–6153. WIDEMON *v.* PETROVSKY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6162. D'ANGELO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80–6166. INGRAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1227.

No. 80–6175. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–871. BRIDDLE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 84 Ill. App. 3d 523, 405 N. E. 2d 1357.

JUSTICE BRENNAN, with whom JUSTICE STEWART joins, dissenting.

Petitioner, who has been acquitted of speeding, has filed a petition for a writ of certiorari, claiming that his pending prosecution for perjury and obstruction of justice would constitute double jeopardy under the Fifth and Fourteenth Amendments if the prosecution were allowed to proceed. I would grant the petition for certiorari and reverse the judgment below insofar as it permitted prosecution of the perjury charge.

At petitioner's trial for speeding, the arresting state trooper testified that, after clocking petitioner's speed by radar, he stopped petitioner's car and took his license. When petitioner told the trooper that he was a county board member and was late for an important meeting at the office of the Forest Preserve District, the trooper allowed petitioner to proceed to that office. The trooper followed petitioner, parked behind petitioner's car after arriving at the office of the Forest Preserve District, and then wrote up the citation. The citation listed petitioner's name, address, and driver's license

number and described his vehicle as a 1978 silver Chevrolet, bearing Illinois dealer license plates, number D/L 80E. Petitioner signed his name and address on the back of the ticket.

Petitioner, appearing *pro se,* testified that, on the day in question, he was driving a green Cadillac which did not bear dealer plates. When the prosecutor asked whether petitioner had borrowed or rented a car that day, petitioner responded that he had never driven a car with dealer plates, had never driven a silver Chevrolet, and had not driven a Chevrolet in the preceding 15 years. Petitioner was acquitted of the speeding charge.

After the acquittal, petitioner was indicted for perjury and for obstruction of justice. The perjury charge was based on petitioner's testimony that he was driving a Cadillac, not a Chevrolet. The trial court dismissed the indictment on the ground that prosecution of these charges was barred "under the doctrine of collateral estoppel." App. to Pet. for Cert. 2. The Appellate Court of Illinois reversed, concluding that the doctrine of collateral estoppel embodied in the Double Jeopardy Clause of the Fifth Amendment was inapplicable and that, accordingly, *Ashe* v. *Swenson*, 397 U. S. 436 (1970), did not bar prosecution of the indictment. 84 Ill. App. 3d 523, 405 N. E. 2d 1357 (1980).

I believe that the Court's opinion in *Ashe* v. *Swenson* forbids prosecution of petitioner for perjury. In *Ashe,* we held that the double jeopardy guarantee encompasses the doctrine of collateral estoppel as a constitutional requirement. Determining the applicability of that doctrine "requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U. S., at 444. Thus, in *Ashe,* petitioner's acquittal of the charge of robbing one of six men playing poker precluded a prosecution for robbing another of the six men, because

"[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.*, at 445.

At petitioner's speeding trial, "[t]he single rationally conceivable issue in dispute," *ibid.*, was whether petitioner was driving the automobile described in the citation, a 1978 silver Chevrolet, or whether he was driving a "green Cadillac." There is no need to speculate over whether petitioner's acquittal might have rested on some other basis since the trial judge in the speeding case testified at the hearing on petitioner's motion to dismiss the perjury and obstruction of justice charges. He stated:

> "The officer testified very specifically that Mr. Briddle had been driving a new model silver Chevrolet. Mr. Briddle was very specific. He was asked the question a number of times about driving his 1973 Cadillac and that he always drove the Cadillac and never borrowed or leased a Chevrolet on that date.
>
> "He was certain he was driving his Cadillac. I felt that there was some possibility at the time that since the officer did not write the ticket until he was at the Forest Preserve meeting that he may have pulled behind the wrong vehicle and written up the wrong car since the specific charge was speeding in a 1978, I believe it was, Chevrolet. That issue was not completely resolved to my satisfaction beyond a reasonable doubt."*

This testimony makes clear that the trial judge found that there was not proof beyond a reasonable doubt that petitioner was driving the Chevrolet, and that the acquittal rested on that basis. Therefore, a necessary fact to sustain a perjury conviction—that petitioner was really driving the silver Chevrolet—was conclusively rejected at the speeding

*In reversing the trial court, the Illinois Appellate Court did not discredit the testimony of the trial judge.

trial. This conclusion is entitled to collateral-estoppel effect. *Ibid.* Any further prosecution of the perjury count of the indictment would negate the beneficial effect of the factfinding at the speeding trial to which petitioner is constitutionally entitled.

I therefore dissent.

No. 80–6034. GALL *v.* KENTUCKY. Sup. Ct. Ky.; and

No. 80–6151. KING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–6034, 607 S. W. 2d 97; No. 80–6151, 390 So. 2d 315.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–806. DROCIAK *v.* SUPREME COURT OF NEW HAMPSHIRE, 449 U. S. 1106;

No. 80–872. ILLINOIS *v.* SAVORY, 449 U. S. 1101;

No. 80–888. ROWBOTHAM *v.* AMERICAN AIRLINES, INC., ET AL., 449 U. S. 1084;

No. 80–5674. HAMILTON *v.* GEORGIA, 449 U. S. 1103; and

No. 80–5715. CLARK *v.* LOUISIANA, 449 U. S. 1103. Petitions for rehearing denied.

MARCH 23, 1981

Appeals Dismissed

No. 79–1733. W. D. R. *v.* TAYLOR COUNTY CHILD WELFARE UNIT. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 79–6370. ABLE ET UX. *v.* DELAWARE. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 414 A. 2d 820.

No. 80–537. IN RE J. W. B. ET AL. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 80–545. LOWREY *v.* MORRIS. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 384 So. 2d 863.

No. 80–5302. HOWELL *v.* COSHOCTON COUNTY CHILDREN'S SERVICES BOARD. Appeal from Ct. App. Ohio, Coshocton County, dismissed, it appearing that the judgment below rests upon independent and adequate state grounds.

No. 80–5492. WHACK *v.* MARYLAND. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 288 Md. 137, 416 A. 2d 265.

No. 80–6090. STEIN *v.* FRANK ET UX. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 80–754. MISSOURI *v.* COUNSELMAN; MISSOURI *v.* MCGEE; MISSOURI *v.* PAYNE; MISSOURI *v.* WHITE; and MISSOURI *v.* WILLIAMS. Ct. App. Mo., Eastern Dist. Motions of respondents Williams and McGee for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Albernaz* v. *United States, ante,* p. 333. JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 603 S. W. 2d 3 (first case); 602 S. W. 2d 709 (second case); 607 S. W. 2d 822 (third case); 610 S. W. 2d 646 (fourth case); 610 S. W. 2d 644 (fifth case).

No. 80–283. DELAWARE *v.* HUNTER. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Albernaz* v. *United States*, *ante*, p. 333. JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 420 A. 2d 119.

No. 80–749. DELAWARE *v.* EVANS. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Albernaz* v. *United States*, *ante*, p. 333. JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 420 A. 2d 1186.

Miscellaneous Orders

No. A–687 (80–1569). JOHNSON *v.* UNITED STATES. Application to recall and stay the mandate of the United States Court of Appeals for the Tenth Circuit, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–779. DORTA *v.* FORSHT, UNITED STATES MARSHAL. D. C. S. D. Fla. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. A–785. BP OIL, INC. *v.* DONOVAN, SECRETARY OF LABOR. D. C. E. D. Pa. Application for stay and injunction pending appeal to the United States Court of Appeals for the Third Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. 80–242. LEHMAN, SECRETARY OF THE NAVY *v.* NAKSHIAN. C. A. D. C. Cir. [Certiorari granted *sub nom. Hidalgo* v. *Nakshian*, 449 U. S. 1009.] Motion of Claude Pepper et al. for leave to file a brief as *amici curiae* granted.

No. 80–581. COMMONWEALTH EDISON CO. ET AL. *v.* MONTANA ET AL. Sup. Ct. Mont. [Probable jurisdiction noted, 449 U. S. 1033.] Motion of Arizona for leave to adopt the brief *amici curiae* of Wyoming et al. denied.

No. 78–1088. KISSINGER *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL., 445 U. S. 136. Motion of Reporters Committee for Freedom of the Press for clarification of the judgment denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 80–396. CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 449 U. S. 1060.] Motion of National Institute of Municipal Law Officers for leave to file an untimely brief as *amicus curiae* denied. Motion of Washington et al. for leave to file a brief as *amici curiae* out of time granted.

No. 80–802. NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER *v.* BLUE CROSS OF KANSAS CITY ET AL. C. A. 8th Cir. [Certiorari granted, 449 U. S. 1123.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted an additional 15 minutes for oral argument.

No. 80–824. POLK COUNTY ET AL. *v.* DODSON. C. A. 8th Cir. [Certiorari granted, *ante*, p. 963.] Motion for appointment of counsel granted, and it is ordered that John D. Hudson, Esquire, of Des Moines, Iowa, be appointed to serve as counsel for respondent in this case.

No. 80–1012. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist.;

No. 80–1030. BOHEMIAN DISTRIBUTING CO. *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist.; and

No. 80–1052. WINE & SPIRITS WHOLESALERS OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–5887. WHITE *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–5392. HOWE *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. [Certiorari granted *sub nom. Howe* v. *Civiletti*, 449 U. S. 1123.] Motions of Kansas Defender Project and Families & Friends of Prisoners, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for divided argument granted.

No. 80–6111. IN RE DAVIS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 80–767. UNITED STATES *v.* LEE. Appeal from D. C. W. D. Pa. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 497 F. Supp. 180.

No. 80–965. TEXACO, INC., ET AL. *v.* SHORT ET AL.; and

No. 80–1018. POND ET AL. *v.* WALDEN ET AL. Appeal from Sup. Ct. Ind. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: —— Ind. ——, 406 N. E. 2d 625.

Certiorari Granted

No. 80–1121. UNITED STATES *v.* CLARK ET AL. Ct. Cl. Certiorari granted. Reported below: 220 Ct. Cl. 278, 599 F. 2d 411.

No. 80–5889. SANTOSKY ET AL. *v.* KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 75 App. Div. 2d 910, 427 N. Y. S. 2d 319.

No. 80–1251. UNITED STATES *v.* VOGEL FERTILIZER Co. Ct. Cl. Certiorari granted. Reported below: 225 Ct. Cl. 15, 634 F. 2d 497.

Certiorari Denied. (See also Nos. 80–5492 and 80–6090, *supra.*)

No. 79–1941. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* SHERWOOD. C. C. P. A. Certiorari denied. Reported below: 613 F. 2d 809.

No. 80–2049. MANN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 668.

No. 80–6682. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 185.

No. 79–6731. CALDWELL *v.* CARROLL COUNTY WELFARE DEPARTMENT. Ct. App. Ohio, Carroll County. Certiorari denied.

No. 79–6860. GUARDIOLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 185.

No. 80–13. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* HIRSCHFELD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 9, 615 F. 2d 1368.

No. 80–816. BOURQUE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 392 So. 2d 686.

No. 80–875. LOUISIANA ET AL. *v.* GARY W. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 804.

No. 80–905. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 999.

No. 80–937. BAGLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 80–949. MICHAEL MOTORS, INC. *v.* COLORADO DEALER LICENSING BOARD. Sup. Ct. Colo. Certiorari denied. Reported below: 200 Colo. ——, 616 P. 2d 110.

No. 80–950. NICOLADZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 225.

No. 80–975. FEDERATION FOR AMERICAN IMMIGRATION REFORM ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–977. HULLUM *v.* UNITED STATES; and
No. 80–1009. LENTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1280.

No. 80–987. NEVADA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–994. DIAMOND *v.* WALTER, ASSISTANT UNITED STATES ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80–1000. PAYTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 400.

No. 80–1004. HAVENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1311.

No. 80–1016. BOISE CASCADE CORP. *v.* UNION PACIFIC RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 720.

No. 80–1021. WOOD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (FIVE POINTS SHOPPING CENTER, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 80–1022. PASCO PETROLEUM CO., INC. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 633 F. 2d 956.

No. 80–1048. KARLIN *v.* ORR, SECRETARY OF THE AIR FORCE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1347.

No. 80–1061. WATERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–1069. LAY FACULTY ASSN., LOCAL 1261 *v.* BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 818.

No. 80–1077. FACTOR ET AL. *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. C. P. A. Certiorari denied.

No. 80–1085. UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 1014.

No. 80–1096. AIKEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 769.

No. 80–1110. SAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1220.

No. 80–1130. PEOPLES BANK OF INDIANOLA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 366.

No. 80–1135. HEDSTROM CO., A SUBSIDIARY OF BROWN GROUP, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 305.

No. 80–1140. THOMAS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 192.

No. 80–1180. MCCALL ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1185.

No. 80–1181. McCALL ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 192.

No. 80–1189. BUMPUS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–1191. BURT *v.* JUSTICES OF THE SUPREME COURT OF IDAHO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 787.

No. 80–1195. SEWELL *v.* PHILLIPS PETROLEUM CO. C. A. 10th Cir. Certiorari denied.

No. 80–1206. GRCICH, ADMINISTRATOR *v.* PITTSBURGH NATIONAL BANK. Sup. Ct. Pa. Certiorari denied. Reported below: 492 Pa. 210, 423 A. 2d 347.

No. 80–1214. COMPTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 607 S. W. 2d 246.

No. 80–1215. AMERICAN FRUIT PURVEYORS, INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 370.

No. 80–1219. PURVIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 223.

No. 80–1220. RAY *v.* FREEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 439.

No. 80–1225. MANSFIELD *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 80–1226. STADLER *v.* CITY OF PHILADELPHIA. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 173 N. J. Super. 235, 413 A. 2d 996.

No. 80–1229. EHRMAN *v.* CITY OF PHILADELPHIA. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–1230. NEWMAN ET AL., CO-EXECUTRIXES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80–1232. THILL SECURITIES CORP. ET AL. *v.* NEW YORK STOCK EXCHANGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 633 F. 2d 65.

No. 80–1238. CAROTHERS ET AL. *v.* RICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 7.

No. 80–1241. BINKOWSKI *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 80–1242. MISSOURI PACIFIC RAILROAD CO. *v.* ALCORN. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 598 S. W. 2d 352.

No. 80–1250. BROWN *v.* BROWN ET AL. Sup. Ct. La. Certiorari denied. Reported below: 388 So. 2d 1151.

No. 80–1255. FIRESTONE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 386 So. 2d 1329.

No. 80–1259. VON BARTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 999.

No. 80–1263. DUNIVANT ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 155 Ga. App. 884, 273 S. E. 2d 621.

No. 80–1272. COUNTY OF SAN MATEO ET AL. *v.* CANTWELL. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 631.

No. 80–1273. MCILROY ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–1283. THORNTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 390 So. 2d 1093.

No. 80–1287. INEXCO OIL CO. *v.* WALTERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 891.

No. 80–1288. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* IBERIA AIR LINES OF SPAIN. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1201.

No. 80–1292. JOHNSON ET AL. *v.* TRUEBLOOD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 287.

No. 80–1293. JOHN L. SCHULZ PLUMBING & HEATING *v.* PRATTE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80–1307. CAMACHO *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 98 Wis. 2d 751, 297 N. W. 2d 517.

No. 80–1327. HUNTER *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 80–1337. MCCORSTIN *v.* U. S. DEPARTMENT OF LABOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 630 F. 2d 242.

No. 80–1351. BERAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–1352. BOLLOTIN *v.* KAUFMAN, TAYLOR, KIMMEL & MILLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1200.

No. 80–1371. WEGNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–1378. CASAREZ-ULLOA, AKA MOLINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–1411. BASKES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 649 F. 2d 471.

No. 80–1418. STEVLICH ET AL. *v.* UNITED STATES; and
No. 80–6242. KAVAJA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 639 F. 2d 786.

No. 80–1424. CANTERA-DUYOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1161.

No. 80–1428. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 460.

No. 80–1440. BAPTISTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 666.

No. 80–1448. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80–5214. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 163.

No. 80–5752. WILKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 868.

No. 80–5763. COUCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1347.

No. 80–5793. COOPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 153, 405 N. E. 2d 1202.

No. 80–5796. TABB *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 491 Pa. 372, 421 A. 2d 183.

No. 80–5864. KETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80–5888. SMOTHERS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 605 S. W. 2d 128.

No. 80–5899. EADES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 633 F. 2d 1075.

No. 80–5908. JUREK *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 929.

No. 80–5914. SHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 633 F. 2d 77.

No. 80–5938. GOOLSBY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. xciii.

No. 80–5953. HACKETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1179.

No. 80–5954. OWENSBY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6005. OUTING *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 632 F. 2d 1144.

No. 80–6038. GALVAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 800, 407 N. E. 2d 558.

No. 80–6067. LAURENTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 1352.

No. 80–6069. BONEY *v.* ITT COMMUNITY DEVELOPMENT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1006.

No. 80–6071. FORMAN *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 634.

No. 80–6074. RICHEY *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–6077. WILLIAMS *v.* EVANGELICAL RETIREMENT HOMES OF GREATER ST. LOUIS, DBA FRIENDSHIP VILLAGE. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1225.

No. 80–6080. SHELDON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 301 N. W. 2d 604.

No. 80–6084. BURTON v. KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 228 Kan. cxciii, 621 P. 2d 436.

No. 80–6085. HOCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6087. BARHAM v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1221.

No. 80–6088. DAVIS *v.* WARDEN, CENTRAL PRISON, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 447.

No. 80–6092. CALDWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 144.

No. 80–6097. MACON *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 781.

No. 80–6098. AKBAR *v.* CANNERY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 2d 339.

No. 80–6100. LOMAX *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 413.

No. 80–6101. MABRY *v.* CENLA FINANCE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 893.

No. 80–6106. HAYTON *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6110. MCDONALD *v.* METROPOLITAN AIRPORT AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1218.

No. 80–6114. MARSHALL *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 80–6115. FRIEDMAN *v.* JEWISH FAMILY SERVICES. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–6116. NYLON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 80–6117. RICHARDS *v.* PARSONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 80–6119. DUKES *v.* DARCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 618.

No. 80–6121. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 1196, 413 N. E. 2d 1386.

No. 80–6124. BUMPUS *v.* GUNTER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 635 F. 2d 907.

No. 80–6128. HOUSTON v. LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6130. MCMILLIAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 409 N. E. 2d 612.

No. 80–6132. GRICE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 718, 410 N. E. 2d 209.

No. 80–6133. ZDANIS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: —— Conn. ——, 438 A. 2d 696.

No. 80–6134. DEPAUL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 491 Pa. 417, 421 A. 2d 207.

No. 80–6143. MARTIN *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 728.

No. 80–6156. LAKE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 390 So. 2d 1088.

No. 80–6172. JOHNSON *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6173. STANMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1228.

No. 80–6176. DEJARNETTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 73.

No. 80–6180. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–6183. STACKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1347.

No. 80–6185. BERTRAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 2d 338.

No. 80–6187. PUCHALA *v.* COINTELPRO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 73.

No. 80–6189. WHITNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 902.

No. 80–6201. SPARROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 635 F. 2d 794.

No. 80–6203. HOLLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 48, 654 F. 2d 763.

No. 80–6204. GABBARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–6207. MCWILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–6215. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–6218. FELICIANO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 441.

No. 80–6220. CIMINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 57.

No. 80–6221. FRANCIS *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1208.

No. 80–6230. KELLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6238. HAYMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 74.

No. 80–6251. DE VINCENT *v.* PUTNAM, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 633.

No. 80–299. JOHN NUVEEN & CO., INC., ET AL. *v.* SANDERS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 619 F. 2d 1222.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

This securities controversy, which has been in litigation for 11 years, involves sales of commercial paper in the 1960's. The Court of Appeals for the Seventh Circuit has heard the case four times on various issues over the years, and the present petition for certiorari is the third to come before the Supreme Court. The Court today denies further review, and it is indeed long past time that this litigation should come to rest. I dissent from the denial of certiorari, however, because I believe that the Court of Appeals has seriously misapplied the Securities Act of 1933. Its decision could

affect adversely the efficiency of the Nation's short-term financing markets.

I

John Nuveen & Co. (hereinafter petitioner) is a broker and dealer registered with the Securities and Exchange Commission (SEC). In the late 1960's, petitioner undertook to sell the short-term promissory notes—commercial paper—of Winter & Hirsch, Inc. (W&H), a consumer finance company. Relying on (i) the company's certified financial statements, (ii) responses to inquiries from banks, and (iii) a brief inspection of company records, petitioner issued a "Commercial Paper Report," similar to a prospectus, on W&H commercial paper. The report reviewed the data in certified financial statements and noted that "[t]he ratio of debt to capital funds came to 311%—Excellent! . . . Bad debts charged off came to $375,000, and recoveries in relation were $173,000—46%, an excellent showing." Respondents and other customers of petitioner made purchases.

Unknown to petitioner and to the public, W&H at the time was in serious financial trouble. W&H officers had conspired with auditors from the certified public accounting firm of Lieber, Bleiweis & Co. to tamper with the company's financial statements to make the company appear profitable. Its financial statement for 1968 showed that W&H had earned $500,000; in fact, it had lost about $1 million.

When the fraud was discovered in 1970, officials from W&H and Lieber, Bleiweis were convicted of federal fraud charges. Holders of W&H commercial paper were paid about 65 cents on the dollar. A class of plaintiffs, respondents here, sued under a variety of theories to recover the remainder. The issue presently before the Court concerns liability under § 12 (2) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77*l* (2), which provides, in pertinent part:

"Any person who—

"(2) offers or sells a security . . . by means of a pro-

spectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact . . . and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him . . . ."

The District Court held that petitioner was liable under § 12 (2) because it had failed to use "reasonable care" when it issued the misleading report and recommended orally to some individuals that they buy W&H paper. The Court of Appeals affirmed. *Sanders IV*, 619 F. 2d 1222 (1980).[1] It reasoned that petitioner had failed to use "reasonable care" because petitioner had not made a reasonable *investigation* of W&H's financial health. Instead, petitioner had relied principally on the certified financial statements.[2] Its inde-

[1] The District Court also found petitioner liable under § 12 (1) of the Act, 15 U. S. C. § 77*l* (1). The Court of Appeals did not decide whether petitioner was liable under this theory, 619 F. 2d, at 1224, n. 1, although in a prior opinion it had expressed "great doubt" about the validity of that legal theory, *Sanders III*, 554 F. 2d 790, 794 (1977).

[2] The Court of Appeals noted that petitioner had an " 'honest belief that [the] financial statements . . . correctly represented' " W&H's financial condition. *Sanders IV*, 619 F. 2d, at 1224, quoting *Sanders II*, 524 F. 2d 1064, 1066 (1975). The court assumed for purposes of its decision that the audit reports and certified financial statements were not defective on their face and that nothing in them gave petitioner any reason to question their accuracy. *Sanders IV*, *supra*, at 1227, n. 10. Lieber, Bleiweis represented that its audit had been conducted "in accordance with generally accepted auditing standards applicable in the circumstances and comprised such tests of the accounting records and supporting evidence and such other procedures as we considered necessary." The auditor's opinion also noted that no "detailed audit" of certain transactions had been performed. Petitioner erroneously stated in its Commercial Paper Report that Lieber, Bleiweis had performed a detailed audit. The Court of Appeals did not suggest that petitioner's error in this respect was relevant to the question of petitioner's care in relying on the data.

pendent investigation consisted of inquiries to banks and a one-day spot check of company records. The Court of Appeals thought that petitioner also should have examined the company's tax returns, its minute books, and the workpapers of the independent accountants. *Id.*, at 1228, citing *Sanders II*, 524 F. 2d 1064, 1069 (1975).

II

Although the opinion of the Court of Appeals is not explicit, it appears to impose a duty of "reasonable investigation" rather than § 12 (2)'s requirement of "reasonable care."

A

Section 11 (a) of the 1933 Act, 15 U. S. C. § 77k (a), imposes liability on certain persons for selling securities in a registered public offering pursuant to a materially false or misleading registration statement. A registered offering is the class of financial transactions for which Congress prescribed the most stringent regulation. The standard of care imposed on an underwriter is that it must have "had, after *reasonable investigation,* reasonable ground to believe and did believe" that the registration statement was accurate. § 11 (b)(3)(A) of the Act, 15 U. S. C. § 77k (b)(3)(A) (emphasis added).

Liability in this case was not imposed on petitioner under § 11, but under § 12 (2). Under the latter section, it is necessary for sellers to show only that they "did not know, and in the exercise of *reasonable care* could not have known," that their statements were false or misleading. (Emphasis added.)

In providing standards of care under the 1933 Act, Congress thus used different language for different situations. "Reasonable *investigation*" is required for registered offerings under § 11, but nothing more than "mer[e] . . . 'reasonable *care*' " is required by § 12 (2). Douglas & Bates, The Fed-

eral Securities Act of 1933, 43 Yale L. J. 171, 208 (1933). The difference in language is significant, because in the securities Acts Congress has used its words with precision. See, *e. g., Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 198–201 (1976); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 755, 756 (1975) (POWELL, J., concurring). "Investigation" commands a greater undertaking than "care." See Douglas & Bates, *supra,* at 208, n. 205.

In a brief filed in this case with the Court of Appeals, the SEC expressly stated that the standard of care under § 12 (2) is less demanding than that prescribed by § 11:

> "[I]t would be inconsistent with the statutory scheme to apply precisely the same standards to the scope of an underwriter's duty under Section 12 (2) as the case law appropriately has applied to underwriters under Section 11. Because of the vital role played by an underwriter in the distribution of securities, and because the registration process is integral and important to the statutory scheme, we are of the view that a higher standard of care should be imposed on those actors who are critical to its proper operations. Since Congress has determined that registration is not necessary in certain defined situations, we believe that it would undermine the Congressional intent—that issuers and other persons should be relieved of registration—if the same degree of investigation were to be required to avoid potential liability whether or not a registration statement is required." Brief for SEC in Nos. 74–2047 and 75–1260 (CA7), *Sanders III,* p. 69.

The Court of Appeals' opinion may be read as holding that petitioner's duty of "reasonable care" under § 12 (2) required it independently to *investigate* the accuracy and completeness of the certified financial statements. It was customary, however—and in my view entirely reasonable—for petitioner to rely on these statements as accurately reflecting W&H's finan-

cial condition.[3] Even under § 11 of the Act, an underwriter is explicitly absolved of the duty to investigate with respect to "any part of the registration statement purporting to be made on the authority of an expert" such as a certified accountant if "he had no reasonable ground to believe and did not believe" that the information therein was misleading. § 11 (b)(3)(C) of the Act, 15 U. S. C. § 77k (b)(3)(C); see § 11 (a)(4), 15 U. S. C. § 77k (a)(4). This provision is in the Act because, almost by definition, it *is* reasonable to rely on financial statements certified by public accountants.[4] Yet, in this case, the Court of Appeals nevertheless seems to have imposed the higher duty prescribed by § 11 to investigate, but denied petitioner the right to rely on "the authority of an expert" that also is provided by § 11.[5]

[3] Although it appears that petitioner, in accord with general custom, relied primarily on the financial statements of the independent auditors, petitioner did take an additional precaution: it checked with the major banks that extended millions of dollars of credit to W&H. The Court of Appeals held that this inquiry was insufficient because the banks themselves may not have acted with "prudence." See *Sanders II,* 524 F. 2d, at 1071, and n 20. In my view, the fact that petitioner ascertained that banks with national and international reputations were extending credit to W&H is highly relevant to whether petitioner exercised reasonable care even assuming, *arguendo,* that petitioner was not entitled simply to rely on the certified financial statements.

[4] Reliance upon facially unexceptionable certified financial statements, as to the correctness of the financial data shown therein, is essential to the proper functioning of securities marketing, to the trading in securities, to the lending of money by banks and financial institutions, and to the reliance by stockholders on the reports of their corporations. For the most part, certified public accountants faithfully have fulfilled the trust placed on them. But where breaches by accountants occur, it is the accountants themselves—not those who rely in good faith on their professional expertise—who are at fault and who should be held responsible.

[5] Moreover, the duty to investigate imposed by the Court of Appeals rarely would uncover the type of fraud involved in this case. According to the Court of Appeals, petitioner would have learned of the fraud if it had examined W&H's minute books, the accountant's workpapers, and company tax returns. *Sanders II, supra,* at 1069. I accept this

B

The Solicitor General at this Court's request has filed a brief *amicus curiae*. He does not embrace the decision of the Court of Appeals, see *supra*, at 1009, but nevertheless suggests that we deny certiorari because, *inter alia*, courts in the future "will undoubtedly recognize" that the decision in this case is confined to its "unusual fact situation." Brief for United States as *Amicus Curiae* 7.

If it were clear that the decision fairly must be read as thus limited, I would not dissent from denial of certiorari. My concern is that the opinion of the Court of Appeals will be read as recognizing no distinction between the standards of care applicable under §§ 11 and 12 (2), and particularly as casting doubt upon the reasonableness of relying upon the expertise of certified public accountants. Dealers may believe that they must undertake extensive independent financial investigations rather than rely on the accuracy of the certified financial statements. If this is so, the efficiency of the short-term financial markets will be impaired.[6] I would grant certiorari.

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finding, but observe that this would be most unusual. What one normally finds in minute books sheds no light whatever on the accuracy of audited financial statements. Nor would it be enlightening to examine the workpapers of the certified public accountants. The drafters of corporate minutes and accountants bent on fraud hardly are likely to reflect the fraud in records or papers that are easily subpoenaed. Similarly, information can be gleaned from tax returns only if they are honestly prepared. The Court of Appeals itself noted: "Experience teaches us that fraud can be skillfully hidden." *Sanders II, supra*, at 1071.

[6] Commercial paper, for example, normally is issued for periods of 30 to 90 days, and in no event more than 270 days. It is useful for borrowers with fluctuating temporary cash needs. Dealers such as petitioner buy commercial paper from issuers and resell it to investors. A dealer's compensation is the "spread" between the price at which he buys the paper from the issuer and the price charged the investor. Comment, The Commercial Paper Market and the Securities Acts, 39 U. Chi. L. Rev. 362, 367–368 (1972). The dealer's "spread" historically has been rela-

No. 80–653. ALIOTO ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 845.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, dissenting.

This case presents the question whether attorney's fees may be awarded under 42 U. S. C. § 1988 to plaintiffs in a civil rights action who obtain a preliminary injunction against a city when the city is later denied the right to appeal the issuance of the injunction because of mootness. In my view, the award of attorney's fees in such a situation is not authorized by any statute, and I dissent from the denial of the petition for a writ of certiorari.

Respondents brought this action under 42 U. S. C. §§ 1981 and 1983 against officials of the city of San Francisco and its police department challenging certain police practices which took place in April 1974 during what became known as "Operation Zebra." Beginning in late 1973, a series of vicious random killings and attempted killings took place on the streets of San Francisco. These murders became known as the "Zebra" killings. Between December 1973 and April 1974, 12 persons were murdered and 6 others were wounded. The police department of San Francisco responded to this violence by initiating a special investigatorial procedure known as "Operation Zebra" to attempt to identify and capture the killers. Police directives and memoranda authorized officers to stop and frisk black males resembling two composite drawings and having described physical characteristics. Over 600 persons were stopped and "pat searched" in the course of the operation.

Respondents brought two separate actions seeking declaratory and injunctive relief on behalf of black males who were stopped or were subject to being stopped pursuant to Opera-

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tively small. *Id.*, at 368; see Pet. for Cert. 17, n. 20. The additional expense and legal exposure made necessary by the Court of Appeals' decision will increase the "spread," and hence also the cost of borrowing.

tion Zebra practices. The District Court preliminarily enjoined the police procedure and also concluded that respondents were entitled to attorney's fees. Petitioners appealed the entry of the preliminary injunction but before the appeal was heard the Zebra killers were apprehended, convicted, and sentenced. The police investigation of the Zebra killings having ceased, the Court of Appeals dismissed the appeal as moot and the judgment of the District Court was vacated. *Williams* v. *Alioto,* 549 F. 2d 136 (CA9 1977). Subsequently, the District Court entered an order awarding respondents a total of $45,000 in attorney's fees. The Court of Appeals affirmed that order, finding that "by obtaining the preliminary injunction [respondents] 'prevailed on the merits of at least some of their claims.' . . . The preliminary injunction prevented [petitioners] from continued enforcement of their original guidelines, which is precisely the relief [respondents] sought." 625 F. 2d 845, 847 (1980).

In my view, an award of attorney's fees under these circumstances is not authorized by 42 U. S. C. § 1988. That section provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

To treat respondents as "prevailing parties" under § 1988 because they secured a preliminary injunction is to ignore the fact that petitioners exercised their right to appeal the entry of that order and the fact that the propriety of the injunction was being challenged on appeal at the time the case became moot and the appeal dismissed. No permanent injunction ever issued and there has been no settlement or consent decree.

The question raised here is of significance because liability for attorney's fees inflicts severe financial penalties. Expo-

sure of any party to such penalties when mootness deprives him of the appeal authorized by law which he had already initiated should result only from a clear authorization by Congress or settled precedent of this Court. Here the settled precedent is exactly contrary to what was done by the court below. Over three decades ago we explained in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), that the practice of this Court in dealing with a civil case which has become moot is to reverse or vacate the judgment below. That is exactly what the Court of Appeals did here. However, we also explained in *Munsingwear* that when the procedure of vacating the judgment is followed, "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.*, at 40. The Court of Appeals failed to follow this rule and petitioners have unquestionably been "prejudiced by a decision which in the statutory scheme was only preliminary."

The decision below has spawned harsh consequences which are contrary to the policy espoused in *Munsingwear, supra.* Accordingly, I would grant the petition for a writ of certiorari and reverse the judgment of the Court of Appeals.

No. 80–763. ESTELLE, CORRECTIONS DIRECTOR *v.* JUREK. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 623 F. 2d 929.

JUSTICE REHNQUIST, dissenting.

In light of the facts of this case and the legal issues it presents, it is inexplicable to me why this Court fails to grant the petition for certiorari and give the case plenary consideration. Against the backdrop of a death sentence, this case involves the voluntariness of a series of confessions, the proper standard of review of state and federal lower court determinations of "voluntariness" in a habeas corpus proceeding, and the applicability of the harmless-error doctrine. To be sure, the issues presented are difficult. But that is

surely no reason for this Court to avoid its responsibility of resolving a case as important to the integrity of our judicial system as this.

Jurek is no stranger to this Court. In early 1974, Jurek was convicted by a jury of the murder of a 10-year-old girl and sentenced to death. The Texas Court of Criminal Appeals affirmed, rejecting Jurek's contention that his oral and two written confessions were involuntary and should not have been admitted into evidence. *Jurek* v. *State,* 522 S. W. 2d 934 (1975). We granted certiorari to decide only whether Texas' death penalty statute was constitutional and affirmed, finding that the statute satisfied the principles announced in *Furman* v. *Georgia,* 408 U. S. 238 (1972). *Jurek* v. *Texas,* 428 U. S. 262 (1976). Jurek then unsuccessfully sought a writ of habeas corpus in the state courts. We denied his petition for a writ of certiorari, after granting a temporary stay of execution pending timely filing for that writ. *Jurek* v. *Estelle,* 430 U. S. 951 (1977).

But, as in so many criminal cases these days, Jurek's conviction was still not final. He next commenced habeas corpus proceedings in the *federal* courts, again challenging the voluntariness of his confessions. The District Court held an exhaustive evidentiary hearing and—like the jury, the state trial court and the state appellate court before it—found the confessions to be voluntary. A panel of the Court of Appeals for the Fifth Circuit nevertheless reversed, concluding that the confessions were involuntary. The 25 judges of the Court of Appeals sitting en banc also reversed, albeit on somewhat different grounds. 623 F. 2d 929 (1980). Judge Garza's opinion, embraced in its entirety by only three other judges, represents the result reached by a majority of the court. The majority found that although the oral confession and the first written confession were voluntary, the second written confession was involuntary. Judge Godbold, joined by one other judge, would have found both written confessions involuntary. Judge Frank M. Johnson, joined by six judges,

would have held all of the confessions involuntary. Judges Brown and Reavely filed separate opinions, joined by 10 and 8 judges respectively, which would have held all of the confessions voluntary.

Briefly stated, these are the facts surrounding the confessions. Jurek was arrested late at night in Cuero, Tex., in connection with the disappearance of Wendy Adams. He was taken to police headquarters, given *Miranda* warnings and questioned for 45 minutes. He was not questioned again until 9 o'clock the next morning. He asked to take a polygraph test and was driven to Austin, Tex., for that purpose.* When confronted with the results of the test, he orally admitted killing Wendy and told the police where the body might be found. The police then returned Jurek to Cuero and immediately took him before a Magistrate where Jurek declined a request for counsel. After searching unsuccessfully for the body, the police again questioned Jurek and late that night took a written confession from Jurek, witnessed by two members of the community, in which he stated he killed Wendy because she made disparaging remarks about his family. For security reasons, the police then transferred Jurek for the night to a jail in Victoria, Tex., about 50 miles away. The next day the police found Wendy's body and that afternoon again questioned Jurek. In a second written confession, again witnessed by two other members of the community, Jurek stated that he killed

*To be sure, there is some dispute as to the facts. The panel found that Jurek was questioned throughout the first night and criticized the police for taking Jurek to Austin, Tex. 593 F. 2d 672 (1979). The Texas Court of Criminal Appeals and the United States District Court, however, found that Jurek was left alone during the night and that Jurek was transferred to Austin at his own request. Thus, the panel clearly ignored the requirement of 28 U. S. C. § 2254 (d) that state-court findings of fact are to be presumed correct. See *Sumner* v. *Mata*, 449 U. S. 539 (1981). To the extent Judge Garza's opinion relied on the panel's findings of facts, it too erred.

Wendy because she refused to have sexual relations with him.

There are several reasons why this case is worthy of review. In the first place, Judge Garza's attempt to distinguish between the first and second written confessions is, to me, wholly unpersuasive. Indeed, other than Judge Garza and the three judges who joined him, no one had ever suggested that the second confession was less voluntary than the first. In cases involving multiple confessions, we have held that some of the confessions may be found involuntary and others not only if such a distinction is justified by a sufficiently isolating "break in the stream of events." *Darwin* v. *Connecticut,* 391 U. S. 346, 349 (1968). There is no such break here.

Judge Garza attempted to distinguish the second confession on the ground that the police were motivated by a desire to secure a death sentence for Jurek. But, as even Judge Johnson recognized in his separate opinion, the record reveals that the prosecutors believed they already had enough evidence to obtain a death verdict. 623 F. 2d, at 943. The record shows that the prosecutors sought the second confession simply because they wanted a signed statement of the "true" events. Each time the police learned of something new relating to Wendy's disappearance, they went to Jurek to confirm it. Surely nothing in the Constitution prevents the police from asking questions to discern the facts and solve a crime. Judge Garza also relied heavily on the alleged difference in "style" between the two confessions, that Jurek had less input in the second confession because it contained some "legalese." But even if there is a significant difference in style between the confessions—which I doubt—that may well be explained simply by the fact that the confessions were "transcribed" by two different persons. And all of the witnesses to the second confession have testified that they believed the confession to be voluntary. The opinion also relies on the fact that there was a 16-hour time

difference between the two confessions, but such reliance is misplaced in light of our decisions holding that even a 6-month time difference is not enough to constitute a sufficiently isolating break between two confessions. *United States* v. *Bayer,* 331 U. S. 532 (1947). Finally, Judge Garza criticized the police for not informing Jurek that if he admitted to attempting to have sexual relations with Wendy, he "was in effect" signing his "death warrant." 623 F. 2d, at 935. But even if it were true that the police were seeking the death sentence, our cases have never required the police to give such unsolicited legal advice. In short, nothing in the record reveals any police misconduct or any "coercion" visited upon Jurek. Quite the contrary, their performance strikes me as commendable. The evidence simply does not establish that Jurek's will was overborne or that his confession was not the product of a rational intellect and a free will.

If the issue in this case was only whether Jurek's confessions were voluntary, I might acquiesce in the denial of certiorari because of the impracticality of this Court's reviewing such fact-specific questions. But this case involves far more than simply whether a particular confession is voluntary. The decision below reveals tremendous confusion as to the proper standard of review in a federal habeas proceeding after a jury, a state trial court, a state appellate court, and a federal district court have determined a confession to be voluntary. Relying on *Beckwith* v. *United States,* 425 U. S. 341, 348 (1976), Judge Garza held that a court of appeals in a federal habeas case must " 'examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " 623 F. 2d, at 931. Judge Brown, on the other hand, found that Jurek's confessions were admissible under even the "independent review" standard, and thus found it unnecessary to choose between that standard and the "clearly erroneous" test. *Id.,* at 962. This issue is important and should be resolved by the Court. As Judge Brown recognized, we have never explicitly applied the "in-

dependent review" test in the federal habeas corpus context, and even in those cases where we have suggested that a broader standard of review might be appropriate we have made clear that "great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate, with due regard to federal-state relations, that the state court's determination should control." *Culombe* v. *Connecticut,* 367 U. S. 568, 605 (1961). In this case, the Court of Appeals gave little deference to findings of historical facts, see n.*, *supra,* much less to the lower court's inferences as to the ultimate issue of voluntariness.

In my view, the Court of Appeals also erred in ignoring the applicability of the harmless-error doctrine to the facts of this case. In *Milton* v. *Wainwright,* 407 U. S. 371 (1972), we clearly held that the harmless-error doctrine should be applied in cases involving multiple confessions. We explained:

> "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless." *Id.,* at 377–378.

What is particularly troubling about this case is that I have no doubt that the decision below was colored by the fact that this is a capital punishment case. The severity of a defendant's punishment, however, simply has no bearing on whether a particular confession is voluntary or on the extent to which federal habeas courts should defer to state-court findings. Following the decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972), holding invalid a state capital punish-

ment statute, the State of Texas, like 34 other States, enacted new death penalty statutes. Those States determined that capital punishment, though an extreme form of punishment, is a suitable sanction for the most extreme of crimes. One of the principal goals of our Federal Government, set forth in the preamble to the Constitution, is "[to] insure domestic Tranquility." Whether as means of deterring future crimes or as means of retribution, these States believed that a carefully designed and limited system of capital punishment would be one way of ensuring domestic tranquility.

In a series of decisions handed down in 1976 this Court upheld the constitutionality of those statutes, *Gregg* v. *Georgia,* 428 U. S. 153; *Proffitt* v. *Florida,* 428 U. S. 242, including the statute at issue here. *Jurek* v. *Texas,* 428 U. S. 262. The opinion announcing the judgment in *Gregg* v. *Georgia* reasoned that "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U. S., at 186–187 (opinion of STEWART, POWELL, and STEVENS, JJ.). The opinion also squarely rejected the notion that "standards of decency" rendered the death penalty unconstitutional, noting that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." *Id.,* at 179.

The murder in this case was committed in 1973. For eight years, the State of Texas has repeatedly presented its case against Jurek to state and federal courts. Yet, despite the fact that every court has concluded that at least one of Jurek's written confessions was voluntary, the people of the State of Texas now find themselves no closer to enforcing

their capital punishment statute than they were when they began eight years ago. By overturning Jurek's conviction on the basis of a procedural nicety, the decision below not only renders Texas' death penalty statute an ineffective deterrent, it also frustrates society's compelling interest in having its constitutionally valid laws swiftly and surely carried out. A potential murderer will know that even if he is convicted and sentenced to death, he will very likely not be put to death. If he litigates the case long enough, the odds favor his finding some court which will accept a legal theory previously rejected by other courts.

As Judge Brown put it:

> "This case presents in dramatic terms the tensions between promoting thorough and efficient enforcement of the laws and ensuring that the rights of the accused are scrupulously guarded. We have on the one hand a murder which could hardly have been more reprehensible; the violent, senseless slaying of a young girl. On the other hand, we have a decision by a panel of this Court throwing out Jurek's two written confessions on the grounds of voluntariness, making it very unlikely that Jurek could again be convicted on retrial." 623 F. 2d, at 956.

I agree with Judge Brown that the decision below makes it "very unlikely that Jurek could again be convicted on retrial." Even though Jurek has made at least one "voluntary" confession, he may well escape all punishment for his violent, senseless slaying of a young girl. I, for one, am unwilling to subscribe to a decision of this Court which sanctions such an outcome. I do not think that this Court can, like Pontius Pilate, wash its hands of the numerous issues presented in this case, issues which are bound to arise not merely in this case, but in countless others. I would therefore grant the petition for certiorari and set the case for argument.

No. 80–794. BLEWS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 379 So. 2d 677.

No. 80–840. WEBER ET AL. *v.* BARRETT. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 916.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE STEWART join, dissenting.

Respondent is a former employee of the Sheriff of Dallas County, Tex., who brought suit against the Sheriff on behalf of himself and others to enjoin the enforcement of certain of the Sheriff's rules on the grounds that they infringed certain First Amendment rights. Petitioners, Dallas County and various county officials, sought leave to intervene in this litigation because county funds might be liable for a judgment against the Sheriff. The trial court denied intervention and the United States Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals then granted the respondent's motion for an award of attorney's fees under 42 U. S. C. § 1988, which provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Court of Appeals stated that respondent was a clear winner on the intervention issue and then explained:

> "[Respondent] has prevailed on his underlying claim against defendant Sheriff Thomas. Part of the cost involved in so prevailing was the devotion of his attorney's time and effort in successfully preventing the initial judgment against Thomas from being derailed as a result of [petitioners'] attempts to intervene. [Petitioners] cannot now be excused from bearing the burden of these

> costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court."

The decision of the Court of Appeals relies in part on the fact respondent prevailed in the trial court on his underlying civil rights claim against the Sheriff. The Court of Appeals, however, ignores the fact respondent has only prevailed in the trial court on this claim. Appeal from that decision is still pending in the Court of Appeals. The Court of Appeals therefore has authorized an award of attorney's fees prior to there being a final determination that respondent prevailed in "an action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 . . . ." Petitioners are being prejudiced by a decision which in the statutory sense was only preliminary. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950). The merits of the denial of the motion to intervene, which are entirely separate from the civil rights claim, is the only issue dealt with by the Court of Appeals in its opinion affirming the denial. See *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 524 (1947). Only last Term we explained in *Hanrahan* v. *Hampton*, 446 U. S. 754 (1980):

> "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Id.*, at 758.

The award of attorney's fees under § 1988 against the petitioners who were not defendants in this civil rights litigation is permissible, if at all, only after there has been a final determination that the respondent has prevailed on the merits on at least some of his claims against the Sheriff. Conceivably,

the judgment against the Sheriff could be reversed and in that case § 1988 would provide no authorization for an award of fees against the petitioners. Because I think the award of such fees for successfully defending an appeal of a collateral order having nothing to do with civil rights is not authorized by § 1988 at this interim stage of the litigation, I dissent from the denial of the petition for a writ of certiorari.

No. 80–924. SHELL OIL CO. ET AL. *v.* DEPARTMENT OF ENERGY ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 231.

JUSTICE POWELL, dissenting.

The Energy Information Administration of the Department of Energy (DOE) compels 27 energy-producing companies, including petitioners, to submit data in response to 7,200 individual requests for information about their operations. These data concern virtually all aspects of these companies' finances. Upon request, DOE releases data submitted under this compulsion to other federal departments and agencies, including the offices in the Department of Justice and the Federal Trade Commission charged with enforcing the antitrust laws.

The dissemination of this extraordinary volume of data to those prosecutorial Government agencies raises a serious question, as these agencies thereby may obtain information that statutory and constitutional safeguards would bar them from obtaining directly in antitrust enforcement actions. The likelihood that rights of potential antitrust defendants will be violated increases as DOE demands increasingly more data from companies subject to its regulation and then disseminates the information to prosecutorial agencies. Congress has given DOE an investigative power that appears to be intrusive as well as excessively burdensome in its own right. But that power should not become a blanket discovery authority for the use of the Department of Justice and the

Federal Trade Commission without the safeguards provided by law against abuse of legal rights.

Because of the seriousness of the question whether Congress intended that information obtained by DOE be put to such use, I would grant the petition for certiorari and set the case for plenary consideration.

No. 80–947. CHANEY *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 80–1204. ANDERSON *v.* NEBRASKA. Sup. Ct. Neb.;

No. 80–5862. HOCHSTEIN *v.* NEBRASKA. Sup. Ct. Neb.; and

No. 80–6127. MCDOWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 80–947, 612 P. 2d 269; Nos. 80–1204 and 80–5862, 207 Neb. 51, 296 N. W. 2d 440; No. 80–6127, 301 N. C. 279, 271 S. E. 2d 286.

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. 80–972. OLDAG *v.* CATHOLIC CHARITIES OF THE DIOCESE OF GALVESTON-HOUSTON ET AL. Sup. Ct. Tex. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 603 S. W. 2d 793.

No. 80–1137. APPALACHIAN INSURANCE CO. ET AL. *v.* UNITED STATES;

No. 80–1145. AID INSURANCE CO. ET AL. *v.* UNITED STATES; and

No. 80–1178. AETNA INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 628 F. 2d 1201.

No. 80–1221. RIGGS *v.* BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 634 F. 2d 621.

No. 80–1269. GIDDENS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 156 Ga. App. 258, 274 S. E. 2d 595.

No. 80–1222. JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT *v.* KOFFLER ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 51 N. Y. 2d 140, 412 N. E. 2d 927.

No. 80–1234. SHAW *v.* UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT DALLAS. C. A. 5th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 625 F. 2d 1013.

No. 80–1235. MOODY *v.* FORRESSTER, COMMISSIONER OF INSURANCE OF ALABAMA, ET AL. C. A. 5th Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 620 F. 2d 548 and 632 F. 2d 1351.

No. 80–6073. GROOMS *v.* SLABAUGH ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 636 F. 2d 1221.

Rehearing Denied

No. 80–5161. JOHNSON *v.* OKLAHOMA, 449 U. S. 1132; and

No. 80–5692. BOYD *v.* CITY AND COUNTY OF DENVER, COLORADO, ET AL., 449 U. S. 1089. Petitions for rehearing denied.

No. 79–700. WALTER FLEISHER CO., INC. *v.* COUNTY OF LOS ANGELES ET AL., 449 U. S. 608. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 79–1171. MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL., 449 U. S. 456. Petition for rehearing denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 80–887. BURNS ET AL. *v.* DIOCESE OF NEWARK ET AL., 449 U. S. 1131. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MARCH 27, 1981

Dismissal Under Rule 53

No. 87, Orig. CALIFORNIA *v.* TEXAS. Motion to dismiss the application of California Avocado Commission et al. for a preliminary injunction or temporary restraining order and motion to intervene were dismissed under this Court's Rule 53. [For earlier order herein, see, *e. g., ante,* p. 977.]

MARCH 30, 1981

Appeal Dismissed

No. 80–6161. STEIN *v.* HILL, JUDGE, ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 627 F. 2d 237.

Certiorari Granted—Vacated and Remanded

No. 80–1368. MISSOURI *v.* BROWN; MISSOURI *v.* COLLINS; MISSOURI *v.* GREER; MISSOURI *v.* HAWKINS; and MISSOURI *v.* MARTIN. Ct. App. Mo., Western Dist. Motions of respondents for leave to proceed *in forma pauperis* and certiorari

granted. Judgments vacated and cases remanded for further consideration in light of *Albernaz* v. *United States, ante,* p. 333. JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 607 S. W. 2d 801 (first case); 607 S. W. 2d 781 (second case); 609 S. W. 2d 423 (third case); 608 S. W. 2d 496 (fourth case); 610 S. W. 2d 18 (fifth case).

Miscellaneous Orders

No. A–795. LEVINSON *v.* FINLEY, CLERK, CIRCUIT COURT OF COOK COUNTY, ET AL. Cir. Ct., Cook County, Ill. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 79–1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD, 449 U. S. 368. Motion of respondent to retax costs denied.

No. 80–328. NEW YORK *v.* BELTON. Ct. App. N. Y. [Certiorari granted, 449 U. S. 1109.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondent also allotted an additional 15 minutes for oral argument.

No. 80–396. CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 449 U. S. 1060.] The order heretofore entered on March 23, 1981 [*ante,* p. 992], is vacated, and the brief *amicus curiae* of National Institute of Municipal Law Officers is ordered filed.

No. 80–780. ROWAN COS., INC. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 449 U. S. 1109.] Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 80–1365. CONNECTICUT *v.* MOHEGAN TRIBE. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–901. DONOVAN, SECRETARY OF LABOR *v.* DEWEY ET AL. D. C. E. D. Wis. [Probable jurisdiction noted *sub nom. Marshall* v. *Dewey*, 449 U. S. 1122.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–6139. IN RE GRIFFIN. Petition for writ of mandamus denied.

Certiorari Granted

No. 80–1045. JACKSONVILLE BULK TERMINALS, INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 626 F. 2d 455.

No. 80–1285. BROWN *v.* HARTLAGE. Ct. App. Ky. Certiorari granted. Reported below: 618 S. W. 2d 603.

Certiorari Denied. (See also No. 80–6161, *supra.*)

No. 79–2010. MARK-GARNER ASSOCIATES, INC. *v.* BENSALEM TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 680.

No. 80–798. MCFARLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–928. PARKS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 492, 270 S. E. 2d 755.

No. 80–941. LOMAS & NETTLETON FINANCIAL CORP. ET AL. *v.* CLARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 49.

No. 80–991. GEORGE *v.* KAY. C. A. 4th Cir. Certiorari denied. Reported below: 632 F. 2d 1103.

No. 80–993. PATTERSON ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 862.

No. 80–1017. LOUCAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 629 F. 2d 989.

No. 80–1024. NEWTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–1075. JENKINS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 80–1107. CAULFIELD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 999.

No. 80–1119. RAMAPURAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 632 F. 2d 1149.

No. 80–1126. TAGGART CORP. ET AL. *v.* EFROS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1208.

No. 80–1127. C–F AIR FREIGHT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–1210. BURLINSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 119.

No. 80–1245. SELCO SUPPLY CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 863.

No. 80–1297. DUGAS *v.* KELLY ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–1298. GILMER ET AL. *v.* TRUCK DRIVERS, OIL DRIVERS, FILLING STATION & PLATFORM WORKERS UNION, LOCAL 705, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 505.

No. 80–1304. PAGE AIRWAYS, INC., ET AL. *v.* ASSOCIATED RADIO SERVICE CO. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1342.

No. 80–1312. ELBERT *v.* BOARD OF EDUCATION OF LANARK COMMUNITY UNIT SCHOOL DISTRICT #305, CARROLL COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 509.

No. 80–1316. BAUER *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 745.

No. 80–1318. GODEK *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: —— Conn. ——, 438 A. 2d 114.

No. 80–1321. METROPOLITAN DETROIT AREA HOSPITAL SERVICES, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 634 F. 2d 330.

No. 80–1347. DIORIO ET AL. *v.* KREISLER-BORG CONSTRUCTION CO., INC. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 75 App. Div. 2d 1029, 427 N. Y. S. 2d 896.

No. 80–1357. WINSTON, SHERIFF, ET AL. *v.* EBY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1212.

No. 80–1370. PETERSON *v.* SORLIEN ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 299 N. W. 2d 123.

No. 80–1387. TANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80–1409. NEW YORK *v.* WARNER-LAMBERT CO. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 295, 414 N. E. 2d 660.

No. 80–1412. IHLE ET AL *v.* FLORIDA PUBLISHING CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 399 So. 2d 136.

No. 80–1425. WEISENSEE *v.* SUPREME COURT OF SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 296 N. W. 2d 717.

No. 80–1427. DIZAK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–1455. COTTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 63.

No. 80–1459. GREEN *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–1467. PALADINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 2d 941.

No. 80–1475. HORTON ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80–1493. CHAGRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 311.

No. 80–5884. DAVIS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 47 Ore. App. 3, 613 P. 2d 110.

No. 80–5916. SPENCER *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80–5932. HINKLE *v.* MUNICIPALITY OF ANCHORAGE. Sup. Ct. Alaska. Certiorari denied. Reported below: 618 P. 2d 1069.

No. 80–5966. ILLSLEY *v.* UNITED STATES PAROLE AND PROBATION DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 636 F. 2d 1.

No. 80–6008. GRAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 142, 408 N. E. 2d 1150.

No. 80–6131. RICHARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 236.

No. 80–6144. LOGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 351, 408 N. E. 2d 1086.

No. 80–6148. MCKINNIE *v.* WISCONSIN; and
No. 80–6149. JONES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 98 Wis. 2d 749, 297 N. W. 2d 515.

No. 80–6150. BRYANT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 836, 407 N. E. 2d 597.

No. 80–6152. LEACHMAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–6157. RUTLEDGE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1200.

No. 80–6158. UNWIN *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 139 Vt. 186, 424 A. 2d 251.

No. 80–6160. SEVERA *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 775.

No. 80–6163. JOHNS *v.* KING, LIEUTENANT GOVERNOR OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 80–6170. RHODES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 892.

No. 80–6171. TAYLOR *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 394 So. 2d 1153.

No. 80–6174. WEXLER *v.* INDUSTRIAL VALLEY BANK & TRUST CO. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 446.

No. 80–6177. CASTELLO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 397 So. 2d 777.

No. 80–6179. DORTY *v.* HAYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 779.

No. 80–6222. THINGVOLD *v.* FRANZEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6227. POWERS *v.* BUCHANAN. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1214.

No. 80–6239. GUNSTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6248. GRAHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 638 F. 2d 1111.

No. 80–6250. CHRISMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–6261. STREETS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6266. SUTTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 245.

No. 80–6279. WHITE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 75.

No. 80–1331. FLORIDA *v.* MALONE. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL would grant certiorari. Reported below: 390 So. 2d 338.

No. 80–1268. MONONGAHELA POWER CO. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 633 F. 2d 960.

No. 80–1339. CLANON, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY AT VACAVILLE, ET AL. *v.* GIBSON ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 633 F. 2d 851.

No. 80–5696. PAYNE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. JUSTICE STEWART would grant certiorari.

No. 80–5942. AMADEO *v.* RUSSEAU, SHERIFF. Sup. Ct. Ga.;

No. 80–5969. MILLER *v.* ARKANSAS. Sup. Ct. Ark.; and

No. 80–6155. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 80–5969, 269 Ark. 341, 605 S. W. 2d 430; No. 80–6155, 28 Cal. 3d 264, 618 P. 2d 149.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–5633. BLAND *v.* TEXAS, *ante,* p. 924;

No. 80–5891. THERIAULT ET AL. *v.* ESTABLISHMENT OF RELIGION ON TAXPAYERS' MONEY IN THE FEDERAL BUREAU OF PRISONS ET AL., *ante,* p. 929;

No. 80–5930. KEEZER ET AL. *v.* MINNESOTA, *ante,* p. 930; and

No. 80–5964. PHIPPS *v.* BROWN ET AL., *ante,* p. 932. Petitions for rehearing denied.

APRIL 6, 1981

Appeals Dismissed

No. 80–1394. WILSON ET UX. *v.* CALIFORNIA HEALTH FACILITIES COMMISSION. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 110 Cal. App. 3d 317, 167 Cal. Rptr. 801.

No. 80–6206. LEE *v.* BOARD OF OVERSEERS OF THE BAR. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 422 A. 2d 998.

No. 80–1422. REYNOLDS *v.* REYNOLDS. Appeal from Ct. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 80–602. UNITED STATES *v.* HICKS ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michael M.* v. *Sonoma County Superior Court, ante,* p. 464. Reported below: 625 F. 2d 216.

No. 80–778. NEW MEXICO ET AL. *v.* MESCALERO APACHE TRIBE. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Montana* v. *United States, ante,* p. 544. Reported below: 630 F. 2d 724.

No. 80–1264. GENERAL TELEPHONE COMPANY OF THE SOUTHWEST *v.* FALCON. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine, ante,* p. 248. Reported below: 626 F. 2d 369.

Certiorari Granted—Reversed. (See No. 80–1162, *ante*, p. 785.)

Miscellaneous Orders

No. A–709 (80–1395). BRADLEY ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL.; and LAFAYETTE, INC., ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL. Sup. Ct. Va. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–794. B. F. ET AL. *v.* COLORADO, IN THE INTEREST OF T. A. F. Ct. App. Colo. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–813. RITZ *v.* NEW YORK. Sup. Ct. N. Y., Bronx County. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–815. STOVALL ET AL. *v.* PATTERSON ET AL. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–832. ZUCCARO *v.* UNITED STATES. Application for an independent determination of bail pending trial, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–226. IN RE DISBARMENT OF KUMAR. It is ordered that Rajeshwar Kumar, of Camp Hill, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–227. IN RE DISBARMENT OF SCHMIDT. It is ordered that Robert M. Schmidt, of Birmingham, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–228. IN RE DISBARMENT OF FRY. It is ordered that Harry A. Fry, of Pasadena, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–229. IN RE DISBARMENT OF LISNER. It is ordered that Donald H. Lisner, of Cincinnati, 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–230. IN RE DISBARMENT OF CONROY. It is ordered that Thomas A. Conroy, of Cincinnati, 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–232. IN RE DISBARMENT OF MCCLELLAN. It is ordered that Howard B. McClellan, of McLean, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion of Texas Power & Light Co. for leave to intervene denied. [For earlier order herein, see, *e. g., ante,* p. 905.]

No. 87, Orig. CALIFORNIA *v.* TEXAS. Motion of Citizens for a Better Environment et al. for leave to file a brief as *amici curiae* granted. Motion of plaintiffs to defer consideration denied. The temporary restraining order entered March 9, 1981 [*ante,* p. 977], is vacated. Motion for leave to file a bill of complaint denied without prejudice. [For earlier order herein, see, *e. g., ante,* p. 1027.]

No. 80–148. ROBBINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 449 U. S. 1109.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Petitioner also allotted an additional 10 minutes for oral argument. Motion of petitioner for divided argument denied.

No. 80–6354. BESHAW *v.* FENTON, WARDEN, ET AL. C. A. 3d Cir. Motion of petitioner to consolidate this case with No. 80–5392, *Howe* v. *Smith, Attorney General, et al.* [certiorari granted *sub nom. Howe* v. *Civiletti,* 449 U. S. 1123], denied.

No. 80–1617 (A–814). IN RE STERRITT. Application for bail, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 79–1618. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* KASSEL ET AL. C. A. 8th Cir. Certiorari granted.

No. 80–427. FAIR ASSESSMENT IN REAL ESTATE ASSN., INC., ET AL. *v.* MCNARY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 622 F. 2d 415.

No. 80–1350. COMMUNITY COMMUNICATIONS CO., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 630 F. 2d 704.

No. 80–1377. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 643 F. 2d 569.

No. 80–1464. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* ENERGY ACTION EDUCATIONAL FOUNDATION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 210 U. S. App. D. C. 20, 654 F. 2d 735.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 616 P. 2d 1159.

Certiorari Denied. (See also No. 80–1422, *supra.*)

No. 79–6716. FEAR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. lxxxvi.

No. 80–874. MATHEWS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 46 Ore. App. 757, 613 P. 2d 88.

No. 80–1035. REDD ET AL. *v.* LAMBERT, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 387 So. 2d 712.

No. 80–1036. MACHINE TOOL & GEAR, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 216.

No. 80–1087. ELLIS FISCHEL STATE CANCER HOSPITAL *v.* DONOVAN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 629 F. 2d 563.

No. 80–1095. BAKER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 760, 650 F. 2d 288.

No. 80–1114. GLASSBORO SERVICE ASSN., INC. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 774.

No. 80–1124. BEGAY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 712, 650 F. 2d 288.

No. 80–1149. MARTIN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 1165.

No. 80–1153. HAUGEN *v.* TAYLOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 191.

No. 80–1169. FAULKNER RADIO, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 80–1171. ABDELLA *v.* SHAWANO LAKE SANITARY DISTRICT No. 1 ET AL. Ct. App. Wis. Certiorari denied. Reported below: 98 Wis. 2d 748, 297 N. W. 2d 514.

No. 80–1216. RANDELL *v.* UNITED STATES; and
No. 80–5818. MUMFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 630 F. 2d 1023.

No. 80–1224. TRANSAMERICAN PRESS, INC., ET AL. *v.* MILLER; and
No. 80–1383. MILLER *v.* TRANSAMERICAN PRESS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 721.

No. 80–1329. RAMOS ET AL. *v.* LAMM, GOVERNOR OF COLORADO, ET AL.; and
No. 80–1340. LAMM, GOVERNOR OF COLORADO, ET AL. *v.* RAMOS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 639 F. 2d 559.

No. 80–1336. CLOUD *v.* BYRD, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 742.

No. 80–1361. M/G TRANSPORT SERVICES, INC. *v.* CITIZENS FIDELITY BANK & TRUST CO., EXECUTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1218.

No. 80–1362. RONWIN *v.* SEGAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80–1363. WILLIAMSON *v.* KIMBROUGH, ZONING ADMINISTRATOR, DALLAS, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1097.

No. 80–1366. CALIFORNIA *v.* SCHUSTER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 109 Cal. App. 3d 887, 167 Cal. Rptr. 447.

No. 80–1367. NIEDERMEYER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 48 Ore. App. 665, 617 P. 2d 911.

No. 80–1372. ROBERT E. KURZIUS, INC., ET AL. *v.* INCORPORATED VILLAGE OF UPPER BROOKVILLE. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 338, 414 N. E. 2d 680.

No. 80–1373. UTILITY CONSUMERS COUNCIL OF MISSOURI, INC. *v.* PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 606 S. W. 2d 222.

No. 80–1381. CISSNA ET UX. *v.* AMMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1355.

No. 80–1386. FRENCH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 615, 434 N. Y. S. 2d 1013.

No. 80–1391. FIRST NATIONAL BANK OF OMAHA ET AL. *v.* MARQUETTE NATIONAL BANK OF MINNEAPOLIS. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 195.

No. 80–1397. CARABBIA ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–1460. SCHWALLIER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 887.

No. 80–1478. WHITTED *v.* LYALL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 784.

No. 80–1492. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 80–1521. GREENBERG *v.* SAN JUAN HOTEL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 562.

No. 80–5028. ARECHIGA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5945. MCFADDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 963.

No. 80–6056. COLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 897.

No. 80–6082. PETTY *v.* JACKSON, CORRECTIONS DIRECTOR. C. A. D. C. Cir. Certiorari denied.

No. 80–6113. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 427 A. 2d 901.

No. 80–6123. MONTELLANO *v.* UNITED STATES; and
No. 80–6167. PORTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 1313.

No. 80–6164. DAVIS *v.* NEW YORK. Sup. Ct. N. Y., Erie County. Certiorari denied.

No. 80–6178. ROWE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 271 Ark. 20, 607 S. W. 2d 657.

No. 80–6182. MOORE *v.* BAKER. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–6184. GRAHAM *v.* MORRIS, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 779.

No. 80–6186. WILLIAMS *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 80–6190. ROBINSON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 127 Ariz. 324, 620 P. 2d 703.

No. 80–6191. PARSONS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 85 Ill. App. 3d 1201, 413 N. E. 2d 1390.

No. 80–6193. GILCRIST ET AL. *v.* DAVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–6195. HORNICK *v.* NOYES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–6196. UNDERWOOD *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80–6197. VITORATOS *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 220.

No. 80–6205. BROUILLETTE *v.* WOOD, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 215.

No. 80–6236. ALEEM *v.* MOORE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 579.

No. 80–6246. MORTON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 438.

No. 80–6283. SANGSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 887.

No. 80–6287. DEENER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 335, 414 N. E. 2d 1055.

No. 80–6290. ALLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–6304. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6306. DRUMMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 F. 2d 580.

No. 80–6316. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–495. LESTER ET UX. *v.* ANDERSON, EXECUTRIX. Ct. App. La., 3d Cir. Motion of Consumer Federation of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 382 So. 2d 1019.

No. 80–1031. BALDWIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 621 F. 2d 251 and 632 F. 2d 1.

JUSTICE MARSHALL, dissenting.

In 1974, the Memphis Police Department began an investigation of petitioner and his business activities. To further this inquiry, an undercover police officer sought a position as petitioner's handyman and chauffeur. The agent was hired, and from July 1975 to December 1975 lived in petitioner's home. On several occasions during this 6-month period the agent found in the home what he believed to be cocaine. The agent took samples of these substances and gave them to his superior officers. On the basis of this evidence, petitioner was indicted for possession of cocaine and possession with intent to distribute cocaine.

Prior to trial, petitioner moved to suppress the evidence on the ground that it was illegally obtained through a warrantless search of his home. The District Court denied the suppression motion and petitioner was convicted. The Court of Appeals also rejected petitioner's Fourth Amendment claim, concluding that there was no "precedent to support the suggestion that the Fourth Amendment requires law enforcement agencies to seek prior judicial approval in the form

of a warrant before utilizing an undercover agent." 621 F. 2d 251, 252. Two judges dissented from the subsequent denial of petitioner's request for rehearing en banc. 632 F. 2d 1. Because the panel opinion resolves an issue of substantial importance in a manner not supported by our prior decisions, I would grant the petition for certiorari.

The Fourth Amendment accords special protection to a person's expectation of privacy in his own home. *Payton* v. *New York,* 445 U. S. 573, 585, 589–590 (1980); *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 561, 565 (1976); *Silverman* v. *United States,* 365 U. S. 505, 511 (1961). Absent special circumstances not present here,[1] searches of a person's home are constitutionally unreasonable when conducted without probable cause and without a warrant. *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971); *Johnson* v. *United States,* 333 U. S. 10 (1948). We have consistently held that these restrictions do not vanish simply because the government seeks to obtain incriminating evidence through deception rather than through a routine search. In *Gouled* v. *United States,* 225 U. S. 298, 306 (1921), a Government agent gained admission into the office of a criminal suspect on the pretext of paying a social visit. During the visit, the agent surreptitiously seized incriminating evidence that was later used in a criminal prosecution against the suspect. This Court, in unanimously concluding that the warrantless search and seizure violated the Fourth Amendment, reasoned:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and there-

[1] The "exigent circumstances" exception to the warrant requirement is obviously inapplicable to the extensive and planned search at issue here.

> fore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights." *Id.*, at 305–306.

We have repeatedly indicated that *Gouled* v. *United States* remains the controlling precedent in this area. *Lewis* v. *United States*, 385 U. S. 206, 211 (1966); *Hoffa* v. *United States*, 385 U. S. 293, 301 (1966). The rationale of that decision would appear directly applicable to this case. Indeed, if anything, the conduct here is arguably more objectionable in constitutional terms than that condemned in *Gouled;* the search was of a home rather than a business office, lasted for six months instead of several minutes, and appears to have been undertaken for the general purpose of gathering any incriminating evidence rather than the specific purpose of seizing certain incriminating documents. Yet rather than recognize the significance of *Gouled* or attempt to distinguish it, the Court of Appeals simply overlooks that case in concluding that there is no precedent governing warrantless undercover searches.

This oversight alone is sufficient to warrant review of the decision below by this Court. Moreover, the Court of Appeals in reaching its conclusion—that the Fourth Amendment's probable-cause and warrant requirements never govern the search of a home by undercover agents—incorrectly construed several decisions by this Court that rejected limited constitutional challenges to such investigatory techniques. In the first case, *Lewis* v. *United States, supra,* we rejected the contention that a search warrant must be obtained before

an undercover agent, posing as a drug purchaser, may enter a person's home to make an illegal drug purchase. However, the challenge there was based on the mere entry into the home, rather than a search for evidence there, and the Court specifically noted that it was not addressing the question whether a search could be conducted under such circumstances. *Id.*, at 208. More important, in concluding that a warrant was not necessary, the Court focused on the fact that the defendant had relinquished his expectation of privacy in the home by inviting the agent in *for the purpose of conducting an illegal drug transaction.* We noted:

> "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.*, at 211.

Here, in contrast, petitioner neither invited the undercover agent into his home for any illegal purpose nor gave up his expectation of privacy in the home by converting it into a center of unlawful business.[2]

The rationale of the other decision relied on by the Court of Appeals, *Hoffa* v. *United States, supra,* is similarly inapplicable here. In that case, we concluded that the Fourth Amendment was not violated when a Government informant reported conversations he had with a criminal suspect. However, *Hoffa* involved only the limited question whether the Fourth Amendment precluded the Government from benefiting from a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.*, at 302. In rejecting this contention we made clear

[2] The Court in *Lewis* further limited its holding by noting that an undercover agent who had gained entry under the pretext of conducting an illegal drug transaction would not be constitutionally empowered "to conduct a general search for incriminating materials." 385 U. S., at 211.

that the defendant's claim—unlike petitioner's here—was not based on any asserted violation of his right of privacy. *Ibid.*[3]

Despite the care with which this Court in *Lewis* and *Hoffa* sought to define the limited scope of its rulings, the Court of Appeals in the instant case has construed those decisions as removing virtually all constitutional constraints on the use of undercover agents to conduct home searches. If the decision of the Memphis police to place an undercover agent in petitioner's home for a 6-month period, during which the agent rifled through his belongings in the search for incriminating evidence, does not implicate the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," it is hard to imagine what sort of undercover activity would. Indeed, under the Sixth Circuit's approach, the Government need never satisfy the probable-cause and warrant requirements of the Fourth Amendment if, by disguising its officers as repairmen, babysitters, neighbors, maids, and the like, it is able to gain entry into an individual's home by ruse rather than force in order to conduct a search.[4]

By ignoring *Gouled,* and extending *Lewis* and *Hoffa* beyond their plainly intended scope, the decision of the Court of Appeals raises important constitutional concerns. The

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[3] The decision in *Hoffa* is further distinguished from the instant case by the facts that the informant was a friend of the defendant rather than a law enforcement officer, and because the "seizure" of conversations that the defendant sought to suppress took place in a variety of public places rather than solely in the defendant's home.

[4] The potential scope of the Court of Appeals ruling is not limited to searches of a home. For example, while we have recently held that inspectors of the Department of Labor must obtain a search warrant before entering most businesses to search for violations of the Occupational Safety and Health Act, *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), under the Sixth Circuit's rule this search warrant requirement could be circumvented if the inspectors gained entry by representing themselves as employees, labor representatives, and the like.

decision is probably wrong; at the very least, it warrants review by this Court. I therefore dissent from the denial of the petition for certiorari.

No. 80–1084. MOUNTAIN STATES LEGAL FOUNDATION ET AL. *v.* COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 10th Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 630 F. 2d 754.

No. 80–1479. PENNSYLVANIA BOARD OF PROBATION AND PAROLE *v.* BRONSON. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 491 Pa. 549, 421 A. 2d 1021.

Rehearing Denied

No. 80–437. ARSHAL *v.* UNITED STATES, 449 U. S. 1077;

No. 80–1033. JAMIL *v.* SOUTHRIDGE COOPERATIVE SECTION 4, INC., *ante*, p. 919;

No. 80–5923. PUSCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 930; and

No. 80–6028. KINNELL *v.* CLERK OF THE COURT OF APPEALS OF KANSAS ET AL.; KINNELL *v.* CARLIN ET AL.; and KINNELL *v.* WILLCOTT ET AL., *ante*, p. 984. Petitions for rehearing denied.

No. 79–1857. ALCOA STEAMSHIP CO., INC. *v.* M/V NORDIC REGENT ET AL., 449 U. S. 890 and 1103. Motion for leave to file a second petition for rehearing denied.

No. 80–323. COLUMBIA BROADCASTING SYSTEM, INC. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL., *ante*, p. 970. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–5516. ELCAN *v.* UNITED STATES, 449 U. S. 1087. Motion for leave to file petition for rehearing denied.

APRIL 8, 1981

Dismissal Under Rule 53

No. 80–1545. SEARS, ROEBUCK & Co. *v.* ROSENER ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed under this Court's Rule 53. Reported below: 110 Cal. App. 3d 740, 168 Cal. Rptr. 237.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1051 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE *v.* LONG ET AL.

ON APPLICATION FOR STAY

No. A–720. Decided March 3, 1981

An application for a stay of the District Court's order requiring applicant, pursuant to the Freedom of Information Act, to turn over to respondents certain information regarding tax audit standards is denied, and a previously granted temporary stay is vacated, in view of applicant's failure, under the circumstances, to amend its answer in the District Court to raise additional defenses.

JUSTICE REHNQUIST, Circuit Justice.

Applicant Bureau of Economic Analysis, a division of the United States Department of Commerce, seeks to stay an order of the United States District Court for the Western District of Washington ordering applicant, pursuant to the Freedom of Information Act, 5 U. S. C. § 552, to turn over to respondents certain information regarding tax audit standards. The procedural history of this case is somewhat confusing. In 1975 respondents commenced an action against the Internal Revenue Service to obtain certain data. Respondents prevailed in that suit and the IRS appealed to the Court of Appeals for the Ninth Circuit. While that action was pending, respondents commenced this action in the District Court against applicant to obtain similar data in its possession and, on February 20, 1979, moved for summary judgment. In May 1979, the Ninth Circuit ruled against the IRS, *Long* v. *Internal Revenue Service,* 596 F. 2d 362 (1979), cert. denied, 446 U. S. 917 (1980), but remanded the case so that the IRS could raise certain additional defenses.

On October 17, 1980, the IRS on remand did indeed amend its answer to raise the additional defenses. Significantly, however, the applicant did not amend its answer in *this* case. On January 12, 1981, the District Court entered summary judgment against applicant on the ground of its "unreasonable delay" in amending its answer to respondents' complaint and ordered that the sought-after information be disclosed. The Court of Appeals for the Ninth Circuit has declined to stay the District Court's order.

In its application for a stay, the applicant asserts that it is likely to prevail on the merits and that it will suffer irreparable harm if the tax information is disclosed. Although I express no views as to the probability of this Court granting a petition for certiorari should applicant lose its appeal to the Court of Appeals for the Ninth Circuit, I think if Congress makes the Government answerable as a defendant in the courts of the United States, the Government is obligated to abide by the rules prescribed for it as a litigant. It is my view that the applicant, by failing to amend its answer in this case for more than a year and a half after the Ninth Circuit's decision in *Long* v. *Internal Revenue Service,* rendered itself liable for summary judgment. The applicant argues that any delay was not unreasonable, since it wrote a letter to the District Court on October 16, 1979, saying that it would be inappropriate to render summary judgment in this case until a final resolution of *Long* v. *Internal Revenue Service.* But the United States Attorney's two-paragraph letter falls well short of an amendment of its answer in this case. Accordingly, I am unwilling to exercise my authority as Circuit Justice at this stage of the litigation and stay the order of the United States District Court for the Western District of Washington.

Accordingly, the temporary stay heretofore granted by me on February 23, 1981, is vacated, and the application for stay is denied.

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VI. Freedom of Religion.

Jehovah's Witness—Voluntary termination of employment in weapons production—Right to unemployment compensation.—Indiana's denial of unemployment compensation benefits to petitioner, a Jehovah's Witness who voluntarily terminated his job because his religious beliefs forbade participation in direct production of weapons, violated his First Amendment right to free exercise of religion, and payment of benefits to petitioner would not involve State in fostering a religious faith in violation of Establishment Clause. Thomas v. Review Bd., Ind. Employment Security Div., p. 707.

VII. Privilege Against Self-incrimination.

Defendant's failure to testify—Jury instruction.—Under Fifth and Fourteenth Amendments, a defendant in a state prosecution had a right to a requested jury instruction that "[he] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way," notwithstanding a state statute prohibiting trial judge from commenting upon defendant's failure to testify. Carter v. Kentucky, p. 288.

VIII. Right to Abortion.

Notice to parents of minor—Validity of Utah statute.—As applied to an unemancipated minor girl living with and dependent on her parents, and making no claim or showing as to maturity or as to her relations with her parents, a Utah statute requiring a physician to notify, if possible, parents or guardian of a minor upon whom an abortion is to be performed serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution. H. L. v. Matheson, p. 398.

IX. States' Immunity from Suit.

Waiver—Liability for Medicaid reimbursements to nursing homes.—Neither statutory general waiver of sovereign immunity for Florida Department of Health and Rehabilitative Services nor Department's agreement, upon participating in Medicaid program, to obey federal law in administering program effects waiver of State's Eleventh Amendment immunity from liability for retroactive monetary relief in federal-court action by nursing homes and a nursing home association wherein regulations relating to Medicaid reimbursements to be paid by participating States to nursing homes were held invalid. Florida Dept. of Health v. Florida Nursing Home Assn., p. 147.

CONSTRUCTION CONTRACTS. See **Davis-Bacon Act.**

CONVENTION DELEGATES. See **Constitutional Law, V.**

COOPERATIVE HOSPITAL SERVICE ORGANIZATIONS. See **Internal Revenue Code, 1.**

COSTS OF LITIGATION. See **Federal Rules of Civil Procedure.**

CRIMINAL LAW. See **Constitutional Law,** II; III, 1; IV; VII.

CURING SYNTHETIC RUBBER. See **Patents.**

DAMAGES. See **Jurisdiction,** 2.

DAVIS-BACON ACT.

Government contractors—Payment of prevailing wages—Employee's private right of action.—Act's provisions regarding requirement that certain federal construction contracts include a stipulation that contractor will pay wages based on those prevailing in locality do not confer upon an employee of a Government contractor a private right of action for back wages under a contract that has been administratively determined not to call for work subject to Act and thus does not contain prevailing wage stipulations. Universities Research Assn. v. Coutu, p. 754.

DEFENDANT'S FAILURE TO TESTIFY AT CRIMINAL TRIAL. See **Constitutional Law.**

DELEGATES TO POLITICAL CONVENTIONS. See **Constitutional Law,** V.

DEMOCRATIC NATIONAL CONVENTION. See **Constitutional Law,** V.

DEPLETION DEDUCTIONS. See **Internal Revenue Code,** 2.

DEPORTATION. See **Immigration and Nationality Act.**

DISCLOSURE OF INFORMATION. See **Stays.**

DISCRIMINATION AGAINST BLACKS. See **Jurisdiction,** 1.

DISCRIMINATION AGAINST MEN. See **Constitutional Law,** III, 4.

DISCRIMINATION AGAINST MENTAL PATIENTS. See **Constitutional Law,** III, 2.

DISCRIMINATION AGAINST WOMEN. See **Civil Rights Act of 1964; Constitutional Law,** III, 3.

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964; Jurisdiction,** 1.

DISPOSITION OF COMMUNITY PROPERTY BY HUSBAND. See **Constitutional Law,** III, 3.

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DOUBLE-TRAILER TRUCKS. See **Constitutional Law,** I.

DRUG OFFENSES. See **Constitutional Law**, II, 1.

DUE PROCESS. See **Constitutional Law**, III, 1, 2.

ELECTIONS. See **Constitutional Law**, V.

ELEVENTH AMENDMENT. See **Constitutional Law**, IX.

EMINENT DOMAIN. See **Jurisdiction**, 2.

EMPLOYEES' STATUTORY WAGE CLAIMS AS AFFECTED BY ARBITRATION. See **Fair Labor Standards Act.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law**, VI; **Davis-Bacon Act; Fair Labor Standards Act; Jurisdiction**, 1.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Jurisdiction**, 1.

ENTERTAINMENT FORMATS OF RADIO STATIONS. See **Communications Act of 1934.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III.

ESTABLISHMENT OF RELIGION. See **Constitutional Law**, VI.

ESTOPPEL. See **Social Security Act.**

EVIDENCE. See **Administrative Procedure Act; Civil Rights Act of 1964; Constitutional Law**, II, 2.

EXEMPTION FROM INCOME TAXES. See **Internal Revenue Code**, 1.

EX POST FACTO LAWS. See **Constitutional Law**, IV.

EXTREME HARDSHIP JUSTIFYING DEPORTATION SUSPENSION. See **Immigration and Nationality Act.**

FAIR LABOR STANDARDS ACT.

Employees' wage claims under Act—Effect of earlier arbitration proceedings.—Petitioner truckdrivers' wage claims under Act—for time spent conducting a required pretrip safety inspection of employer's trucks and transporting trucks that failed inspection to employer's on-premises repair facility—were not barred by union's prior unsuccessful submission of their grievances to arbitration under collective-bargaining agreement. Barrentine v. Arkansas-Best Freight System, Inc., p. 728.

FEDERAL COMMUNICATIONS COMMISSION. See **Communications Act of 1934.**

FEDERAL CONSTRUCTION CONTRACTS. See **Davis-Bacon Act.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL RESERVE BOARD. See **Bank Holding Company Act.**

FEDERAL RULES OF CIVIL PROCEDURE.

Settlement of action—Plaintiff's rejection of defendant's offer.—Rule 68—which provides that if a plaintiff rejects a defendant's formal settlement offer "to allow judgment to be taken against him" and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer"—does not apply to a case in which judgment is entered against plaintiff-offeree and in favor of defendant-offeror. Delta Air Lines, Inc. v. August, p. 346.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I; IX; **Interstate Commerce Act**; **Jurisdiction**, 2; **Tax Injunction Act.**

FIFTH AMENDMENT. See **Constitutional Law**, II; III, 2; VII; **Jurisdiction**, 2.

FINAL JUDGMENTS. See **Jurisdiction**, 2.

FINES. See **Constitutional Law**, III, 1.

FIRST AMENDMENT. See **Communications Act of 1934**; **Constitutional Law**, V; VI.

FISHING REGULATIONS. See **Indians.**

FLORIDA. See **Constitutional Law**, IV.

FOURTEENTH AMENDMENT. See **Constitutional Law**, III, 1, 3, 4; V; VII; **Jurisdiction**, 2.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, V.

FREEDOM OF INFORMATION ACT. See **Stays.**

FREEDOM OF RELIGION. See **Constitutional Law**, VI.

"GAIN TIME" FOR PRISONER'S GOOD CONDUCT. See **Constitutional Law**, IV.

GENDER-BASED DISCRIMINATION. See **Civil Rights Act of 1964**; **Constitutional Law**, III, 3, 4.

GEORGIA. See **Constitutional Law**, III, 1.

GLASS-STEAGALL ACT. See **Bank Holding Company Act.**

GOVERNMENT CONTRACTS. See **Davis-Bacon Act.**

HEARING TO SUSPEND DEPORTATION. See **Immigration and Nationality Act.**

HIGHWAY TRAFFIC AND SAFETY. See **Constitutional Law**, I.

HOLDING COMPANIES. See **Bank Holding Company Act.**

HOSPITAL SERVICE ORGANIZATIONS. See **Internal Revenue Code,** 1.

HUNTING REGULATIONS. See **Indians.**

HUSBAND AND WIFE. See **Constitutional Law, III, 3.**

ILLINOIS. See **Tax Injunction Act.**

IMMIGRATION AND NATIONALITY ACT.

Deportation—Suspension for "extreme hardship."—Board of Immigration Appeals did not exceed its authority in denying without a hearing a motion to reopen deportation proceedings in order to suspend deportation of alien husband and wife for "extreme hardship" under § 244 of Act and applicable regulations on basis of alleged extreme hardship to couple's American-born children through loss of educational opportunities and to both couple and their children from forced liquidation of assets, and thus Court of Appeals erred in ordering that case be reopened. INS v. Jong Ha Wang, p. 139.

IMMUNITY OF STATES FROM SUIT. See **Constitutional Law, IX.**

INABILITY TO PAY FINE. See **Constitutional Law, III, 1.**

INCOME TAXES. See **Internal Revenue Code.**

INDIANA. See **Constitutional Law, VI.**

INDIANS.

Title to bed of Big Horn River—Regulation of hunting and fishing.—Title to bed of Big Horn River is not held by United States in trust for Crow Tribe of Montana under pertinent treaties, but instead passed to Montana upon its admission into Union, and although Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to Tribe or held by United States in trust for Tribe, it has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of Tribe. Montana v. United States, p. 544.

INJUNCTIONS. See **Jurisdiction 1; Tax Injunction Act.**

INSTRUCTIONS TO JURY ON ACCUSED'S FAILURE TO TESTIFY. See **Constitutional Law, VIII.**

INTEGRATED CEMENT MINER AND MANUFACTURER. See **Internal Revenue Code, 2.**

INTEREST ON TAX REFUNDS. See **Tax Injunction Act.**

INTERLOCUTORY ORDERS. See **Jurisdiction, 1.**

INTERNAL REVENUE CODE.

1. *Income taxes—Charitable organizations—Cooperative hospital service organization.*—A cooperative hospital service organization cannot qualify

INTERNAL REVENUE CODE—Continued.

for exemption from income taxation as a charitable organization under § 501 (c)(3) of Code, but instead may qualify only if it performs one of services listed in § 501 (e)(1)(A), and since laundry service is not included in such list, petitioner nonprofit corporation, organized to provide laundry services for exempt hospitals and an exempt ambulance service, was not entitled to tax-exempt status. HCSC-Laundry v. United States, p. 1.

2. *Income taxes—Depletion deduction—Integrated cement miner and manufacturer.*—Code and Treasury Regulations support Commissioner of Internal Revenue's position that in calculating, by proportionate profits method, constructive gross income from mining of taxpayer integrated cement miner and manufacturer—for purpose of determining taxpayer's depletion deduction from taxable income—taxpayer should have included (1) proceeds from sale of bagged cement as well as bulk cement, and (2) costs incurred for bags, bagging, storage, distribution, and sales. Commissioner v. Portland Cement Co. of Utah, p 156.

INTERSTATE COMMERCE. See **Constitutional Law, I.**

INTERSTATE COMMERCE ACT.

Rail carrier's abandonment of branch line—ICC approval—Shipper's right to maintain state-court action.—Act precludes a shipper from maintaining a state-court action for damages for violation of state statutory and common law against a regulated rail carrier when Interstate Commerce Commission, in approving carrier's application for abandonment of its branch line that had served shipper, reached merits of matters shipper sought to raise in state court. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., p. 311.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

INTERSTATE HIGHWAYS. See **Constitutional Law.**

INVENTIONS. See **Patents.**

"INVERSE CONDEMNATION" ACTIONS. See **Jurisdiction, 2.**

INVESTMENT ADVISERS. See **Bank Holding Company Act.**

IOWA. See **Constitutional Law, I.**

JEHOVAH'S WITNESSES. See **Constitutional Law, VI.**

JUDGMENTS. See **Federal Rules of Civil Procedure.**

JURISDICTION. See also **Tax Injunction Act.**

1. *Employment-discrimination action—District Court's interlocutory order refusing to enter consent decree—Appealability.*—In an employment discrimination action under 42 U. S. C. § 1981 and Title VII of Civil

JURISDICTION—Continued.

Rights Act of 1964, wherein parties moved District Court to enter a proposed consent decree that would permanently enjoin defendant employer and unions from discriminating against black employees and would require them to give hiring and seniority preferences to blacks, District Court's interlocutory order refusing to enter consent decree was an order "refusing" an "injunction" and was therefore appealable to Court of Appeals under 28 U. S. C. § 1292 (a)(1). Carson v. American Brands, Inc , p. 79.

2. *Supreme Court—Finality of state-court judgment.*—Since 28 U. S. C. § 1257 permits Supreme Court to review only final judgments or decrees of a state court, Supreme Court must dismiss, for lack of a final judgment, an appeal from California Court of Appeal's decision which—in reversing trial court's judgment that awarded damages to appellant in its inverse condemnation action based on appellee city's rezoning of appellant's property—held that monetary compensation was not an appropriate remedy but did not decide whether any other remedy was available and instead appeared to contemplate further trial court proceedings on remand to resolve disputed factual issues as to whether there had been any taking. San Diego Gas & Electric Co. v. San Diego, p. 621.

JURY INSTRUCTIONS ON ACCUSED'S FAILURE TO TESTIFY. See **Constitutional Law**, VII.

KENTUCKY. See **Constitutional Law**, VII.

LABOR GRIEVANCES. See **Fair Labor Standards Act.**

LAUNDRY SERVICE ORGANIZATIONS. See **Internal Revenue Code**, 1.

LIABILITY FOR COURT COSTS. See **Federal Rules of Civil Procedure.**

LICENSES OF RADIO STATIONS. See **Communications Act of 1934.**

LIMITATIONS ON TRAILER-TRUCK LENGTHS. See **Constitutional Law**, I.

LOUISIANA. See **Constitutional Law**, II, 2; III, 3.

MANDAMUS. See **Jurisdiction**, 2.

MARIHUANA. See **Constitutional Law**, II, 1.

MATHEMATICAL EQUATIONS. See **Patents.**

MEDICAID. See **Constitutional Law**, III, 2; IX.

MENTAL PATIENTS. See **Constitutional Law**, III, 2.

MINIMUM WAGES. See **Davis-Bacon Act; Fair Labor Standards Act.**

MINING. See **Internal Revenue Code, 2.**

MINORS' RIGHT TO ABORTION. See **Constitutional Law, VIII; Standing to Sue.**

MONTANA. See **Indians.**

MOTHER'S SOCIAL SECURITY BENEFITS. See **Social Security Act.**

MULTIPLE PUNISHMENTS. See **Constitutional Law, II, 1.**

NATIONAL CONVENTIONS. See **Constitutional Law, V.**

NEW TRIAL AFTER FINDING OF INSUFFICIENT EVIDENCE TO SUPPORT GUILTY VERDICT. See **Constitutional Law, II, 2.**

NOTICE TO PARENTS OF MINOR SEEKING ABORTION. See **Constitutional Law, VIII; Standing to Sue.**

NURSING HOMES. See **Constitutional Law, IX.**

OFFERS TO SETTLE ACTIONS. See **Federal Rules of Civil Procedure.**

OPEN PRIMARY ELECTIONS. See **Constitutional Law, V.**

OVERTIME PAY. See **Fair Labor Standards Act.**

PARENTAL NOTICE OF ABORTION TO BE PERFORMED ON MINOR. See **Constitutional Law, VIII; Standing to Sue.**

PATENTS.

Process for molding synthetic rubber products—Use of computer—Patentability.—Patent application claims for invention of a process for molding raw, uncured synthetic rubber into cured products through use of a computer to calculate proper cure time under established mathematical equation, recited subject matter that was eligible for patent protection. Diamond v. Diehr, p. 175.

POLICY STATEMENTS OF FEDERAL COMMUNICATIONS COMMISSION. See **Communications Act of 1934.**

POLITICAL PARTIES. See **Constitutional Law, V.**

PORTAL-TO-PORTAL ACT OF 1947. See **Davis-Bacon Act.**

PRE-EMPTION OF STATE LAW. See **Interstate Commerce Act.**

PREPONDERANCE OF EVIDENCE. See **Administrative Procedure Act; Civil Rights Act of 1964.**

PRESIDENTIAL PRIMARY ELECTIONS. See **Constitutional Law, V.**

PREVAILING WAGES IN LOCALITY. See **Davis-Bacon Act.**

PRIMARY ELECTIONS. See **Constitutional Law, V.**

PRISONERS. See **Constitutional Law, IV.**

PRIVACY RIGHTS. See **Constitutional Law, VIII; Standing to Sue.**

PRIVATE RIGHTS OF ACTION. See **Davis-Bacon Act.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, VII.**

PROBATION. See **Constitutional Law, III, 1.**

PROCESS PATENTS. See **Patents.**

PROGRAM FORMAT CHANGES BY RADIO STATIONS. See **Communications Act of 1934.**

PROPERTY TAXES. See **Tax Injunction Act.**

PROSPECTIVE APPLICATION OF DECISIONS. See **Constitutional Law, III, 3.**

PUBLIC DISCLOSURE OF INFORMATION. See **Stays.**

PUBLIC MENTAL INSTITUTIONS. See **Constitutional Law, III, 2.**

RACIAL DISCRIMINATION. See **Jurisdiction, 1.**

RADIO STATION LICENSES. See **Communications Act of 1934.**

RAILROAD LINE ABANDONMENTS. See **Interstate Commerce Act.**

RAPE. See **Constitutional Law, III, 4.**

REDUCTION OF SENTENCE FOR GOOD CONDUCT. See **Constitutional Law, IV.**

REFUND OF TAXES. See **Tax Injunction Act.**

REFUSAL TO ENTER CONSENT DECREE. See **Jurisdiction, 1.**

REGULATIONS OF FEDERAL RESERVE BOARD. See **Bank Holding Company Act.**

REIMBURSEMENTS UNDER MEDICAID TO NURSING HOMES. See **Constitutional Law, IX.**

RELIGIOUS FREEDOM. See **Constitutional Law, VI.**

REOPENING DEPORTATION PROCEEDINGS. See **Immigration and Nationality Act.**

RETROACTIVITY OF DECISIONS. See **Constitutional Law, III, 3.**

RETROACTIVITY OF STATUTES. See **Constitutional Law, IV.**

REVOCATION OF PROBATION. See **Constitutional Law, III, 1.**

REZONING. See **Jurisdiction, 1.**

RIGHT TO ABORTION. See **Constitutional Law, VIII; Standing to Sue.**

RIGHT TO COUNSEL. See **Constitutional Law, III, 1.**

RIVERBEDS. See **Indians.**

SAFETY REGULATIONS. See **Constitutional Law, I.**

SECRETARY OF HEALTH AND HUMAN SERVICES. See **Social Security Act.**

SECURITIES AND EXCHANGE COMMISSION. See **Administrative Procedure Act.**

SECURITIES REGULATION. See **Administrative Procedure Act; Bank Holding Company Act.**

SELECTION OF CONVENTION DELEGATES. See **Constitutional Law, V.**

SELF-INCRIMINATION. See **Constitutional Law, VII.**

SEPARATE CONSPIRACIES ARISING FROM SINGLE AGREEMENT. See **Constitutional Law, II, 1.**

SETTLEMENT OF ACTIONS. See **Federal Rules of Civil Procedure.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law, III, 3, 4.**

SEXUAL INTERCOURSE BETWEEN MINORS. See **Constitutional Law, III, 4.**

SOCIAL SECURITY ACT. See also **Constitutional Law, III, 2.**

"Mother's insurance benefits"—Failure to file written application—Estoppel of Government.—A Social Security Administration field agent's erroneous statement to respondent that she was not eligible for "mother's insurance benefits" under Act, and agent's failure to comply with internal handbook's instructions that it be recommended to claimant that a written application be filed, did not estop Secretary of Health and Human Services from denying retroactive benefits to respondent for period in which she was eligible for benefits but had not filed a written application as required by Act. Schweiker v. Hansen, p. 785.

SOVEREIGN IMMUNITY. See **Constitutional Law, IX.**

SOVEREIGNTY OF INDIAN TRIBES. See **Indians.**

STANDARD OF PROOF. See **Administrative Procedure Act; Civil Rights Act of 1964.**

STANDING TO SUE. See also **Constitutional Law, VIII.**

Constitutionality of Utah abortion statute—Standing of pregnant, unmarried minor.—In a class action brought by a pregnant, unmarried minor challenging constitutionality of a Utah statute requiring a physician to

STANDING TO SUE—Continued.
notify, if possible, parents or guardian of a minor upon whom an abortion is to be performed, plaintiff lacked standing to challenge facial constitutionality of statute on ground of overbreadth in that it could be construed to apply to all unmarried minor girls, including those who are mature and emancipated, since plaintiff did not allege or offer evidence that either she or any member of her class was mature or emancipated. H. L. v. Matheson, p. 398.

STATE PROPERTY TAXES. See **Tax Injunction Act.**

STATES' IMMUNITY FROM SUIT. See **Constitutional Law, IX.**

STATUTORY RAPE. See **Constitutional Law, III, 4.**

STAYS.

Freedom of Information Act—Tax audit standards—Disclosure order.—Application to stay District Court's order requiring applicant, pursuant to Freedom of Information Act, to turn over to respondents certain information regarding tax audit standards is denied, and a previously granted temporary stay is vacated. Bureau of Economic Analysis v. Long (REHNQUIST, J., in chambers), p. 1301.

SUPPLEMENTAL SECURITY INCOME BENEFITS. See **Constitutional Law, III, 2.**

SUPREME COURT. See **Jurisdiction, 2.**

SUSPENSION OF DEPORTATION. See **Immigration and Nationality Act.**

SYNTHETIC RUBBER PRODUCTS. See **Patents.**

TAKING PRIVATE PROPERTY FOR PUBLIC USE. See **Jurisdiction, 2.**

TAX AUDITS. See **Stays.**

TAXES. See **Internal Revenue Code; Stays; Tax Injunction Act.**

TAX INJUNCTION ACT.

State tax refund procedures—Federal jurisdiction to grant injunctive relief.—Illinois' statutory procedure whereby real property owners, after unsuccessfully contesting property taxes in administrative proceedings, must pay taxes under protest and then seek refund in court action is "a plain, speedy and efficient remedy" within meaning of Act, thereby barring federal jurisdiction to grant injunctive relief after taxpayer's unsuccessful administrative proceedings, notwithstanding customary delay from time of payment of taxes under protest until any refund is two years and refund is not accompanied by a payment of interest. Rosewell v. LaSalle National Bank, p. 503.

TAX REFUNDS. See **Tax Injunction Act.**

TERMINATION OF EMPLOYMENT BECAUSE OF RELIGIOUS BELIEFS. See **Constitutional Law, VI.**

TITLE TO RIVERBEDS. See **Indians.**

TRAILER-TRUCK REGULATIONS. See **Constitutional Law, I.**

TREASURY REGULATIONS. See **Internal Revenue Code, 2.**

TREATIES OF FORT LARAMIE. See **Indians.**

TRIBAL SELF-GOVERNMENT. See **Indians.**

TRUCKDRIVERS' WAGE CLAIMS. See **Fair Labor Standards Act.**

TRUCKERS. See **Constitutional Law, I; Fair Labor Standards Act.**

UNEMPLOYMENT COMPENSATION. See **Constitutional Law, VI.**

UTAH. See **Constitutional Law, VIII; Standing to Sue.**

VOLUNTARY TERMINATION OF EMPLOYMENT BECAUSE OF RELIGIOUS BELIEFS. See **Constitutional Law, VI.**

WAGE CLAIMS. See **Davis-Bacon Act; Fair Labor Standards Act.**

WAIVER OF STATE'S IMMUNITY FROM SUIT. See **Constitutional Law, IX.**

WEAPONS PRODUCTION. See **Constitutional Law, VI.**

WELFARE BENEFITS. See **Social Security Act.**

WISCONSIN. See **Constitutional Law, V.**

WORDS AND PHRASES.

1. *"A plain, speedy and efficient remedy."* Tax Injunction Act, 28 U. S. C. § 1341. Rosewell v. LaSalle National Bank, p. 503.

2. *"Extreme hardship."* § 244, Immigration and Nationality Act, 8 U. S. C. § 1254 (a)(1). INS v. Jong Ha Wang, p. 139.

3. *"Final judgments or decrees."* 28 U. S. C. § 1257. San Diego Gas & Electric Co. v. San Diego, p. 621.

4. *"In accordance with . . . substantial evidence."* § 7 (c), Administrative Procedure Act, 5 U. S. C. § 556 (d). Steadman v. SEC, p. 91.

5. *"Interlocutory orders . . . refusing . . . injunctions."* 28 U. S. C. § 1292 (a)(1). Carson v. American Brands, Inc., p. 79.

6. *"So closely related to banking."* § 4 (c)(8), Bank Holding Company Act, 12 U. S. C. § 1843 (c)(8). Board of Governors, FRS v. Investment Company Institute, p. 46.

7. *"Useful process."* 35 U. S. C. § 101. Diamond v. Diehr, p. 175.

WORK TIME. See **Fair Labor Standards Act.**

ZONING. See **Jurisdiction, 2.**